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The Limits of Limiting Liability in the Battle of the Forms: U.C.C. Section 2-207 and the “Material Alteration” Inquiry

Colin P. Marks*

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I. INTRODUCTION

Not long ago, I bought a lamp on-line as a Christmas gift for my parents. After ordering, I was able to immediately pay using an on-line

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service. The next day I received an e-mail confirming receipt of payment, stating that the item would be shipped in seven to ten business days; at the bottom of the receipt were the seller's boilerplate warranties and other provisions. The lawyer in me could not help but read through these clauses, and amongst them was a clause limiting liability to the cost of the goods. I began to imagine what possible consequential damages I could incur from the transaction. If the lamp arrived 6 weeks late, could I recover punitively for the loss of love and affection of my parents because they received a late Christmas present? Probably not, but I did question whether this single unilateral addition to the agreement would be binding on me if I were a merchant.

The ordering of goods followed by the issuance of receipts or invoices is a common practice in a number of industries. Electronic commerce and the advent and increasing use of e-mail confirmations and correspondence have only added to this practice. Often times, however, one or both parties to such a transaction include additional terms to the contract in their orders, conformations or invoices. The "battle of the forms,"¹ as this is known, continues to generate problems with regard to whether additional clauses should be enforced. Section 2-207 of the Uniform Commercial Code ("U.C.C.")—the section that deals with conflicting terms in the buyers' and sellers' forms—instructs that additional terms that "materially alter" the contract do not become a part of the contract.² But what types of terms are deemed to "materially alter" the contract? Though the commentary to section 2-207 explicitly deals with a number of these situations,³ one problem not resolved by the commentary—and one that has caused varying results in the case law—is the effect of a clause limiting liability. How courts should approach this situation is perplexing due, at least in part, to the great variance in the sophistication of the parties and the events leading up to the disputes.

Take, for example, the following two hypothetical situations. In situation one, a local, non-profit youth soccer league orders 1,500 specially made shirts to sell at its annual fall weekend soccer tournament. The shirts are embroidered with the tournament's name and have always been a huge seller for the soccer league, bringing in much-needed revenue to run the league. The league receives a cost estimate from a large t-shirt supply company that can do the embroidery and sends in its order with payment, specifying that the shirts must be delivered no later than the Thursday before the tournament starts. The t-shirt supplier sends a confirmation of the order

1. BLACK'S LAW DICTIONARY 162 (8th ed. 2004) (defining "battle of the forms" as "[t]he conflict between the terms of standard forms exchanged between a buyer and a seller during contract negotiations").

2. U.C.C. § 2-207(2)(6) (2004).

3. *See* U.C.C. § 2-207 cmts. 1-7.

and at the bottom of the confirmation is a clause excluding consequential damages. The tournament starts but the league does not receive the shirts until the Monday after the tournament. The supplier agrees to return the check, but refuses to compensate the league for the lost profits in reliance on its exclusion of consequential damages clause.

In situation two, Company A, a manufacturer of polystyrene, posts an offer to sell 5,000 metric tons for \$.20 per pound on an on-line trading platform. Company B accepts Company A's offer and delivers a purchase contract to Company A the same day. The contract lists the quantity, price, and time of delivery. The next day, Company A responds with its acceptance via a Polystyrene Sales Order Confirmation. Attached to this Confirmation is Company A's list of General Terms and Conditions. This attachment contains provisions limiting liability and excusing nonperformance. The limitation of liability provision states, in relevant part, that "NEITHER PARTY WILL BE LIABLE FOR ANY PROSPECTIVE PROFITS, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES." Company A is unable to supply the contracted-for quantity by the date specified and Company B sues for breach of contract, seeking consequential damages. Company A defends that it has a valid limitation of liability clause excluding consequential damages.

Should the law treat these situations similarly when applying the "material alteration" standard? There are several distinctions between the two, not just in the amount of money involved, but also in the sophistication of the parties and the goods involved. Should it matter that the soccer league had no legal advice while the t-shirt supply company had in-house counsel? Should it matter that Company B could have easily obtained the polystyrene from an alternate source or that the polystyrene was only needed to fulfill a contract with a sister company? Interestingly, while some courts might consider these factors, others do not, leading to varying results under the very same set of facts.

It is important to note that an analysis of the approaches used by the courts is no mere academic exercise. The varying approaches used by courts have led to uncertainty for clients and lawyers alike.⁴ In courts that have not spoken on this issue, there is no way of knowing what approach a court will choose. Also, because courts in different jurisdictions have taken different approaches to this issue, this has encouraged forum shopping. Finally, the lack of uniformity among the courts runs counter to the very purposes and

4. See *infra* Part III.

policies of the U.C.C., “to make uniform the law among the various jurisdictions.”⁵

This article will describe the varying approaches that courts use to decide whether clauses limiting liability materially alter the contract under U.C.C. section 2-207. In Part II, the article reviews the development of U.C.C. section 2-207, beginning with its common law roots, and its interaction with the section limiting liability.⁶ In Part III, the three principal approaches used by the courts, the *per se* material alteration approach, the *per se* not material alteration approach and the “surprise or hardship” approach are discussed and analyzed.⁷ Ultimately, this article concludes that the “surprise or hardship” model is the approach most consistent with the dictates of the revised section 2-207.⁸ Finally, Part IV reflects upon what effect the revisions to Article 2 will have on these approaches.⁹

II. THE HISTORY AND OPERATION OF SECTION 2-207

Our soccer league and polystyrene examples present classic “battle of the forms” scenarios. In such cases, when one merchant sends an offer, either verbally or in writing, to another merchant,¹⁰ and that merchant responds with his own set of preprinted forms which contain additional or different terms from the initial offer, then the provisions of U.C.C. section 2-207 are applicable.¹¹ Section 2-207 states:

Additional Terms in Acceptance or Confirmation.

5. U.C.C. § 1-102(2)(c) (2004).

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part III.C.4.

9. *See infra* Part IV.

10. The sub-sections of section 2-207(2) relevant to the “material alteration” language are only applicable “between merchants.” U.C.C. 2-207(2) (stating that “[b]etween merchants such terms become part of the contract unless . . .”). The U.C.C. defines “merchant” as, a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104.

11. *See Dale Horning Co. v. Falconer Glass Indus.*, 710 F. Supp. 693, 697 (S.D. Ind. 1989) (noting that where there was a conflict between an oral agreement and the terms of a form, the case called for “what is in theory a straightforward application of § 2-207”); *In re Chateaugay Corp. v. N. States Contracting Co., Inc.*, 162 B.R. 949, 954 (Bankr. S.D.N.Y. 1994) (applying section 2-207 to a case where “two merchants exchanged two sets of forms that contained additional or different terms, ignored them, and fully or substantially performed their agreement”).

(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 term

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.¹²

12. U.C.C. § 2-207. U.C.C. section 2-207 comment 1 states:

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 such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction. [Comment 1 was amended in 1966.]

U.C.C. § 2-207 cmt. 1.

As will be discussed, section 2-207 was formulated to remedy problems that arose at common law. Despite the drafters' best efforts, however, this provision has proven to be wrought with problems.¹³

A. *The "Battle of the Forms" at Common Law*

At common law, parties to a contract were subject to the "mirror-image rule." Under this rule, a party's acceptance of an offer had to precisely match the terms of the offer to be effective.¹⁴ If a party sent back a confirmation with additional or different terms, this was deemed a counteroffer and thus a rejection of the original offer.¹⁵ This did not prevent parties, however, from moving forward with the contract, potentially leading to later disputes over the terms of the agreement. Under the common law approach to the battle of the forms, the party that fired the "last shot" was favored because that party's terms were viewed as assented to.¹⁶ The performance of the parties would make clear a contract was formed, and, as the last form sent was deemed as a counteroffer (rejecting any prior offer), the contract was on the terms of the party that sent the last counteroffer.¹⁷ As the seller was often the party that fired the last shot with a "confirmation of sale," the common law favored the seller.¹⁸

This common law system ignored, however, the fact that many times the parties to such contracts utilize their own forms with little consideration of the terms that are actually sent or received. Often the contracting process begins with subordinates placing a phone call or with the dispatching of an order form.¹⁹ Both parties have their own forms, which often agree on many of the major terms such as price, quality, quantity and delivery terms, but differ on other important terms.²⁰ Professor Macauley aptly summarized this battle of the forms process as follows,

[T]he seller may fail to read the buyer's 24 paragraphs of fine print and may accept the buyer's order on the seller's own acknowledgment-of-order-form. Typically this form will have ten

13. Indeed, the section has even been compared to "an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert." 1 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-3, at 6 (4th ed. 1995).

14. See Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893, 901 (1991); 1 E. ALLEN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.21, at 315-16 (3d ed. 2004).

15. See 1 FARNSWORTH, *supra* 14, at 315.

16. *Id.* at 318.

