

Contracts -- Sales and Leases of Goods -- UCC Article 2

A. COMMON LAW VIEW: THE MIRROR IMAGE RULE. [§5.0]

Under the common law, an effective acceptance had to accept the offer unconditionally and entirely. That is, the acceptance had to be the "mirror image" of the offer. If the purported acceptance added an additional term, had one fewer term, or even slightly changed a term, it was considered a counter-offer, not an acceptance.

B. UNFAIRNESS OF MIRROR IMAGE RULE. [§5.1]

The mirror image rule makes sense in face-to-face transactions, for it seems only fair to say in those situations that unless the parties agree as to all the terms they have not manifested the mutual assent necessary for a valid contract. However, in modern commercial transactions, where the parties often do not deal face to face and where offer and acceptance are often made via pre-printed forms, the mirror image rule often leads to unfairness. This unfairness comes about in two ways, each of which is described by example below.

1. EXAMPLE OF UNFAIRNESS WHERE ONE PARTY DOESN'T PERFORM.

[§5.11] On September 1, a farmer in Kansas sends a "Purchase Order" form to a grain supplier in Illinois. On the Purchase Order are blanks which the farmer fills in by hand to indicate she wants 1,000 pounds of corn to be delivered on or before next February 15, at quoted prices. Clause 36 of her Purchase Order is preprinted and states that delivery shall be made by U.P.S. Upon receiving the Purchase Order, the grain supplier sends out a preprinted form entitled "Acceptance of Purchase Order." The owner fills in the blanks to indicate the grain company is promising to supply 1,000 pounds of corn to be delivered on or before February 15, and promises to sell the corn at the same price quoted in the Purchase Order. However, clause 31 of the Acceptance is also pre-printed and says that delivery is to be made by "any common carrier." When the Acceptance form arrives, Farmer checks only to ensure that the quantity, price, and delivery dates are correct, and puts the document in her files. If grain company never delivers the corn, under the mirror-image rule there is no breach of contract because no contract was ever formed. Because of the discrepancies in the delivery term, ("U.P.S." versus "any common carrier") the Acceptance was only a counter-offer which was never itself accepted. Obviously, this is unfair to Farmer.

2. EXAMPLE OF UNFAIRNESS WHERE THE PARTIES PERFORM: THE

"LAST SHOT" DOCTRINE. [§5.12] Builder places an order for 100 front doors from lumber company. On the Purchase Order builder uses to order the doors is the clause, "Supplier warrants that all doors supplied under this contract shall be of stainable quality." Lumber company sends back an acknowledgment form that is identical to the Purchase Order in every respect, except that its form states "Supplier represents its products are only of paintable, not stainable, quality." Neither party looks at the other's form and the doors are delivered and paid for.

Later, when the doors turn out to be unstainable, builder sues lumber company. Under the mirror image rule, the parties never had a contract based on the exchange of forms. Further, the lumber company's form was the pending offer at the time the parties performed (because taking delivery of the doors and paid for them), common law held that when the builder paid for the doors, he or she implicitly accepted lumber company's counter-offer, and thus became bound to a contract whose terms included the paintable only quality warranty. This rule is sometimes called the "last shot" doctrine and resulted in a contract by performance being made on the terms of the last party to submit a form. While perhaps not quite as unfair as the situation described in §5.11, the last shot doctrine did deprive offerors of some of the benefits they thought they were getting under these types of contracts. Recall, the scenario is that neither party reads the fine print and boiler plate language contained in the other party's form, and thus neither party really knows what terms are truly in the deal. The drafters of the UCC attempted to deal with these issues and cure these types of unfairness in §2-207 which is discussed below.

C. UCC §2-207: AN OVERVIEW. [§5.2]

§2-207 of the U.C.C. is intended to lessen, if not eliminate, the unfairness of the common law view. It does so by eliminating the strict mirror-image rule and allowing for a valid acceptance to contain terms different from or additional to an offer. However, it is important to note that not only does §2-207 govern whether the parties have a contract (i.e., whether there was an offer and an acceptance) but it also determines what the terms of that resulting contract are. It is only in this latter capacity that §2-207 becomes complicated.

