Background for UCC § 2-207 and Pathology (Logocratic Vice) in Statutory Design

Hypo for "Last Shot" idea under Common Law rules of offer and acceptance

(i)

A says to B, "Are you interested in paying me $100 if I walk across the Brooklyn Bridge at noon tomorrow?"

B: "OK, you do that and I'll pay exactly $ 100 and no more."

A walks at noon, B says, "I've changed my mind, only $90"

A sues B for 100. Who wins?

(ii)

A says to B, "I'll walk across the Brooklyn Bridge tomorrow at noon if you'll agree pay me $100."

B: "OK, if you walk exactly at noon."

A walks at noon, B says, I've changed my mind, only $90

A sues B for 100. Who wins?

(iii)

A says to B, "I'll walk across the Brooklyn Bridge tomorrow at noon if you will agree pay me 100."

B: "OK, if you agree to walk exactly at noon and notify me the following day at 9am by email."

A says nothing, walks at noon, but doesn't send the email the next day.

B refuses to pay

A sues B for 100. Who wins under *Princess Cruises*?

> *Princess Cruises*, KCP8 165-66: "At common law, an offeror who proceeds under a contract after receiving the counteroffer can accept the terms of the counteroffer by performance. See Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1443 (9th Cir.

1986) (citing C. Itoh & Co. (America) v. Jordan Intl. Co., 552 F.2d 1228, 1236 (7th Cir. 1977)); Durham v. National Pool Equip. Co. of Va., 205 Va. 441, 138 S.E.2d 55, 58 (1964) ("Assent may be inferred from the acts and conduct of the parties.") (citations omitted).

See also *Restatement (Second) of Contracts* § 19

> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
>
> (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
>
> (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

Legal background in American contract law for Uniform Commercial Code ("UCC") 2-207

The UCC is a statute adopted separately in the different states that comprise the United States, but the text of the statute is the same, for the most part, in the different states (hence the term 'Uniform Commercial Code'). Article 2 of the UCC, in which the provision we examine appears, deals with sales of goods. The drafters of the UCC sought to change the common law in many ways, to bring about what they thought would be better outcomes in certain kinds of contracts disputes than one would get under the common law.

Under common law rules, before the adoption of the UCC, this was a frequent pattern that courts encountered.

Pattern A: A buyer would use a standard form, a form the buyer created to suit the buyer's business, to make an offer to the seller to buy goods on terms a, b, and c. The seller would send back a form purporting to accept the buyer's offer, but also using a standard form, a form the seller created to suit the seller's business. The seller's form would contain terms a, b, not-c, and d. According to the common law rules for offer and acceptance, in order for a response to an offer to be an acceptance (and thus be capable of forming an enforceable promise, that is, a contract), the response had to be the "mirror

image" of the offer, that is, no term or set of terms in the response could differ in any significant way from the terms in the offer.

In our abstract example, the offeror's terms (in the buyer's form) in the offer were

a, b, c

The seller's response (on the seller's form) was

a, b, not-c, d

Thus the response contains both a different, inconsistent term, namely, not-c, and an additional term, namely d. Under the common law, a purported acceptance that contained terms different from or additional to those on an offer was not an acceptance, regardless of how the seller characterized it, but was instead a *counter-offer*. Next, on this typical fact pattern the seller would ship the goods without the buyer noticing that the seller's form contained different or additional terms. And the buyer would accept shipment of the goods, only to discover that they were somehow defective or unsuited to the buyer's needs, very often in a way that was within the scope of the seller's additional or different terms. For example, buyer's term c might be a warranty of good quality, and the seller's term not-c would be a disclaimer of warranty. When the buyer sued, seeking to have its term c enforced, the buyer would discover that under the common law not only was the seller's response not an acceptance of (all of) the buyer's terms, but that the seller's terms, including not-c, were a counter-offer *that the common law regarded the buyer as having accepted when it accepted the shipment of the goods.*

The scenario in Pattern A is referred to as the "battle of the forms," because it so often involves mismatched terms in the standard forms that the buyer and seller create for their businesses, to suit their needs. It is also known as the "last shot" rule, because, in a set of dueling forms, the party who sends the last form has fired the last shot and typically gets a contract on his terms when there is a dispute.