17. *See id.*

18. *Id.*

19. See 1 WHITE & SUMMERS, *supra* 13, § 1-3, at 7.

20. *See id.*

to 50 paragraphs favoring the seller, and these provisions are likely to be different from or inconsistent with the buyer's provisions. The seller's acknowledgement form may be received by the buyer and checked by a clerk. She will read the *face* of the acknowledgment but not the fine print on the back of it because she has neither the time nor ability to analyze the small print.²¹

Many times this difference in terms is of no consequence and the deal will go forward without any problems.²² But when there is a dispute, the parties then must pull out their forms, sometimes for the first time, to see what they actually contracted for.²³

The common law, though straightforward in application, often resulted in seriously unpleasant economic surprises when the parties learned that the law did not reflect their own understanding of the contract.²⁴ This result led savvy (or perhaps sneaky) sellers to take advantage of the "last-shot doctrine" by including their own terms—terms that effectively became a secret provision because the forms' use, namely economic efficiency, meant that the forms were rarely read.²⁵ Though the seller was often the last party to file a form, or the "last shot," the common law's effect was to encourage "a constant effort by businessmen to gain an advantage in their transactions by qualifying their obligations by means of forms containing unilaterally beneficial conditions."²⁶ The common law rule also provided a loophole for parties wishing to extricate themselves from unfavorable deals which, in commercial understanding, had been closed.²⁷ Thus, parties could attempt to

21. Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 59 (1963).

22. See 1 WHITE & SUMMERS, *supra* 13, § 1-3, at 7.

23. See *id.*; Brown, *supra* note 14, at 901-02; Corneill A. Stephens, *On Ending the Battle of the Forms: Problems With Solutions*, 80 KY. L.J. 815, 818 (1992) (noting that the mirror image rule is based on an assumption contrary to modern realities).

24. See Brown, *supra* 14, at 902.

25. *Id.* at 902-03.

26. Recent Case, *Offeree's Response Materially Altering an Offer Solely to Offeror's Disadvantage is an Acceptance Conditional on Offeror's Assent to the Additional Terms Under Section 2-207 of the Uniform Commercial Code*, 111 U. PA. L. REV. 132, 133 (1962); Stephens, *supra* note 23, at 819-20 (noting that the contract was controlled by whichever party fired the "last shot").

27. See Recent Case, *supra* note 26, at 133; Stephens, *supra* note 23, at 819 ("Once the variation was discovered, the recalcitrant party could refuse to consummate the transaction, with immunity, by alleging that a legally enforceable and binding contract was never formed.").

renege on a deal which had been made merely because of inconsequential variations between the offer and acceptance.²⁸

The oft-criticized case of *Poel v. Brunswick-Balke-Collender Co.*,²⁹ is a classic example of how the common law often operated counter to the true intentions of the contracting parties.³⁰ In *Poel*, the plaintiffs, Poel & Arnold, had entered into negotiations with the defendant, Brunswick-Balke-Collender Company of New York (“BBC”), through its representative Rogers, to purchase twelve tons of rubber.³¹ Poel & Arnold contended that it had entered into a binding contract with BBC through its letters confirming an order to buy twelve tons of rubber at \$2.42 per pound and that BBC breached this contract.³² BBC countered that Rogers did not have the authority to enter into such a contract and that there was no contract to begin with or a writing memorializing such contract to satisfy the Statute of Frauds.³³ The court assumed, without deciding, that Rogers had the authority to enter into such a contract and chose to focus instead on the issue of whether the parties had entered into a contract.³⁴ Though the court acknowledged that Poel & Arnold had sent a confirmation of the order, the court held that BBC’s subsequent letter, issued only two days later, constituted a counteroffer.³⁵ The letter contained the following language:

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time.³⁶

28. 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 3.37, at 498 (Joseph M. Perillo ed., 1993); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1217-19 (1982) (noting that the two major problems that arose at common law were parties seeking to renege on deals prior to performance and disputes arising after performance over terms upon which the parties’ forms disagreed).

29. 110 N.E. 619 (N.Y. 1915).

30. 1 CORBIN, *supra* note 28, § 3.37, at 497 (discussing the decision and noting that it is frequently cited and criticized). *But see* Baird & Weisberg, *supra* 28, at 1233-35 (commenting that, in reality, courts did not often apply the “mirror image” rule mechanically and were unsympathetic towards parties’ attempts to escape from a deal by pointing to discrepancies between the offer and acceptance).

31. *See Poel*, 110 N.E. at 620-21.

32. *See id.*

33. *See id.* at 620.

34. *See id.*

35. *See id.* at 621.

36. *See id.* at 621.

At the outset, the court noted that Poel and Arnold's initial letter did not constitute a contract by itself, but was an offer to enter into a contract.³⁷ Essentially relying on the common law "mirror-image" doctrine, the court found that instead of accepting Poel and Arnold's offer, BBC responded with the above letter, which the court viewed as BBC's own proposal or counteroffer.³⁸ The court first noted that the counteroffer's language specifying the time to be delivered and the associated guarantee added nothing to Poel and Arnold's proposal.³⁹ But, the court then held that the other condition in BBC's letter, that the offer was conditional upon the receipt of the order being promptly acknowledged, was a new term and thus the proposal was a rejection of Poel and Arnold's letter and a counteroffer.⁴⁰ Thus, because Poel and Arnold did not acknowledge the receipt of this order, BBC's proposal remained unaccepted.⁴¹

The absurdity of this result is patent. The only difference of any consequence between Poel and Arnold's offer and BBC's "counteroffer" was that BBC wanted acknowledgement of the order, but Poel and Arnold had already acknowledged the order on the very same terms with its initial "offer."⁴² It was obvious that they wanted to go forward with the agreement on the offered terms. The reality of the case was not that the deal went awry because of the variance between the offer and acceptance; instead, BBC wanted to escape from the deal because changed market conditions had made the deal unprofitable.⁴³ The variance in terms between the offers became an issue as an excuse for nonperformance only after BBC had repudiated the agreement.⁴⁴ It was this case, and others like it, that led the drafters of the Uniform Commercial Code to devise section 2-207 in a way that would prevent renegeing on an agreement that was commercially understood to have been made, simply due to minor variations between the offer and acceptance.⁴⁵

37. *See id.* at 621.

38. *Id.*

39. *See id.* at 622.

40. *See id.*

41. *See id.*

42. *See supra* notes 31-36 and accompanying text.

43. *See* 1 CORBIN, *supra* note 28, § 3.37, at 497-98.

44. *Id.* at 498.

45. *Id.*

B. *The Development of Section 2-207*

The primary goal of the drafters of section 2-207 was to avoid situations whereby minor differences between offer and acceptance—differences that were not raised prior to the dispute—allowed one party to renege on a contract due to issues unrelated to the issue of offer and acceptance.⁴⁶ Section 2-207 was designed to effectuate the parties' intent and thereby to surmount the technical difficulties posed by the use of preprinted forms.⁴⁷ This is accomplished through subsection (1) of section 2-207.⁴⁸

Subsection (1) provides that the sending of preprinted forms, such as a written confirmation, 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.”⁴⁹ Thus, the rigid common law “mirror image rule” has given way to a more realistic approach to contract formation. However, the last proviso would at least appear to be a nod to the common law roots of the section by invoking the “rule that a conditional acceptance is not an effective acceptance.”⁵⁰ Section 2-207 generally works well in determining whether a contract has been formed, though issues can still arise as to whether a written offer has been made, whether there has been a definite expression of acceptance and whether the acceptance was conditional.⁵¹

46. See 1 CORBIN, *supra* note 28, § 3.37, at 499; see also *Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co.*, 697 A.2d 323, 327 (R.I. 1997) (noting that section 2-207 was intended to alter the common law mirror-image rule).

47. *Brown*, *supra* note 14, at 899. This also comports with the Uniform Commercial Code's policy regarding the general formation of contracts as articulated in § 2-204, which states:

(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.

U.C.C. § 2-204 (2004); see also *Brown*, *supra* note 14, at 899.

48. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 319.

49. U.C.C. § 2-207(1). Though § 2-207 does not explicitly limit itself to agreements in which at least one party's preprinted form plays a role, such a limitation is generally understood. *Brown*, *supra* note 14, at 899.

50. *Brown*, *supra* note 14, at 919. Though some courts, such as *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962) and its progeny, have held that a reply term that materially alters the contract must constitute an acceptance “expressly made conditional” on the offeror's assent to the new term, this approach has been criticized as frustrating the purposes of § 2-207. *Brown*, *supra* note 14, at 919-20 n.124.