D. ANALYSIS OF §2-207 PROBLEMS. [§5.3.]

After ascertaining that the rules of Article 2 of the UCC govern the transaction (see Chapter Thirty-Seven), nearly all §2-207 problems can be analyzed in only three steps:

- (1) **Do the parties have a contract** based on the exchange of their writings under §2-207(1)? (i.e., is the purported acceptance actually an effective acceptance, or is it a counter-offer as would be true under common law?) (see §5.31);
- (2) **If the offeree's form is an effective acceptance**, then the terms of the contract are dictated by the rules §2-207(2) and (see §5.32);
- (3) **If the offeree's form is not an effective acceptance**, then the parties do not have a contract based on their writings under §2-207(1). In that case it is necessary to examine whether they have a contract by conduct under §2-207(3), and if they do, to use §2-207(3) to determine the terms of that contract (see §5.33).

Example. Throughout the next several sections we will use the following example:

The offeror is a buyer who orders a product on a "Purchase Order" form, and the offeree is a seller who purports to accept that order by an "Acknowledgment" form which differs from the Purchase Order in some respect.

1. FIRST STEP: DO THE PARTIES HAVE A CONTRACT BASED ON THEIR WRITINGS UNDER §2-207(1)? [§5.31]

The first issue is whether the parties have a contract based on their exchanged writings. This is determined by judging their writings under the provisions of §2-207(1). The only function of §2-207(1) is to determine if the Purchase Order and Acknowledgment together constitute a binding offer and acceptance. This is done in two sub-steps:

- (1) determining whether the seller/offeree's Acknowledgment is a "seasonable expression of acceptance;" and
- (2) ascertaining whether the seller's acceptance is "expressly made conditional" on the buyer/offeror's "assent to [any] different or additional terms."

The analysis for each of these sub-steps is described below.

a. First Sub-Step: Does the Offeree's Document Act as a "Definite and Seasonable Expression of Acceptance?" [§5.311.]

The first question is whether the purported acceptance is really intended to act as an acceptance. Usually this is not a problem, as most seller's forms evidence a desire to sell the same goods the buyer wishes to purchase, at the same price the buyer wanted to pay. However, if the purported acceptance is too different from the offer, or contains a different quantity (or perhaps even too different a price) term from that found in the Purchase Order, it is not an acceptance, but will be deemed a counter-offer, and the determination of whether the parties have a contract is judged under §2-207(3) not §2-207(1). In other words, §2-207(1) will allow a purported acceptance to be an effective acceptance even if it contains different or additional terms from the offer, but when either the number of the differences between the seller's and buyer's forms gets too great, or when the seller's form differs sufficiently in an essential term from that found in the Purchase Order, the Acknowledgment will be deemed a counter-offer, not an acceptance.

b. Second Sub-Step: Does the Offeree's Document "Expressly Make [Acceptance] Conditional on [the Offeror's] Assent to the Additional or Different Terms?" [§5.312.]

While §2-207(1) holds that most purported acceptances with different or additional terms are, in fact, acceptances and not counter-offers, a question remains as to how an offeree can make a valid counter-offer if he or she does not want to accept one or more of the offeror's terms. To solve this problem, §2-207(1) provides that if the seller's form makes acceptance "expressly . . . conditional on assent to the additional or different terms,"

found in seller's form, then the Acknowledgment will be treated as a counter-offer and not an acceptance. Once again this makes sense, for if the seller indicates: (a) that the seller is proposing a deal on different terms; and (b) that the seller is only willing to go forward if the buyer agrees to the seller's terms, then the seller should be treated as having made a counter-offer and not an acceptance.

- (1) To be Effective, an "Expressly Made Conditional On Assent" Clause must Require Express, Not Implied, Consent from Offeree. [§5.3121.]