Another frequently encountered fact pattern, similar to but actually importantly different from the battle of the forms, is as follows.

Pattern B: A buyer and a seller have an oral conversation (in person or over the phone) and they would orally agree to a contract of sale on terms a, b, and c. That is, in their conversation there would, according to common law rules, be an oral offer and acceptance. But then one party would send what purported to be a confirmation of their oral agreement, and the confirmation would have a different or additional term, say, a, b,

not-c, and d. Again, the other party would not notice the different or additional term, only to discover it when some problem with the goods (if the buyer was the disappointed party) or with the deal (if the seller was the disappointed party) arose, and litigation would ensue.

UCC § 2-207 was expressly adopted to change this common law rules that led to the "last shot" in the battle of the forms in Pattern A. But the drafters of the UCC thought, perhaps for the sake of intellectual economy, that they would also cover problems that arose in Pattern B. The resulting rule is UCC § 2-207. This rule is a very important change in American contract law for sales of goods. Is it *logically coherent*? Let's find out.

Analyzing the rule-enthymeme in UCC § 2-207(1)

Rule-enthymeme in UCC § 2-207(1)

> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Hypo: Suppose you have a fact pattern in which there is a definite and seasonable expression of acceptance of an offer, but that expression of acceptance has terms additional to those in the offer, and it also says that the offeree is unwilling to proceed with the deal unless his additional terms are part of the deal. Under the literal terms of UCC § 2-207, does the definite and seasonable expression of acceptance operate as an acceptance?

Pathology in Statutory Design: Logocratic Vice!

We now have several tools to use to rulify UCC § 2-207(1). Is there a problem with this rule? Is there a *logical* problem with the rule? No, it is a substantive problem, not a logical problem. But it was likely that *insufficient attentiveness to logical structure* that led the UCC drafters to attempt to consolidate in one rule a change to the common law treatment of both Pattern A and Pattern B) in a way that lead to an *internal inconsistency* in the legal framework to be applied to cases that fit within Pattern B.

The inconsistency is as follows. The "written confirmation" element of the rule is intended to address the Pattern B setting, in which there has *already been a prior oral offer and acceptance*, which the "written confirmation" *confirms*. But if there has already been a prior oral offer and acceptance, it's too late (under both the UCC and the common law) for the "written confirmation" to "operate as an acceptance"!

See UCC § 1-103(b):

> Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

See UCC §2-204. Formation in General

> (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.
>
> . . .
>
> **Official Comment to UCC § 2-204**
> . . .
> Subsection (1) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. The legal effect of such an agreement is, of course, qualified by other provisions of this Article. . . . **Under subsection (1) appropriate conduct by the parties may be sufficient to establish an agreement.**

It's also too late for "acceptance to be expressly made conditional on assent to additional or different terms." Therefore, in a case involving a written "confirmation" whose terms are additional to or differ from those offered or agreed upon, there is no role for an inquiry into whether the final strong disjunct ("expressly made conditional on assent to the different or additional terms") is true, and the court should move directly to analysis under 2-207(2).

§ 2-207(1)-(2) transition and Official Comment 3

UCC § 2-207 Rule enthymeme

Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms **additional to or different from** those offered or agreed upon, unless acceptance is expressly made conditional on assent to the **additional or different terms**.

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

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

(b) they materially alter it; or

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

Official Comment 3 to UCC § 2-207

Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as **materially to alter** the original bargain, they will not be included **unless expressly agreed to by the other party**. If, however, they are terms which would not so change the bargain they will **be incorporated unless notice of objection to them has already been given or is given within a reasonable time**.