51. See 1 CORBIN, *supra* note 28, § 3.37, at 499, 501-03. There may also be limits on what will constitute an acceptance, such as when the confirmation states entirely different terms as to quantity and price. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 319-21. “[S]urely a buyer should not be taken to accept the seller's offer of two carloads at \$10,000 each if the buyer replies, ‘I accept one

Once a contract has been formed under subsection (1), subsection (2) governs the question of which terms of the writings are included in the contract.⁵² As subsection (1) is viewed as having given substantial power back to the offeror in the “battle of the forms,” the drafters added a sop to the offeree in subsection (2).⁵³ When both parties are merchants, the drafters recognized that the offeree could be extended some latitude to set new terms so long as the new terms did not significantly alter the bargain proposed in the offer.⁵⁴ Accordingly, subsection (2) provides that, between merchants,⁵⁵ additional terms⁵⁶ are to be construed as proposals to the contract and become a 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.”⁵⁷ But the exceptions to the rule, found in subsections (2)(a) and (2)(c), reserve to the offeror the common law power to set terms by so stipulating in the offer or by objecting before or after the fact.⁵⁸

carload at \$5,000.” *Id.* at 321. Variance in such terms, which are usually subject to bargaining, may not be viewed as “expressions of acceptance.” *Id.*; *see also, e.g., Lambert v. Kysar*, 983 F.2d 1110, 1113 (1st Cir. 1993).

52. *See Brown, supra* note 14, at 928; 1 CORBIN, *supra* note 28, § 3.37, at 504. As a matter of grammatical construction, subsection (2) presupposes that a contract has been formed under subsection (1). *See* 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 6:22, at 193 (Richard A. Lord 4th ed. 1990).

53. 1 FARNSWORTH, *supra* note 14, § 3.21, at 322.

54. *See Brown, supra* note 14, at 931.

55. Corbin instructs that if either party is a non-merchant, the additional or different terms drop out of the contract and have no further relevance unless expressly agreed to. 1 CORBIN, *supra* note 28, § 3.37, at 505. *See also Stephens, supra* note 23, at 825 (noting that if the transaction is not between merchants, the additional terms in the offeree’s response do not become a part of the contract, but rather are treated as proposals for addition to the contract).

56. There appears to be some disagreement as to whether subsection (2) deals exclusively with additional terms or with additional and different terms. *See Brown, supra* note 14, at 930-33 (advocating that only additional terms are covered by subsection (2)). Though the text of subsection (2) speaks only in terms of “additional terms,” the comments to § 2-207 state that “[w]hether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2).” U.C.C. § 2-207 cmt 3 (2004) (emphasis added). Some commentators and courts have suggested that the omission of the word “different” from the text was a typographical error and that subsection (2) does apply to different terms. *See John E. Murray, Jr., The Chaos of the “Battle of the Forms”: Solutions*, 39 VAND. L. REV. 1307, 1354-56 (1986); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578-79 (10th Cir. 1984). Other commentators have pointed out that the drafters could have just as easily inserted “or different” into subsection (2) had they wanted to and that it is doubtful that the omission was inadvertent. *See* 1 WHITE & SUMMERS, *supra* note 13, § 1-3, at 10.

57. *Brown, supra* note 14, at 825 (quoting U.C.C. § 2-207(2)).

58. *See id.*

Under subsection (2)(a), an offeree who receives an offer that expressly limits acceptance to its terms cannot add terms and hope to have them survive, but may choose to send its own “acceptance . . . made conditional on the acceptance of [its own] additional or different terms.”⁵⁹ Such an acceptance may actually be viewed as a counteroffer and no contract will be formed unless the offeror accepts the counteroffer.⁶⁰ However, in response to this faux acceptance, the offeror may move forward under the assumption that a contract has been made on the offeror’s terms.⁶¹ Though this would seem to restore the “last shot” doctrine, subsection (3) establishes that, even though the exchange of writings has not established a contract, the offeree is still bound by a contract consisting of the terms common to both writings, together with any other terms supplied by the Uniform Commercial Code.⁶²

Even if an offeror remains completely silent on additional terms, an offeree is still limited by subsection (2)(b), which prevents additions that would materially alter the contract.⁶³ Accordingly, this subsection has further accomplished the goal of the drafters to erode the “last shot doctrine” by preventing material last shot boilerplate additions that may have been otherwise overlooked by the parties. But determining whether a term materially alters the contract is a complex matter.⁶⁴

C. “Material Alteration” Under Section 2-207

Assuming neither subsection (2)(a) or (2)(c) apply, the only issue remaining when an offeree adds terms is whether the complained-of provisions materially alter the contract. The commentary to section 2-207 gives some guidance as to what terms become a part of the contract and

59. U.C.C. § 2-207 cmt. 2; 1 FARNSWORTH, *supra* note 14, § 3.21, at 327.

60. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 327-29; 1 WHITE & SUMMERS, *supra* note 13, § 1-3, at 17. Though the mere presence of additional terms, without any conditional acceptance language, should not indicate that the offeree’s acceptance is a counteroffer, some courts have held otherwise. See, e.g., *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962); *Providence & Worcester R.R. Co. v. Sargent & Greenleaf, Inc.*, 802 F. Supp. 680, 686-87 (D.R.I. 1992); *Middleton Eng’g Co. v. Climate Conditioning Co.*, 810 S.W.2d 57, 59 (Ky. Ct. App. 1991); *Alloy Computer Prods., Inc. v. N. Telecom, Inc.*, 683 F. Supp. 12, 14 (D. Mass. 1988); *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537, 546 (D. Mass. 1977). But see *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 551-52 (D. Del. 1981) (criticizing the *Roto-Lith* decision); *Boese-Hilburn Co. v. Dean Mach. Co.*, 616 S.W.2d 520, 526 (Mo. Ct. App. 1981) (rejecting *Roto-Lith* as reviving the common law “mirror image rule”). White and Summers reject such an approach and would consider the offeree’s document as an acceptance. 1 WHITE & SUMMERS, *supra* note 13, § 1-3, at 17.

61. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 328-29.

62. *Id.* at 329.

63. *Id.* at 322-23.

64. See 2 WILLISTON, *supra* note 52, § 6.22, at 193 (“[I]t remains no easy matter to determine whether a particular term in the offeree’s expression of acceptance materially alters the contract formed under subsection (1), by that expression of acceptance.”).

what terms are material alterations.⁶⁵ For instance, comment 4 clarifies what terms do in fact materially alter a contract, stating,

Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.⁶⁶

This comment indicates that the test for materiality rests upon whether a clause would impose “surprise or hardship” upon the party against whom the clause is sought to be enforced. The comment also instructs, however, that such clauses cannot be incorporated without “express awareness.”⁶⁷ Thus, if an offeree’s clause that materially alters a contract is specifically pointed out to the offeror, the offeror can protect himself from unfair surprise or hardship by objecting to it.⁶⁸ Relying on section 2-207 comment 4, courts have found the following clauses to be material alterations to a contract: a choice of law clause;⁶⁹ a choice of forum clause;⁷⁰ a clause disclaiming

65. Comment 3 to § 2-207 states that unless expressly agreed to by the other party, materially altering terms will not be included in the contract. See U.C.C. § 2-207 cmt. 3 (2004).

66. U.C.C. § 2-207 cmt. 4.

67. 2 WILLISTON, *supra* note 52, § 6:22, at 201-03 (noting that though the comments to § 2-207 provide that materially altering terms must be “expressly agreed to,” the comments also suggest that what is really necessary is “express awareness”).

68. See, e.g., *Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329 (7th Cir. 1985) (holding that though an express warranty and accompanying disclaimer were material alterations, because the purchaser had actual knowledge of the disclaimer, had inquired about it and took advantage of the warranties benefits, he had expressed assent, through his conduct, to the addition); see also *Clifford-Jacobs Forging Co. v. Capital Eng’g & Mfg. Co.*, 437 N.E.2d 22, 25 (Ill. App. 1982) (finding that though a price term was an addition to the contract, there was no unreasonableness or surprise because the price increase sought to effectuate a term upon which both parties’ contracts were in agreement); cf. *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir. 1987) (holding an arbitration clause was not a material alteration in light of the parties’ course of dealing).

69. See *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 352 (M.D.N.C. 1995) (finding that, under North Carolina law, a choice of law provision was a material alteration to the contract where both parties included differing choice of law provisions). But see *Liberty Steel Prods., Inc. v. Franco Steel Corp.*, 57 F. Supp. 2d 459, 466 (N.D. Ohio 1999) (finding that an Ohio

warranties;⁷¹ a clause providing for attorney's fees;⁷² a clause for indemnification;⁷³ a clause changing the price term;⁷⁴ a clause changing quantities to be shipped in an installment contract;⁷⁵ a clause adding warranties when the offer expressly negated them;⁷⁶ and a clause that deletes a major remedy, such as consequential damages.⁷⁷

seller's provision for New York choice of law did not "materially alter" the contract because it was not listed in the commentary as a term that would impose surprise and hardship).

70. See *Dependable Component Supply, Inc. v. Pace Elec. Inc.*, 772 So. 2d 582, 584 (Fla. Dist. Ct. App. 2000) ("An exclusive venue provision outside one's home area seems both material, as well as a variance, especially where, as here, the provision would send buyer up to seller's court in a suit to recover the price already paid for nonconforming goods."); *Pacamor Bearings, Inc. v. Molon Motors & Coil, Inc.*, 477 N.Y.S.2d 856, 858 (App. Div. 1984) (finding a condition specifying New York jurisdiction to be a material alteration). See also *Prod. Components, Inc. v. Regency Door & Hardware, Inc.*, 568 F. Supp. 651, 654 (S.D. Ind. 1983). In the *Product Components* case the court stated that:

This Court likewise concludes that selection of a distant forum with which a party has no contacts, while enforceable if contained in an agreement freely and consciously entered into, can result in surprise and hardship if permitted to become effective by way of confirmation forms that unfortunately are all too often never read.