Occasionally a seller will try to include a clause on its form that makes inaction or silence on the part of the buyer an implied acceptance of the additional or different terms contained in the seller's form. For example, an offeree-seller's form may have language like, "Buyer must notify seller of any objection to any term contained in this document within ten days of receipt; otherwise Buyer agrees that the terms of this Acknowledgment are binding." In including this type of clause, the offeree-seller is intending to do two things: (1) make its form a counter-offer rather than an acceptance under §2-207(1); and (2) devise a way that the buyer will be deemed to have accepted the counter-offer by silence or inaction (see §4.571), so that the seller's terms will control the deal. However, under the UCC this type of clause is not effective. It is not a counter-offer, because to be a counter-offer under §2-207(1), the offeree-seller's form must clearly communicate both:

- (A) that the seller is unwilling to go forward on the terms of the offer; and
- (B) that its own terms will not control unless the buyer-offeror EXPRESSLY, not implicitly, assents to the seller's different or additional terms.

Further, a seller cannot sneak terms into the deal which result in an unbargained for advantage by setting up an acceptance by silence situation for the offeror, i.e., a situation where the offeror implicitly "accepts" the terms put forth by the seller if he or she does nothing. Indeed, such a result would resurrect the last shot doctrine (see §5.12), something §2-207 was designed to prevent, and would make acceptance by silence binding, something traditional common law contract formation will not usually permit (see §4.57 et seq.).

- (2) Example of Incorrect Approach under §2-207(1): Roto-Lith v. F.P. Bartlett & Co. [§5.3122]

Perhaps the most criticized §2-207 case ever is the one virtually every first-year student is initially assigned, *Roto-Lith, Ltd. v. F.P. Bartlett & Co.* 297 F.2d. 497 (1st Cir. 1962). The reason the case is so widely criticized is that it fails to recognize that point made in the immediately previous section. In *Roto-Lith*, the seller-offeree's acknowledgement form both disclaimed all warranties and contained the following clause, ". . . if these terms are not acceptable, buyer must notify seller at once." Buyer did not notify the seller of any objection and eventually purchased the goods. When the goods turned out to be sub-standard, the buyer tried to sue for breach of warranty. The court held that the quoted language made the offeree's acknowledgement a counter-offer, which was

implicitly accepted by the buyer when it accepted the goods. However, this analysis is incorrect, for a clause that does not call for an express manifestation of the buyer's assent to the different terms found in the offeree's document is insufficient to render that document a counter-offer under §2-207(1). Rather, the seller's document should have been classified as an acceptance under §2-207(1), and because the warranty disclaimer materially altered the offer (see §5.322 for a discussion of the material alteration issue), under §2-207(2) the disclaimer should not have been deemed to be part of the contract.

(3) Examples of Correct Approach under §2-207(1): Dorton v. Collins & Aikman Corp and C. Itoh & Co. v. Jordon International. [§5.3123]

The two cases cited in the heading, taken together, establish the correct analysis under §2-207(1). In both cases the seller was the offeree, and its form contained an additional term calling for arbitration of certain disputes under the contract, rather than litigation of those claims. In Dorton, the seller's form also stated ". . . [our] acceptance of your order is subject to all the terms and conditions [in this document], including arbitration." The court correctly held that the "is subject to" language was insufficient to transform the purported acceptance into a counter-offer because the language did not require the buyer's specific affirmative assent to those terms before they became part of the contract. Hence, the seller's form became a valid acceptance, and the question of whether the arbitration term became part of the contract was decided by reference to §2-207(2) (see §5.322). In Itoh, the seller's form stated that its acceptance was "expressly conditional on Buyer's assent to the additional . . . terms and conditions set forth below." The court correctly held that the "expressly made conditional on Buyer's assent" language was sufficient to turn the purported acceptance into a counter-offer, and thus the parties had no contract based on the exchange of their writings. Whether they had a contract at all was thus determined by reference to §2-207(3). (See Case Squibs Section, Dorton and Itoh.)