Id. at 654.

71. See *Tuck Indus., Inc. v. Reichhold Chems, Inc.*, 542 N.Y.S.2d 676, 678 (App. Div. 1989) (finding that a warranty disclaimer was a material alteration to the contract and thus not a part of the agreement between the parties); *Se. Adhesives Co. v. Funder Am., Inc.*, 366 S.E.2d 505, 508 (N.C. Ct. App. 1988) ("A term [disclaiming warranties] which so drastically affects the remedies available to the buyer upon seller's breach must be considered a material alteration when not explicitly negotiated by the parties.").

72. See *Herzog Oil Field Serv., Inc. v. Otto Torpedo Co.*, 570 A.2d 549, 551 (Pa. Super. Ct. 1990) ("[W]e find that the provision calling for the addition of an attorney's fee of 25% of the balance due is a material alteration and, therefore, did not become part of the agreement."); *Johnson Tire Serv., Inc. v. Thorn, Inc.*, 613 P.2d 521, 523 (Utah 1980) ("The addition of a provision for attorneys' fees alters the offer materially and thus does not fall within the 'additional or different terms' which the statute renders acceptable by mere silence on the part of the offeror.").

73. See *Palmer G. Lewis Co. v. ARCO Chem. Co.*, 904 P.2d 1221 (Alaska 1995) (applying Washington law).

74. See *Luedtke Eng'g Co. v. Indiana Limestone Co.*, 740 F.2d 598, 600 (7th Cir. 1984) (upholding trial court's determination that a term altering the delivery terms was a material alteration).

75. *Steiner v. Mobil Oil Corp.*, 569 P.2d 751, 754 (Cal. 1977) (holding that defendant's substitution of a guaranteed discount amount of gasoline terminable at its discretion materially effected plaintiff's interests). As noted above, altering terms such as quantity and price may vary so much from the original offer that they will actually be considered counteroffers and thus subsection (2) would not be applicable. See *supra* note 51 and accompanying text.

76. See *Valtrol, Inc. v. Gen. Connectors Corp.*, 884 F.2d 149, 155 (4th Cir. 1989) (finding that purchase order warranties that were additional terms materially altered the existing contract); *Boese-Hilburn Co. v. Dean Mach. Co.*, 616 S.W.2d 520, 528 (Mo. Ct. App. 1981) ("Basic logic compels the conclusion that if a clause negating a standard warranty constitutes a 'material' alteration, conversely, inclusion of a warranty clause where none previously existed and was expressly disclaimed likewise constitutes a 'material' alteration.").

77. See *Glyptal Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 894 (D. Mass. 1992) (claiming to follow the recent trend in case law to find that remedy-limiting provisions are material alterations); *W. Indus., Inc. v. Newcor Can., Ltd.*, 739 F.2d 1198, 1205 (7th Cir. 1984) (holding that "[t]he deletion of a major remedy would be a material alteration"); *Reliance Steel Prods. Co. v. Ky. Elec.*

The comments also give guidance as to what terms do not materially alter a contract in comment 5, which states,

Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).⁷⁸

Of particular interest is the reference to section 2-719. U.C.C. section 2-719 deals with limitations on remedies and on consequential damages and provides,

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

Steel Co., 35 U.C.C. Rep. Serv. 1430, 1433 (E.D. Pa. 1983) (stating that a clause disallowing consequential damages or restricting warranties is a material alteration); *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980) ("A term disclaiming warranties, and we might add a term limiting remedies, is undoubtedly a term that materially alters a contract."); *Air Prods. & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414, 424-25 (Wis. 1973) ("We conclude that the disclaimer for consequential loss was sufficiently material to require express conversation between the parties over its inclusion or exclusion in the contract."). See also 2 WILLISTON, *supra* note 52, § 6:22, at 207-13 (noting that, by and large, courts have not had great difficulty dealing with the issue of whether a clause materially alters a contract formed under subsection (1)). Arbitration clauses have also been generally recognized as being material alterations except when the trade is one in which such clauses are the norm, and therefore do not result in surprise and hardship. See *id.*

78. U.C.C. § 2-207 cmt. 5 (2004).

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.⁷⁹

Comment 5 to section 2-207 indicates that limiting a remedy in a "reasonable manner" is permissible and references 2-719. As the only limits imposed under section 2-719 are that the remedy not fail of its essential purpose or, in the case of consequential limitations, be unconscionable, this would seem to indicate that limiting remedies would not be a material alteration so long as the exclusions of section 2-719 do not apply.⁸⁰ But, as was noted above, clauses eliminating major remedies, such as excluding consequential damages, have been found to be material alterations.⁸¹ Indeed, as will be discussed below, despite the dictates of comment 5, some courts have held that such attempts to limit remedies are always material alterations while others find that they are not.

III. CURRENT APPROACHES TO WHETHER CLAUSES LIMITING LIABILITY ARE "MATERIAL ALTERATIONS"

Many courts have confronted the issue of whether a clause limiting liability is a material alteration to the contract under 2-207. Unfortunately, courts have arrived upon varying approaches and results. Courts have adopted both a *per se* rejection of such provisions, finding them always to be

79. U.C.C. § 2-719.

80. See U.C.C. § 2-719(2)-(3).

81. See *supra* note 77 and accompanying text.

material, and a *per se* acceptance of such provisions, finding them not to be material.⁸² There is also a middle ground of cases which adopt a case-by-case approach to this issue, looking to whether the clause would result in surprise and hardship.

A. The “*Per Se Material*” Approach

Under this approach, courts seemingly ignore the language in the latter part of comment 5 to section 2-207. This line of cases instead focuses on the “surprise or hardship” factors found in comment 4.⁸³ These cases find that the limitation of remedies causes a significant and substantial shift in the ordinary allocation of risk, and such clauses therefore always cause a hardship.⁸⁴

Such was the case in *Winter Panel Corp. v. Reichhold Chemicals, Inc.*⁸⁵ In *Winter Panel*, the plaintiff, Winter Panel ordered from the defendant, Reichhold Chemicals (“Reichhold”), a polyurethane foam system to be used in Winter Panel’s production process for its foam-insulated construction panels.⁸⁶ Reichhold, over a period of several months, delivered chemicals to Winter Panel and included with its deliveries invoices limiting its liability for breach of warranty and disclaiming liability for consequential damages.⁸⁷ After production with the Reichhold foam, Winter Panel’s customers began

82. This is not meant to imply that clauses limiting liability are the only ones which courts treat in a *per se* manner. For instance, many courts have held that the addition of an arbitration clause is a *per se* material alteration. See, e.g., *Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co.*, 697 A.2d 323, 329 (R.I. 1997) (stating that “[w]e are of the opinion that a provision compelling a party to submit to binding arbitration materially alters the terms of the parties’ agreement.”); *Coastal Indus., Inc. v. Automatic Steam Prods. Corp.*, 654 F.2d 375, 379 (5th Cir. 1981) (applying New York law to find that “the unilateral insertion of an arbitration clause constitutes a *per se* material alteration of a contract”). Material alteration in the context of limitation of liability clauses is of particular interest, however, because courts have taken such polar opposite approaches as well as a middle ground approach.

83. Comment 4 indicates that “clauses which would normally ‘materially alter’” a contract are ones that “result in surprise or hardship if incorporated without express awareness by the other party.” U.C.C. § 2-207 cmt. 4.

84. See, e.g., *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1107-08 (3d Cir. 1992); *Winter Panel Corp. v. Reichhold Chemicals, Inc.*, 823 F. Supp. 963, 971 (D. Mass. 1993); *Glyptal Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 894 (D. Mass. 1992); *Reliance Steel Prod. Co. v. Ky. Elec. Steel Co.*, 35 U.C.C. Rep. Serv. 1430, 1433 (E.D. Pa. 1983); *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1048 (Ill. Ct. App. 1980); *Air Prods. & Chems, Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414, 424-25 (Wis. 1973).

85. 823 F. Supp. at 963.