2. SECOND STEP: IF THE PARTIES HAVE A CONTRACT BASED ON THEIR EXCHANGED WRITINGS UNDER §2-207(1), THEN §2-207(2) GOVERNS WHAT TERMS MAKE UP THE CONTRACT. [§5.32]

Once it is determined that a contract is formed by the exchanged writings under §2-207(1), i.e., it is determined that the offeree sent a definite and seasonable expression of acceptance and that it was not a counter-offer, the provisions of §2-207(2) provide the rules to determine what the terms of that contract are. The proper analysis under §2-207(2) depends on whether the parties are merchants.

a. If Either Party is a Non-Merchant, the Offeror's Terms Control. [§5.321]

If either party to the contract is a non-merchant, then any additional terms contained in the acceptance are merely proposals for addition to the contract, which may be accepted or not by the offeror. That is, such terms do not automatically become part of the contract, and are treated as nothing more than suggestions of possible additions to the deal presented to the offeror.

b. If Both Parties are Merchants, Offeree's Terms Control Unless One of the Three §2-207(2) Exceptions Apply. [§5.322]

§2-207(2) is rather awkwardly phrased on this issue, but it says that when two merchants are involved, the additional terms in the offeree's acceptance become part of the contract unless:

- (1) the offer expressly limits acceptance to the terms of the offer [§2-207(2)(a)];
- (2) the additional terms in the acceptance materially alter the offer [§2-207(2)(b)]; or
- (3) notification of objection to the additional terms by the offeror is given within a reasonable time after notice of them has been received [§2-207(2)(c)].

Thus, only if none of these three conditions apply will the additional terms become part of the contract. It is very rare that such will be the case; so, as you will see, the probable result under §2-207(2), even with merchants, is that the offeror's terms will still likely control the deed.

In the four examples given below, assume both parties are merchants.

(1) Example. [§5.3221] Offeror/Buyer's Purchase Order says, "Acceptance of this offer is limited to the terms of this offer." Offeree/Seller's Acknowledgement is the same as the offer, except it does not contain the quoted language above, and contains a "no modification except in writing" clause. The "no modification except in writing" provision does not become part of the contract, because the offer expressly limited acceptance to only those terms found in the offer [UCC §2-207(2)(a)].

(2) Example. [§5.3222] Offeree/Seller's Acknowledgement is the same as the offeror/buyer's Purchase Order, except that it says, "No goods sold under this contract shall be sold with any warranty, express or implied, including the warranty of merchantability." If seller's form is judged an acceptance under §2-207(1), the warranty disclaimer does not become part of the contract because it materially alters the contract [UCC §2-207(2)(b)]. (For examples of those terms which do and do not materially alter a contract, see UCC §2-207, Com. 4 and 5.)

(3) Example. [§5.3223] Seller's Acknowledgement is the same as the offeror's Purchase Order, except it says, "Any dispute arising under this agreement shall be resolved by arbitration, not litigation." A day or two after receiving seller's form, buyer notices the arbitration provision and notifies buyer that he or she objects to that provision. Because the offeror's objection to the additional term is made within a reasonable time after buyer

has notice of it, the arbitration provision does not become part of the contract [UCC §2-207(2)(c)].

(4) Example. [§5.3224] Seller's Acknowledgement is the same as the offeror's Purchase Order, except it says, "Any Delivery of Goods made by Seller is to be made after 8:30 a.m. on the date of delivery." If this term is not objected to by the buyer, and if the offer does not limit acceptance to only the terms found in the offer, the "after 8:30 a.m." provision becomes part of the contract, assuming it does not materially alter the offer.

c. The Curious Treatment of "Different" Terms under 2-207(2). [§5.323]

Section 2-207(1) states that an expression of acceptance can act as an effective acceptance, "even though it states terms additional to or different from those offered or agreed upon" However, in §2-207(2), there is no mention of "different" terms. The provision states only, "[T]he additional terms are to be construed as proposals for addition to the contract" Thus, often the parties will end up in a situation where an acceptance is found under §2-207(1) despite the presence of a different term in the acceptance; however, there is no guidance under §2-207(2) as to whether that "different" term is or is not part of the resulting contract.

Several theories have arisen to explain how "different" terms should be handled under §2-207(2), only two of which have much support. The first and most widely held is that different terms should be treated the same as additional terms, for it was just an oversight that the word "different" was left out of §2-207(2). There is support for this theory in Comment 3 to §2-207, which states "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2)." The second theory is that additional terms simply drop out altogether and can never become part of the agreement. That is, the presence of a different term in a seller's acknowledgement will not prevent a contract from being formed based on the writings under §2-207(1) i.e. will not prevent the Acknowledgement from being an acceptance, but once it is determined that a contract has been made, the different terms have no legal significance and can never, under any circumstances, be part of the contract. The support for this theory comes from the plain language of the statute, i.e., the phrase "different terms" is included in 2-207(1) and not in 2-207(2).