86. See *id.* at 966.

87. See *id.* Reichhold also sent technical bulletins containing warranty and damages limitation clauses. *Id.* at 967.

to complain that its panels were warping, forcing Winter Panel to replace and repair the faulty panels.⁸⁸ Winter Panel sued Reichhold for breach of warranty and for consequential damages, and Reichhold defended that such claims were precluded by the terms of the damages limitation clauses.⁸⁹ The district court held that a fact issue remained as to whether the invoices were received prior to or subsequent to delivery of the chemicals,⁹⁰ but also held that Reichhold's clauses were material alterations to the contract.⁹¹ The court found that terms which cause a shift of the commercial risk, though common in commercial dealings and expressly allowed under U.C.C. section 2-719, "must be considered significant terms in any contract, which would result in surprise or potential hardship if incorporated without express awareness by the buyer."⁹² In holding that such clauses are material alterations, the court purported to follow a prevailing trend that damages limitations clauses are potentially too burdensome not to be considered material.⁹³

The Third Circuit reached a similar result in *Altronics of Bethlehem, Inc. v. Repco, Inc.*⁹⁴ There, a security business that purchased radio-operated security systems brought suit against the manufacturer to recover the purchase price of two of the systems, and also for incidental and consequential damages.⁹⁵ The defendant appealed an award in favor of the plaintiff based, among other things, on the grounds that consequential damages were precluded by the defendant's invoice forms, which stated, "sellers shall not be liable for any incidental or consequential damages incurred by buyer or anyone else by reason of product defects or failure to conform to specifications."⁹⁶ After determining that the clause's inclusion turned solely upon whether the exclusion of consequential damages would materially alter their contract, the Third Circuit rejected defendants' argument, stating, "Defendant's additional terms would operate to prevent plaintiffs from taking advantage of the remedies otherwise available to them

88. *See id.* at 968.

89. *See id.* at 968-69.

90. The court held that, under *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), warranty and damages limitation clauses included in acknowledgments of purchase orders are incorporated into the final contract when the purchaser subsequently accepts delivery of goods. *Id.* at 969. Winter Panel contended, however, that it did not receive the invoices until after delivery of the chemicals, thus raising a factual issue. *Id.* The court held that if the invoices were received after delivery then the clauses would be subject to U.C.C. § 2-207(2) and would be considered proposals for additional terms. *Id.* at 970.

91. *See id.* at 969-71.

92. *Id.* at 971.

93. *Id.*

94. 957 F.2d 1102 (3d Cir. 1992).

95. *See id.* at 1104.

96. *Id.* at 1107.

under Pennsylvania law. It follows that inclusion of the additional terms in the contract would constitute a material alteration."⁹⁷

Though this approach is straightforward and easy to apply, it is flawed in that it ignores both the realities under which the parties may be operating as well as comment 5 to section 2-207.⁹⁸ Turning back to our soccer club and polystyrene hypotheticals, application of a *per se* material rule would appear to reap a just result for the soccer club, but reveals the inadequacies of the rule when applied to the sophisticated parties in the polystyrene example.⁹⁹ Suppose it was common in the polystyrene industry to include such clauses or that Company B could have obtained polystyrene from another source just as easily. The rule is hardly fair under such circumstances, because it would not cause surprise or hardship for the opposing party. Because such a rule allows a party to escape the terms of a contract that the parties have arguably agreed to, such a rule also violates the policies underlying the move from the common law to the U.C.C., i.e., it allows one party to renege on part of the bargain based on discrepancies between the offer and acceptance. Furthermore, as comment 5 clearly contemplates whether limitations clauses may not be material alterations, the *per se* material model is not a sound approach.¹⁰⁰

B. The "Per Se Not Material" Approach

This approach arguably takes the most straightforward approach in that it unwaveringly follows the comments and section 2-719. It follows comment 5 to section 2-207 which states, in relevant part:

Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: . . . a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).¹⁰¹

97. *Id.* at 1108.

98. See U.C.C. cmt. 5 (2004).

99. See *supra* Part I.

100. See U.C.C. § 2-207 cmt. 5.

101. U.C.C. § 2-207 cmt. 5 (emphasis added).

U.C.C. section 2-719, to which the comment refers, deals with limitations on remedies and on consequential damages, and provides that such limitations are permissible so long as the exclusive or limited remedy does not fail of its essential purpose, or, in the case of limiting consequential damages, that the limit is not unconscionable.¹⁰² Therefore, a literal reading of the U.C.C. appears to provide a straightforward approach to whether such clauses are material alterations. Comment 5 of section 2-207 renders clauses limiting consequential damages reasonable, and directs the parties to section 2-719.¹⁰³

Under this latter provision, limitations on remedies, including consequential damages, are reasonable *as a matter of law*, and do not materially alter the parties' agreement, unless the limitation on the remedy, such as to repair or replacement, fails of its essential purpose, or the limitation on consequential damages is unconscionable.¹⁰⁴

When the parties to the contract at issue are both sophisticated entities, unconscionability should not be an issue, and, under this approach, a limitation of liability provision would most likely be found not material.

This approach was adopted by the District Court of New Jersey in *Kathenes v. Quick Chek Food Stores*.¹⁰⁵ In *Kathenes*, Nancy Kathenes was injured when the cap of a soda bottle flew off and struck her in the eye.¹⁰⁶ She sued the retailer as well as the bottler, Joyce Beverages, and the manufacturer of the bottle, Owens-Illinois.¹⁰⁷ A state court entered judgment against Joyce and dismissed the claims against the retailer and Owens.¹⁰⁸ The only claims remaining were Joyce's claims for indemnity from Owens.¹⁰⁹

The case was removed to federal court and Owens moved for summary judgment based on language in its order acknowledgment form limiting liability to the contract price and excluding liability for special or

102. See U.C.C. § 2-719 (2)-(3).

103. See U.C.C. § 2-207, cmt. 5.

104. *Chateaugay Corp. v. N. States Contracting Co.*, 162 B.R. 949, 956 (Bankr. S.D.N.Y. 1994); see also, e.g., *Kathenes v. Quick Chek Food Stores*, 596 F. Supp. 713 (D.N.J. 1984); *Hydraform Prod. Corp. v. Am. Steel & Aluminum Corp.*, 498 A.2d 339 (N.H. 1985) (finding that clause was not unconscionable but did fail its essential purpose, and was therefore a material alteration); *J.A. Maurer, Inc. v. Singer Co.*, 1970 WL 12645 (N.Y. Sup. Ct. Feb. 9, 1970).

105. 596 F. Supp. 713 (D.N.J. 1984).

106. *Id.* at 714.

107. *Id.*

108. See *id.*

109. See *id.*

consequential damages.¹¹⁰ After determining that Ohio law applied, the court turned to the question of whether the clause was a material alteration of the contract.¹¹¹ Though Joyce contended that such a clause was a material alteration, the court noted that comment 5 allows for such limitations so long as they are reasonable under section 2-719.¹¹² The court then rejected Joyce's contentions that the remedy provided in the clause failed its essential purpose or was unconscionable.¹¹³ The court found that there was no indication that the remedy failed of its essential purpose because its purpose "was to shift the unpredictable risk of consequential damages to Joyce," and was not so oppressive as to be unconscionable.¹¹⁴

Not all clauses survive the dictates of section 2-719, however, despite being found to be a part of the contract under the *per se* not material approach. For instance, in *Hydraform Products Corp. v. American Steel & Aluminum Corp.*, the New Hampshire Supreme Court held that though a term limiting liability was enforceable as a term of the contract, it failed of its own essential purpose.¹¹⁵ There, a wood stove manufacturer, Hydraform, brought suit against a steel seller, American, for breach of contract.¹¹⁶ Hydraform had ordered steel from American but some deliveries were late and other deliveries had defective steel.¹¹⁷ Furthermore, the replacement deliveries were also late.¹¹⁸ After the first deliveries arrived late, Hydraform informed American of the importance of timely deliveries, but American continued its tardy course of conduct.¹¹⁹ Ultimately, Hydraform "concluded that American would never perform as agreed and brought suit."¹²⁰ American defended that its delivery receipts contained language limiting its liability to replacement or refund of the purchase price and excluding consequential damages.¹²¹

110. *Id.*

111. *Id.* at 716. Though the court analyzed the case under Ohio law, it noted that its decision would be the same under New Jersey law because New Jersey's version of 2-207 was identical to Ohio's. *Id.* at 716 n.2.

112. *See id.*

113. *See id.* at 717.

114. *Id.* at 717-18.

115. 498 A.2d 339, 344 (N.H. 1985).

116. *See id.* at 341.

117. *See id.*

118. *See id.*

119. *See id.*

120. *Id.* at 341. Hydraform did attempt to mitigate its damages by seeking another supplier but could not find one that could supply the required steel in time. *Id.*

121. *See id.* at 342.