3. THIRD STEP: IF NO CONTRACT IS FORMED UNDER 2-207(1) BASED ON THE EXCHANGED WRITINGS, AN IMPLIED-IN-FACT CONTRACT MAY BE FORMED ON THE PARTIES' CONDUCT UNDER §2-207(3). IF SO, THE KNOCKOUT RULE OF §2-207(3) WILL DETERMINE WHICH TERMS BECOME PART OF THE CONTRACT. [§5.33]

If the offeree's form is found not to constitute an effective acceptance, either because it was not a "seasonable expression of acceptance," or because it was expressly made conditional on assent to additional or different terms, then analysis of a §2-207 problem must proceed directly to §2-207(3). That is, §2-207(2) plays absolutely no role in such a case, and is by-passed completely in analyzing such a problem. This is because §2-

207(2)'s only function is to provide the rules for determining what terms are part of the contract if a contract is made by exchange of the writings under §2-207(1). Contrast that with §2-207(3), which applies when "conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract although the writings of the parties do not establish a contract." Thus, even if the offeree is deemed to have sent a counter-offer that is never formally accepted, the parties can establish an implied-in-fact contract by their conduct. Thus, if the seller sends the goods called for in the offer, and the buyer accepts them, they have made a contract by conduct under §2-207(3).

(Note that if the parties do have a contract based on the exchange of their writings, its terms must be governed by §2-207(2). In other words, resort to §2-207(3) can only be made when no contract is formed based on the parties' exchanged writings as judged by application of the rules in §2-207(1)).

a. The "Knock-Out" Rule. [§5.331]

Under the common law's last shot doctrine, the terms of an implied-in-fact contract made under §2-207(3) would be the terms stated in the last form exchanged between the parties, i.e., the other party would be deemed to have impliedly accepted whatever offer (or counter-offer) was last exchanged between them (see §5.12). Section 2-207(3) changes the rule. Once a contract by conduct has been found under the first sentence of 2-207(3), the second sentence of that provision states that the terms of such a 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." Thus, all the terms which are in both parties writings become part of the contract, but any term that is not found in both documents is "knocked out," and does not become part of the contract. In other words, the contract consists of all the terms both parties agreed on, but no term on which only one party put forward. If at the end of the "knock-out" process the contract is left with no term regarding price, time of delivery, place of delivery, time of payment, or place of payment, such terms can be supplied by the UCC's "gap fillers" which are some of the "supplementary terms" referred to in §2-207(3) (see §6.21 for a discussion of gap fillers). In addition, other such supplementary terms include, e.g., the implied warranty of merchantability [UCC §2-314], and the implied warranty of fitness for a particular purpose [UCC §2-315].

4. WHEN THE ADDITIONAL OR DIFFERENT TERMS ARE FOUND IN A CONFIRMATION INSTEAD OF AN ACCEPTANCE. [§5.34]

Until now, the analysis under §2-207 has assumed that the parties have exchanged a written offer and a written "acceptance" that differs from the offer. However, a close reading of §2-207(1) reveals that it also applies where one party sends the other "a written confirmation . . . within a reasonable time which states terms additional to and different from those . . . agreed upon." In other words, if the parties have made, e.g., an oral contract over the telephone, and one party thereafter sends the other a written confirmation of the oral contract, but the confirmation contains different or additional terms than those agreed to on the phone, §2-207 is implicated.

a. Effect of Confirmation Containing Additional Different Terms. [§5.341]