The court considered this clause in light of section 2-207, noting that the clause would become a part of the contract so long as it was not a material alteration.¹²² After noting that “comment 4 to section 2-207 implies that the test for material alteration is whether the term in question would result in surprise or hardship,” the court concluded that under comment 5, a term that is reasonable under sections 2-718 and 2-719 is not unreasonably surprising.¹²³ The court then turned to whether the clause was unconscionable under section 2-719, and concluded that the parties did not have such disparate bargaining power as to lead to the conclusion that the term was unconscionable, nor did the dealings of the parties support such a conclusion.¹²⁴ However, the court then turned to whether the remedy in the clause failed of its essential purpose and concluded that it did.¹²⁵ The court found that although the “purpose of the clause was to limit the right to seek consequential damages,” it was “subject to American’s obligation to provide replacements as a remedy for defective goods.”¹²⁶ Because time was of the essence in the shipment, delays of replacement shipments negated the adequacy of the remedy and therefore, the remedy failed of its essential purpose.¹²⁷

Though limitations clauses are not always incorporated into the contract, the *per se* not material approach may still take comment 5 too literally.¹²⁸ By ignoring the “surprise or hardship” language, this approach permits clauses which may not have been truly contemplated by both parties to become a part of the contract. For example, turning back to our two hypotheticals, it would appear to be unfair to allow such a clause to become a part of the soccer league’s contract, especially if there was no prior course of dealing.¹²⁹ Even in our polystyrene hypothetical, this approach could be unfair and work surprise and hardship. If Company A and B had previously entered into fifty such contracts without Company A adding the limitations, and only the last contract contained this clause, the parties’ course of conduct could indicate that the clause was an unexpected addition. Under such circumstances, even sophisticated parties could be surprised by the application of a limitation of liability. Allowing such clauses to *per se* become a part of the contract would further act to defeat the very purpose of

122. *See id.* at 343.

123. *Id.*

124. *Id.* at 343-44. In examining unconscionability, the court referred to § 2-302, which seeks to prevent “‘oppression and unfair surprise,’” but does not disturb the “‘allocation of risks because of superior bargaining power.’” *Id.* at 343 (quoting U.C.C. § 2-302 cmt 1).

125. *See id.* at 344-45.

126. *Id.* at 344.

127. *See id.*

128. *See* 2 WILLISTON, *supra* note 52, § 6:22, at 206-07 (criticizing *Kathenes* and *Hydraform*).

129. However, under this approach, a court might find that such a clause failed of its essential purpose, just as in *Hydraform*.

U.C.C. section 2-207 by effectively reinstating the “last shot doctrine.”¹³⁰ Just as a court should not assume that a particular clause mentioned in comment 4 effects a material alteration, it should not automatically assume the converse of a provision mentioned in comment 5.¹³¹

C. *The “Surprise or Hardship” Approach*

The third approach rejects both *per se* approaches as “contrary to the [U.C.C.’s] special emphasis on the particular circumstances surrounding each contractual relationship.”¹³² These cases analyze the issue of material alteration using a case-by-case basis.¹³³ Under this approach, the party opposing the limitation bears the burden of proving either surprise or hardship.¹³⁴ Like the cases in the *per se* material approach above, these cases concentrate on comment 4’s language of “surprise or hardship,” but go through a more thorough analysis on a case-by-case basis.¹³⁵

1. *The Horning I and II Approach*

The “surprise or hardship” approach was utilized in *Dale R. Horning Company, Inc. v. Falconer Glass Industries, Inc.* (“*Horning I*”).¹³⁶ In *Horning I*, Architectural Glass & Metal Company (“AGM”) verbally ordered a type of glass containing ceramic backing from Falconer Glass.¹³⁷ The next day, Falconer sent AGM a form confirming their oral agreement with a stated price quotation; the form also contained sixteen different “Terms and Conditions of Sale” on the back.¹³⁸ One of these terms limited AGM’s remedies to replacement and “excluded any special, direct, indirect,

130. See U.C.C. § 2-207 (2004).

131. See 2 WILLISTON, *supra* note 52, § 6:22, at 207.

132. *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236, 1245 (E.D. Pa. 1991).

133. See *Chateaugay Corp. v. LTV Energy Prod. Co.*, 162 B.R. 949, 956 (Bankr. S.D.N.Y. 1994); see also, e.g., *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 765 (10th Cir. 1983); *Dale R. Horning Co. v. Falconer Glass Indus. Inc.*, 710 F. Supp. 693, 701 (S.D. Ind. 1989); *Wheaton Glass Co. v. Pharmex, Inc.*, 548 F. Supp. 1242, 1245 (D.N.J. 1982).

134. See *Comark Merch., Inc. v. Highland Group, Inc.*, 932 F.2d 1196, 1201 (7th Cir. 1991); *Bergquist*, 777 F. Supp. at 1245 n.11; *Horning*, 730 F. Supp. at 966 n.2 (S.D.Ind. 1990). But see *Westech Eng’g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 199 n.3 (Tex. App. 1992) (placing the burden on the offeree but noting that the burden is very light).

135. See, e.g., *Comark Merch.*, 932 F.2d at 1201; *Bergquist*, 777 F. Supp. at 1245 n.11; *Horning*, 730 F. Supp. at 966 n.2.

136. 710 F. Supp. 693 (S.D. Ind. 1989) (“*Horning I*”).

137. See *id.* at 695.

138. *Id.*

incidental or consequential damages.”¹³⁹ Falconer subsequently delivered the glass to AGM but the glass was defective.¹⁴⁰ Falconer agreed to replace the goods but did not do so for five months, causing AGM to suffer consequential damages in the amount of \$19,000.¹⁴¹ AGM brought suit against Falconer for its breach,¹⁴² and Falconer defended that AGM could not recover for consequential damages under its limitation of liability clause.¹⁴³

In analyzing whether the clause became a part of the contract, the court turned to section 2-207 and examined whether such a clause was a material alteration.¹⁴⁴ The court noted that other courts had come to different conclusions about whether such clauses were, or were not, material alterations.¹⁴⁵ Ultimately, the court concluded, however, that it could not make such a determination as a matter of law, because the focus under the language of section 2-207 is whether the new term would surprise or work hardship on the buyer and this was an issue for the trier of fact.¹⁴⁶ The court concluded that because Falconer had not established that the limitation of consequential damages was a part of the contract, its motion to dismiss should be denied.¹⁴⁷

However, the issue arose again after more evidence had been presented.¹⁴⁸ This time, the court delved more deeply into the “surprise or hardship” analysis, and concluded that AGM had not shown that the disclaimer of consequential damages was a surprise.¹⁴⁹ The court did not end its analysis there, but went on to examine whether the exclusion worked a hardship upon AGM.¹⁵⁰ The court concluded that it did because Falconer knew or had reason to know of AGM’s potential liability and “attempted to shift this substantial economic burden” onto AGM through boilerplate language.¹⁵¹ Thus the clause was not a part of the contract.¹⁵²

139. *Id.* at 695-96.

140. *See id.* at 696.

141. *See id.*

142. *See id.*

143. *See id.* at 699.

144. *See id.* at 699-700.

145. *See id.* at 700.

146. *See id.* at 700-01.

147. *See id.* at 701.

148. *See Dale R. Horning Co. v. Falconer Glass Indus., Inc.*, 730 F. Supp. 962 (S.D. Ind. 1990) (*Horning II*).

149. *Id.* at 966-97.

150. *See id.* at 967.

151. *Id.* at 967-68.

152. *See id.* at 967.

2. Defining “Surprise or Hardship”

Though the court in *Horning I* initially placed the burden on the defendant to show that the clause was a part of the contract, it later placed the burden on the party opposing the limitation to show “surprise or hardship,” an approach adopted by other courts as well.¹⁵³ No matter which party bears the burden of proof, however, the analysis eventually turns upon whether there is “surprise or hardship,” two words the U.C.C. leaves undefined¹⁵⁴ but which have been given meaning via case law.¹⁵⁵

“Surprise” means that “[a]n alteration is material if consent to it cannot be presumed.”¹⁵⁶ “It consists of both a subjective and objective element; what did the assenting party know and what should it have known.”¹⁵⁷ Factors bearing on this issue include the parties’ prior course of dealing and the number of written confirmations that they exchanged, industry custom and the conspicuousness of the term.¹⁵⁸

“Hardship” has been interpreted as “substantial economic hardship,” and involves “a shift in legal liability which has the effect of relieving one party of the potential for significant economic hardship”.¹⁵⁹

Where a buyer faces substantial potential liability for consequential damages if the seller delays delivery or delivers a defective product, and the seller knew or had reason to know [of this potential liability], the seller’s attempt to ‘shift this substantial economic burden back to [the buyer] not through negotiation, but instead by inserting fine print boilerplate on the reverse side of a confirming standard form’ imposes hardship.¹⁶⁰

153. Compare *Dale R. Horning Co. v. Falconer Glass Indus., Inc.*, 710 F. Supp. 693 (S.D. Ind. 1989) (*Horning I*) with *Horning II*, 730 F. Supp. at 966; see also *Chateaugay Corp. v. N. States Contracting Co.*, 162 B.R. 949, 958 (Bankr. S.D.N.Y. 1994) (finding that the party seeking to avoid the clause had failed to come forward with evidence regarding surprise and thus the clause became a part of the contract).

154. U.C.C. § 2-207 (2004).

155. See *infra* notes 132-35 and accompanying text.

156. *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1336 (7th Cir. 1991).

157. *Chateaugay Corp. v. N. States Contracting Co.*, 162 B.R. 949, 956-57 (Bankr. S.D.N.Y. 1994); see also *Am. Ins. Co. v. El Paso Pipe & Supply Co.*, 978 F.2d 1185, 1191 (10th Cir. 1992).