The §2-207 analysis of a problem where the confirmation, rather than the acceptance, is the operative document varies only slightly from the normal §2-207 analysis. The principal difference is that there is no need to inquire whether the parties have entered into a contract based on their exchanged writings under §2-207(1). By definition, a "confirmation" confirms that a contract exists, and merely serves to restate the terms of that contract. Thus, if the confirmation recites that it is intended to confirm a contract previously made by the parties, analysis proceeds directly to §2-207(2) to determine the terms of the contract. Under §2-207(2), the terms of the confirmation are compared against the terms of the previously made contract. To analogize a "confirmation" situation to a more typical §2-207 analysis with exchanged writings by both parties, think of the oral contract as the "offer" and the written confirmation as the "acceptance" under §2-207(2). As a result, it is unlikely that the party sending the confirmation will be able to slip in a term not present in the original oral contract. It is only in the unlikely event that: (A) both parties are merchants; (B) the party to whom the confirmation is sent does not notify the other of his or her objection to the additional terms of the confirmation (§2-207(2)(c)); and (C) those additional terms do not materially alter the contract (§2-207(2)(b)), that the terms of the confirmation become part of the contract. Otherwise, the additional terms are only proposals that may be accepted or not by the recipient of the confirmation. (If the terms of the confirmation are "different" rather than "additional," the analysis would proceed as described in §5.323.) This rule makes sense, for it would be manifestly unfair for a party sending a written confirmation to be able to slip in a material term not agreed to by the other party.

(1) REVIEW PROBLEM. [§5.3411]

Charles, the owner of a retail health and fitness store, telephones Terri, the owner of a company that manufactures exercise equipment. Charles places an order for fifteen \$1,000 HEM-100 home exercise machines. They agree that the machines will be delivered to Charles's store on Monday, April 10, and that Charles will pay for them within 30 days after their receipt. Nothing is said as to whether Charles is liable for interest if he is late in paying. Later that day, Terri sends Charles a "confirmation," stating accurately the terms of the deal, except she has added a term stating "Buyer will owe interest to seller at a rate of 0.75% per month if seller does not pay within 30 days of delivery. Charles receives the confirmation and does not object.

Question:

Does their contract now contain the 8% per annum interest clause?

Answer:

Yes. The analysis is as follows: First, since the writing at issue is a confirmation, §2-207(1) is bypassed and the situation is analyzed under §2-207(2). For a §2-207(2)

analysis, the oral contract (without the interest term) is to be compared with the confirmation containing the interest term. Under §2-207(2), because both parties are merchants, the interest provision becomes part of the contract unless §2-207(2)(a), (b), or (c) applies. Section §2-207(2)(a) does not apply, for the contract says nothing explicitly about being limited only to its terms. Section §2-207(2)(b) does not keep out the provision, because according to Com. 5 to §2-207, an interest-on-overdue-balance clause does not materially alter the transaction. Section 2-207(2)(c) does not apply because Charles did not object. Thus, the additional term of the confirmation "become[s] part of the contract" under §2-207(2).

E. EXAM APPROACH TO §2-207 ISSUES. [§5.4]

Recall, there are only three steps to applying §2-207 in a typical case: (1) Determine whether the purported acceptance is truly an acceptance under §2-207(1) despite the presence of additional or different terms, or is it a counter-offer (usually because it contains a clause, e.g., "this Acceptance expressly conditioned on Buyer's assent to any additional or different terms") (see §5.31); (2) If the purported acceptance is deemed a valid acceptance, then the terms of the contract are determined under §2-207(2) (and §2-207(3) is never used) (see §5.32); and (3) If the purported acceptance is found not to be a valid acceptance, the parties have no contract based on their exchanged writings (and §2-207(2) is never used). However, if the parties perform they have a contract by conduct, and the rules of §2-207(3) determine that contract's terms (see §5.33).

For those who prefer a diagram, a flow chart of the steps involved in analyzing a §2-207 problem is as follows:

1. Example. [§5.41] Construct Co. sends a Purchase Order form to Door Co., seeking to purchase 100 oak doors. Door Co. sends an Acknowledgment of Order form back to Construct Co., acknowledging the order. The pertinent portions of these forms are as follows:

Purchase Order Acknowledgment of Order

100 oak entry doors, 6 ft. x 3 ft. 100 oak entry doors, 6 ft. x 3 ft.

\$300/door, payment due on delivery \$300/door, payment due on delivery

Delivery on 4/1/92 Delivery on 4/1/92

Doors of Stainable Quality No Warranty, Either Express or Implied, Including the Implied Warranty of Merchantability Regarding the Stainable Quality of the Doors

Question: Do they have a contract and if so, what are its terms?