158. See *Am. Ins. Co.*, 978 F.2d at 1191.

159. *Trans-Aire Int’l, Inc. v. N. Adhesive Co.*, 882 F.2d 1254, 1262 (7th Cir. 1989).

160. *Chateaugay*, 162 B.R. at 957 (citing *Dale R. Horning Co. v. Falconer Glass Indus., Inc.*, 730 F. Supp. 962, 967 (S.D. Ind. 1990) (*Horning II*)). Interestingly, this logic is similar to the reasoning used by the *Hydraform* court in determining that the limitation clause failed in its essential purpose. See *Hydraform Prod. Corp. v. Am. Steel & Aluminum Corp.*, 498 A.2d 339, 344 (1985) (finding no

It is under this second prong that most courts find the exclusion of consequential damages to be material,¹⁶¹ in part because the definition used for hardship is so broad. Some cases have recognized this, however, and have spoken in language designed to ensure that the exception does not swallow the rule.¹⁶² For instance, Judge Posner criticized a broad use of the “hardship” term in the *Union Carbide* case, stating that “[h]ardship is a consequence, not a criterion (Surprise can be either).”¹⁶³

3. The *Chateaugay* Approach

The *Chateaugay* court seized upon Judge Posner’s language when it formulated its own test based on this third approach.¹⁶⁴ In *Chateaugay*, the plaintiff and debtor, LTV Energy Products Company (“LTV”), commenced an adversarial proceeding against the Northern States Contracting Company (“Northern”) to recover \$22,517.60 and to expunge a claim by Northern in the amount of \$1,727,240.65.¹⁶⁵ Northern had entered into a contract with LTV for LTV to supply it with steel laminated pads and plain bearing pads needed in the construction of a bridge for the New York State Department of Transportation (“NYSDOT”).¹⁶⁶ To confirm the order, LTV sent to Northern a Sales Order Acknowledgment containing a number of clauses on the reverse side including clauses exculpating LTV from delay, labor-related or consequential damages and limiting Northern’s remedies to repair or replacement of, or credit for, defective goods at the option of LTV.¹⁶⁷ Though LTV delivered the steel laminated pads without incident, it failed to deliver the plain bearing pads for another year.¹⁶⁸ Northern accepted the late pads but brought claims against LTV for the consequential and delay damages it suffered as a result of LTV’s delay in delivering conforming plain bearing pads.¹⁶⁹ LTV moved for dismissal based on the exculpatory language of its Sales Order Acknowledgment.¹⁷⁰

error by trial court for refusing to enforce clause that did not address the problem to which it purportedly applied).

161. See *Trans-Aire*, 882 F.2d at 1263.

162. See *Chateaugay*, 162 B.R. at 957.

163. *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 133, 1336 (7th Cir. 1989).

164. *Chateaugay*, 162 B.R. at 957-58.

165. See *Chateaugay*, 162 B.R. at 952.

166. See *id.*

167. See *id.* at 952-53.

168. See *id.* at 953. The failure to deliver the pads on time, and whether the delays were related to anything LTV did or did not do, was also a matter in dispute. *Id.* Northern had also brought claims against NYSDOT for the very same damages. *Id.* at 953 n.1.

169. See *id.* at 953-54.

170. See *id.*

The bankruptcy court, recognizing that the terms of the Sales Order Acknowledgement were subject to U.C.C. section 2-207, turned to whether the clause was a material alteration to the contract.¹⁷¹ The court first recognized that some courts had adopted a *per se* acceptance of such terms as not being material while others had *per se* rejected such clauses because they always cause a significant and substantial shift in the ordinary allocation of risks.¹⁷² The court rejected both of these approaches, however, as “contrary to the U.C.C.’s special emphasis on the particular circumstances surrounding each contractual relationship,” and instead adopted the “surprise or hardship” approach of the *Horning II* court.¹⁷³ However, the court did not adopt the *Horning II* court’s approach in full, recognizing that a broad definition of “hardship” would create an exception that swallows the rule.¹⁷⁴ Citing Judge Posner’s approach to hardship, and relying upon rationale in both *per se* rules and the cases adopting the “surprise or hardship” approach, the *Chateaugay* court arrived upon the following test:

The rule we cull from the case law is the following: Between merchants, where U.C.C. section 2-207(2)(a) and (2)(c) do not apply, the limitations on remedies or damages become part of the parties’ agreement, unless the non-assenting party proves that (1) its inclusion constitutes unreasonable surprise in light of the parties’ prior dealings, industry custom or inconspicuousness of the term, (2) the clause is unconscionable or (3) the limitation fails of its essential purpose.¹⁷⁵

Under this test, the *Chateaugay* court ruled that Northern, as the party that was challenging the additional clauses, had failed to come forward with any evidence regarding surprise and had likewise failed to show that the remedies provided for failed of their essential purpose or were unconscionable.¹⁷⁶

171. *See id.* at 955.

172. *See id.* at 956.

173. *Id.* at 956-57 (quoting *Bergquist Corp. v. Sunroc Corp.*, 777 F. Supp. 1236, 1245 (E.D. Pa. 1991)).

174. *Id.* at 957.

175. *Chateaugay*, 162 B.R. at 957-58 (internal footnote omitted).

176. *See id.* at 958-60 (“It is extremely rare for a court to find an unconscionable limitation on consequential damages in a contract between experienced businessmen arising in a commercial setting.”).

4. The “Surprise or Hardship” Approach As Compared to the *Per Se* Approaches

The major disadvantage to the “surprise or hardship” approach, as compared to the *per se* approaches, is that it is not as easy to apply. A court must actually consider the parties, their course of dealing, and industry custom to arrive at what is a finding of fact. A *per se* approach is easy to apply and may be more predictable, but therein lies the problem with the *per se* approaches.¹⁷⁷ The *per se* material approach, by ignoring the intention of the parties and industry custom, would allow parties out of a provision in a contract that should, in all fairness, be included. The *per se* not material approach could likewise enforce provisions that were never truly contemplated by one or both parties and allow a party to avoid liability through boilerplate language. Though this effect can be mitigated somewhat in cases where the court considers whether the limitation fails of its essential purpose, this approach still ignores the factor of surprise. The “surprise or hardship” approach effects the purposes of the U.C.C. in that it takes into account the intentions of the parties and the circumstances surrounding each contract.¹⁷⁸

177. See *Waukesha Foundry, Inc. v. Industrial Eng'g, Inc.*, 91 F.3d 1002, 1008 (7th Cir. 1996) (holding that the question of materiality requires inquiry into the circumstances of the parties' relationship, expectations, and course of dealing, therefore, rejecting the assertion that warranty disclaimers and limitations of remedies are “per se” material for the purposes of U.C.C. § 2-207(2)(b)).

178. This is consistent with U.C.C. sections 2-204 and 2-206 which allow for contract formation through more than just the written documents. Section 2-204 states,

- (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.

Section 2-206 likewise provides for a variety of ways in which acceptance of an offer may be made.

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.

Courts utilizing the “surprise or hardship” approach, however, may find that the term “hardship” is problematic. A broad definition of “hardship” could make every limitation of liability into a material alteration, and thus turn the “surprise or hardship” approach into the *per se* material approach. To counter this, the *Chateaugay* court formulated its test which collapses the “fails of its essential purpose” and “unconscionability” exceptions to section 2-719 into the hardship prong. Even if a court should choose not to take this extra step, however, the “surprise or hardship” approach is still the superior model in analyzing limitation of liability clauses in a battle of the forms context. This can be seen by turning, once again, to our soccer club and polystyrene hypotheticals.

In our soccer club hypothetical, if this was the first contract the club had ever made with the t-shirt company, there would be no prior course of dealing to indicate that a limitation on its liability was standard. This, coupled with the level of sophistication of the parties, might mitigate toward a finding of unfair surprise. Also, if the club had told the dealer of its time frame and the reasons why timely delivery was so important, it is likely that a court would find that the limitation worked a hardship upon the club. However, if the club was silent on the purpose of the t-shirts and had operated on numerous occasions under the very same terms without complaint, a court might find that the provision is a part of the contract.

Likewise, in our polystyrene example the fact that these were sophisticated parties and that this sort of limitation on liability was the industry standard would mitigate in favor of keeping the clause. However, if Company B had made its timeline and the importance of timely delivery clear, a court could still find that such a clause worked a hardship upon Company B and find that it was not a part of the contract. The point is, in either situation, the court is free to reach a result that is equitable under the circumstances and that takes into account the true intentions of the parties; a freedom which a *per se* approach severely limits, if it affords it at all. Though it is true that the “surprise or hardship” approach requires a much more detailed factual inquiry, and thus is more of a strain on judicial resources, it is the far more equitable approach and is more in keeping with the purposes of the U.C.C. As such, the “surprise or hardship” model is the superior approach.

IV. REVISED ARTICLE 2 AND ITS EFFECTS

“On March 1, 1990, a Study Group of the Permanent Editorial Board (“PEB”) for the U.C.C. released a Preliminary Report commenting on the need for a comprehensive revision of Article 2 of the U.C.C.”¹⁷⁹ A Drafting Committee was then created by the PEB, with the approval of the National Conference of Commissions on Uniform State Laws and the American Law Institute.¹⁸⁰ This Committee began work in 1991 and produced a series of draft revisions to Article 2. Though no state has yet adopted these revisions, it is likely that some form of these revisions will find their way into the state legislatures.¹⁸¹ Thus, a review of the impact these revisions will have on section 2-207 is appropriate.

Some observers have suggested that the Article 2 redrafting exercise was required entirely because of section 2-207.¹⁸² Indeed, in its preliminary report, the Study Group of the PEB “found section 2-207 to be ‘controversial, complex and frequently litigated’” and “expressed the need to reconsider and simplify the section to reflect the underlying theory of the Article.”¹⁸³ Therefore, not surprisingly, one of the most sweeping changes to the U.C.C. under the revisions is to the battle of the forms section.¹⁸⁴ The revised section 2-207 states:

SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION.

If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:

179. Alex Devience, Jr., *The Renewed Search for the “Bargain in Fact” Under U.C.C. Section 2-207: Battle of the Forms, Part II? Comments on the Recommendation to Revise Section 2-207*, 9 DEPAUL BUS. L.J. 349, 351 (1997).

180. See Daniel T. Ostas & Frank P. Darr, *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, 73 DENV. U. L. REV. 403, 404 and n.3 (1996).

181. For example, in February of 2005, the Kansas legislature considered adopting a form of the revised Article 2. Bills proposing the adoption of Revised U.C.C. Article 1 (HB 2453) and the 2003 amendments to U.C.C. Article 2 (HB 2454) were introduced in the Kansas House on February 11, 2005. H.R. 2453, 2005 Leg., 2005 Sess. (Kan. proposed 2005); H.R. 2454, 2005 Leg., 2005 Sess. (Kan. proposed 2005).

182. See Phillip A. White, *A Few Comments About the Proposed Revisions to UCC Section 2-207: The Battle of the Forms Taken to the Limit of Reason*, 103 COM. L.J. 471, 473 (1998).

183. Devience, *supra* note 179, at 352 (internal quotations omitted).

184. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 332.

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of this Act.¹⁸⁵

Revised section 2-207 first asks if a contract has been formed and then, if so, asks what the terms of the contract are.¹⁸⁶ Subsections (a), (b) and (c) of the revised 2-207 answer this second question.¹⁸⁷ The revised section “rejects the possibility of surprising the parties with unbargained for terms by defining the terms of the agreement to be those terms that the parties expressly agreed to, either in their forms or otherwise, and those terms provided by the U.C.C.”¹⁸⁸ Subsection (b) allows courts to consider and enforce varying terms, whether in the record or not, including different and additional terms, so long as they are agreed to.¹⁸⁹

Noticeably absent from the revised section 2-207(b) is the “material alteration” language.¹⁹⁰ The revised section 2-207 instead asks courts to determine whether a party “agrees” to the other party’s terms, thus giving courts a great deal of discretion to include or exclude terms.¹⁹¹ Though this would seem to eliminate many of the problems associated with the current section 2-207 and its comments, which have led to a rather mechanical approach to what terms “materially alter” a contract, this portion of the revision faces its own challenges. It is under subsection (b) that many courts

185. See *Proposed Amendments to Uniform Commercial Code Article 2 – Sales* 26 § 2-207 (National Conference of Commissioners on Uniform State Laws, July 26 – August 2, 2002), <http://www.law.upenn.edu/bll/ulc/ucc2/annual2002.htm> [hereinafter Proposed Amendments].

186. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 332 (noting that the answer to the first question is provided by §§ 2-204 and 2-206); James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 729 (2004).

187. See 1 FARNSWORTH, *supra* note 14, § 3.21, at 332-33; James J. White, *supra* note 186, at 730.

188. *Proposed Amendments*, *supra* note 185, § 2-207(a) - (c); Ostas & Darr, *supra* note 180, at 420.

189. See James J. White, *supra* note 186, at 730; Ostas & Darr, *supra* note 180, at 420.

190. 1 FARNSWORTH, *supra* note 14, § 3.21, at 332-33.

191. See *Proposed Amendments*, *supra* note 185, § 2-207(b); 1 FARNSWORTH, *supra* note 14, § 3.21, at 333; James J. White, *supra* note 186, at 730 (stating that this subsection gives courts “latitude to find agreement in the verbal and nonverbal behavior of the parties, even when the term to which they have agreed is not included in the records that either party has sent, and even when the agreed-to term is contradicted by the other’s form”).

and commentators may find variance in interpreting what has and has not been agreed to.¹⁹²

Subsection (b) is of particular interest to this discussion because it appears to cover situations in which additional terms are unilaterally added by one party. Subsection (b) provides that such terms are included if the parties “agree” to the terms, but does not define “agree.” Indeed, the comments state that “the text recognizes the enormous variety of circumstances that may be presented under this section, and the section gives the court greater discretion to include or exclude certain terms than original Section 2-207 did.”¹⁹³ Despite this vote of confidence in the judiciary to easily determine when a term has been expressly agreed upon, it is likely that courts will still struggle when terms are added, with no objection by the other party, and a contract is moved forward upon.¹⁹⁴ After all, a term which is industry standard or has always been a part of the parties’ course of conduct may be deemed to be expressly agreed to simply by the fact that this is the way the parties have conducted business in the past and no objection was lodged on the occasion in question. In effect, this could return courts to the “surprise or hardship” approach.¹⁹⁵ The same factors that are considered in determining surprise and hardship, i.e., course of conduct, sophistication of the parties, industry customs and the inconspicuousness of the term would all help a court in determining whether a term was agreed to.¹⁹⁶ Indeed, proposed comment 4 explicitly states that “[a]n ‘agreement’ may include terms derived from a course of performance, a course of dealing, and usage of trade.”¹⁹⁷ Considering that “the primary reason for a 2-207 is to prevent unfair surprise and advantage taking by the use of forms in transactions where all of the terms are not contained in a single record,”¹⁹⁸ it is logical to

192. See James J. White, *supra* note 186, at 730 (positing that judicial interpretation of parties’ conduct in determining what terms have been agreed to “will be the battlefield under amended Section 2-207”); see also Phillip A. White, *supra* note 182, at 485-86 (noting that the distinction between “express agreement” and “implied agreement” is really unimportant and that the Code still embraces both aspects of agreement elsewhere).

193. *Proposed Amendments, supra* note 185, § 2-207 note 3.

194. See Phillip A. White, *supra* note 182, at 485-86 (noting the confusion that may still exist with the undefined term “expressly agreed”).

195. See, U.C.C. § 2-207 cmt. 4 (2004); see also discussion *supra* notes 132-35 and accompanying text.

196. See *supra* Part III.C.3.

197. *Proposed Amendments, supra* note 185, § 2-207 note 4.

198. *Revision of Uniform Commercial Code Article 2 – Sales*, § 2-207 (National Conference of Commissioners on Uniform State Laws, May 1, 1998), <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2598.htm>.

conclude that many of the same factors developed under the “surprise and hardship” approach should apply under the revision.¹⁹⁹

V. CONCLUSION

The primary goals of the drafters of section 2-207 were to overcome both the evils of the “mirror-image rule” as well as the “last shot” doctrine. At common law, last minute additions that limited liability could be used as an excuse to escape an unfavorable contract or, in the alternative, could oppressively place limitations on parties that were deemed to have accepted the new “counter-offer” through their performance. By and large, section 2-207 has accomplished the goals of eliminating these inequitable results, but the adoption of *per se* rules can defeat the purposes of U.C.C. section 2-207 either by effectively allowing parties to escape from clauses to which they may have actually assented, or enforcing limitations on parties that were never contemplated, or negotiated for. The “surprise or hardship” approach, however, focuses on whether the terms in question were actually contemplated by considering factors like course of conduct and performance, industry customs, inconspicuousness and the sophistication of the parties as well as the circumstances surrounding each particular contract. Because this approach accomplishes the purposes of the U.C.C., it is superior to the *per se* approaches and therefore *per se* models should be rejected. Though revisions have been contemplated which do away with the “material alteration” language of 2-207 which gave rise to the “surprise or hardship” approach, this approach may very well remain useful to courts in jurisdictions that adopt the revisions. The “surprise or hardship” approach, and the factors it takes into account, will aid courts in determining whether a term, such as one limiting liability, has been “expressly agreed” to or whether such terms “materially vary” from the original agreement—issues courts will consider under the revised section. As such, the “surprise or hardship” model should remain a practical way of determining the applicability of limitation of liability clauses in a battle of the forms context.

199. See Ostas & Darr, *supra* note 180, at 424 (concluding that trade customs, previous course of dealing, course of performance, and the supplementary provisions of Article 2 provide the core factors to be considered in exchange expectations).