Analysis: (1) Is there a contract based on these writings under §2-207(1)? YES. First, the Acknowledgment is clearly a definite and reasonable expression of acceptance under the

UCC, as the presence of the different warranty terms is insufficient, in and of itself, to make the Acknowledgment a counter-offer. Second, there is no "expressly made conditional on [buyer's] assent to different or additional terms" clause, thus the Acknowledgment is a valid acceptance under § 2-207(1), despite the fact it contains different warrant provisions. Thus the analysis must proceed under §2-207(2) to determine the terms of the contract.

(2) Does the different term found in the Acknowledgment become part of the contract under §2-207(2)? NO. First, are the parties merchants? Yes. Then there is a small chance that the "no stainable quality" term might become part of the contract. (If either party were not a merchant, there is no chance the term would become part of the contract). Second, are any of the provisions of §2-207(2)(a)-(c) implicated. NO. There is no objection by the buyer to any different terms, either in the Purchase Order itself, or afterwards. Hence neither §2- 207(2)(a) or (c) are satisfied. The "no stainable quality" terms certainly materially alters the deal, and thus, it could not become a term of the contract under §2-207(2)(b). (Recall there are two theories as to how to deal with "different" as opposed to "additional" terms under §2-207(2) [see §5.323]. One theory says that "different" terms drop out all together, and thus under this approach, the no stainable warranty provision would never have legal significance). Either way, the no warranty term is out.

2. Example. [§5.42] Same parties as above, except this time the relevant forms are as follows:

Purchase Order Acknowledgment of Order

100 oak entry doors, 6 ft. x 3 ft. 100 oak entry doors, 6 ft. x 3 ft.

\$300/door, payment due on delivery \$300/door, payment due on delivery

Delivery by 4/1/92 Delivery by 4/1/92

Doors of Stainable Quality No Warranty, Either Express or Implied Including the Implied Warranty of Merchantability.

Regarding the Stainable Quality of the Doors, Seller, Door Co., is unwilling to accept Buyer's offer and enter into a contract with Buyer unless Buyer expressly assents to the additional and/or different terms found in this Acknowledgment.

Neither party looks at the form of the other, except to ensure the quantity, price, and delivery terms are correct. Non-stainable quality doors are shipped and accepted, and three months later Construct Co. sues for breach of warranty, claiming the doors are not of stainable quality as called for in the contract.

Question: Is there a contract and, if so, what are its terms?

Analysis: (1) Is there a contract based on the writings under §2-207(1)? NO. While the Acknowledgement is a definite and seasonable expression of acceptance, its final clause turns the document into a counter-offer. It clearly states Door Co. is unwilling to go forward on anything other than its own terms and states that no contract based on the writings can be formed without the express assent of Construct Co. Therefore, analysis must proceed to §2-207(3).

(2) Is there a contract by conduct under §2-207(3)? YES. Door Co. shipped doors to Construct Co., who accepted and paid for them. Thus, a contract by conduct was formed.

(3) Does the different warranty term in the Acknowledgment become part of the contract under §2-207(3)? NO. Under §2-207(3), the terms of an implied-in-fact contract by conduct consist of only the terms both parties agreed upon, plus the supplemental terms of the UCC. Thus the contract was for 100 doors, at \$300/door, with payment and delivery due on April 1. However, under the knock-out rule [see §5.331] the quality terms of each party are knocked out (for they only appear in their own forms) and do not become part of the contract. Instead, the Code's implied warranty of merchantability under §2-314 will supply the quality term. (See §36.2 for a discussion of the warranty of merchantability)

F. THE RESTATEMENT VIEW. [§5.5]

Sections 59 and 61 of the Restatement 2d appear to adopt many of the rules embodied in UCC §2-207. Thus, in non-UCC transactions, e.g., service contracts, real estate contracts, etc., there is support for abolition of the mirror-image rule. However, these Restatement provisions have not proven quite as persuasive as other Restatement sections, and it is fair to say that some courts might still hold that to be valid, an acceptance must match exactly and reciprocally the terms of the offer in non-UCC transactions.