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Clifford-Jacobs Forging Company v. Capital Engineering & (and) Manufacturing Co.: The Continuing Problem within U.C.C. Section 2-207, 16 J. Marshall L. Rev. 589 (1983)

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CASENOTES

*CLIFFORD-JACOBS FORGING COMPANY v. CAPITAL ENGINEERING & MANUFACTURING CO.:** THE CONTINUING PROBLEM WITHIN U.C.C. SECTION 2-207

Although the "battle of the forms"[1] was not a major historical military conflict, it has proven to be a major conflict between contracting parties.[2] To provide a resolution to the battle of the forms, the drafters of the Uniform Commercial Code created

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* 107 Ill. App. 3d 29, 437 N.E.2d 22 (1982).

1. The "battle of the forms" is a problem which arises under the common-law mirror-image rule of contract law. The mirror image doctrine requires a valid acceptance to match the offer in every detail. The battle begins thusly: offeror drafts an offer, a confirmatory memorandum of a prior oral agreement, which contains terms to his advantage and sends it to the offeree. The offeree drafts an acceptance, or his confirmatory memorandum of the oral agreement, which contains terms to his advantage. This acceptance, or either of the confirmatory memoranda, may contain some extra terms not discussed by the parties. Usually no problems are encountered until a dispute arises, and each party pulls out its form to examine the terms. The parties then discover that their forms do not exactly match. Under the mirror-image rule, the parties are left without a contract because the two writings do not match, even though one or both parties may have begun to perform. The battle then erupts over which contract and which terms will govern performance. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2 (2d ed. 1980); Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 BUS. LAW. 789 (1969).

2. For general discussions of the battle of the forms, see Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171 (1975); Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75 (1963) (disappointed expectations and frustrated intentions of businessmen in commercial transactions); Kove, *"The Battle of the Forms": A Proposal to Revise Section 2-207*, 3 U.C.C. L.J. 7 (1970) (analysis of confusion added by § 2-207); Murray, *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969) (common law allowed party to escape undesirable bargain through loophole created by mirror-image rule); Note, *All Quiet on the 2-207 Front?*, 35 U. PITT. L. REV. 685 (1974) (battle of the forms is an absurdity and an exercise in futility) [hereinafter cited as *All Quiet*]; Comment, *Section 2-207 of the Uniform Commercial Code—New Rules for the "Battle of the Forms"*, 32 U. PITT. L. REV. 209 (1971) (characterizing pre-code law as harsh and mechanical).

section 2-207.[3] This provision allows parties intending to form a contract to enforce their agreement despite the presence of additional[4] or different[5] terms in the acceptance form.[6] The statute provides that a contract is formed and the extra terms are considered proposed modifications to the contract. If the parties are merchants,[7] additional, but not different, terms will become part of the contract, unless the terms are timely objected to by the offeror, or will materially alter the contract.[8] In *Clifford-Jacobs Forging Co. v. Capital Engineering & Manufacturing Co.*,[9] the Illinois Appellate Court for the Fourth District addressed the question of whether a price-adjustment provision included in a standard acceptance form could be considered part of an agreement between merchants even though the term seemed to differ from the terms of the offer.[10] The court applied Illinois' section 2-207 and held that the price-adjustment provision was an addition to the offer and part of the contract because it did not materially alter the agreement.[11]

On March 5, 1979, the defendant, Capital Engineering, sent a purchase order to the plaintiff, Clifford-Jacobs, offering to buy a large quantity of forged parts.[12] In addition to containing an estimate of the price, quantity, and delivery date, the purchase or-

3. U.C.C. § 2-207 (1978) (Additional Terms in Acceptance or Confirmation); ILL. REV. STAT. ch. 26, § 2-207 (1981). Illinois adopted U.C.C. § 2-207 *verbatim*. In the text of this casenote, section 2-207 refers to the Illinois statute, U.C.C. § 2-207, and the other states' statutes which have been modeled on U.C.C. § 2-207. Louisiana is the only state which has not adopted § 2-207.

4. The U.C.C. does not define what additional is. It is commonly defined as something existing or coming by way of addition or added further. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 24 (1981).

5. The U.C.C. does not define what different is. It is commonly defined as partly or totally unlike in nature, form, or quality; distinct, separate, or contrasting. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 630 (1981).

6. *See, e.g.*, Alan Wood Steel Co. v. Capital Equip. Enter., 39 Ill. App. 3d 48, 349 N.E.2d 627 (1976) (general policy of § 2-207 is that the parties should be able to enforce their agreements).

7. A merchant is a person who holds himself out as having a special knowledge or skill in the transaction undertaken; he is held to a higher standard of care in commercial transactions. ILL. REV. STAT. ch. 26, § 2-104(1) (1981). "Between merchants" means any transaction where both parties are considered merchants in that particular transaction. *Id.* at § 2-104(3).

8. *Id.* at § 2-207(2). *See supra* note 3.

9. 107 Ill. App. 3d 29, 437 N.E.2d 22 (1982).

10. *Id.* at 30, 437 N.E.2d at 23.

11. *Id.* at 32-33, 437 N.E.2d at 24-25.

12. *Id.* at 30, 437 N.E.2d at 22-23. The parts were to be used in a defense contract awarded to Capital by the federal government. Capital claimed that because a fixed-price federal contract was involved, Clifford-Jacobs was aware of Capital's need to have a fixed price set in the contract. Brief

der also included a provision limiting the cost of the forged parts to the estimates contained in the order.[13] It further provided that if the prices should be higher than the estimate, Capital was to be notified prior to shipment.[14] The plaintiff received the defendant's purchase order and on March 22, 1979, returned its standard acceptance form which stated the terms of the agreement.[15] This standard acceptance included a price-adjustment provision allowing Clifford-Jacobs to adjust the price according to changes in its production and shipping costs any time prior to shipment,[16] but requiring Clifford-Jacobs to allow Capital an opportunity to cancel its order if the price adjustment was unsatisfactory.[17]

In September, one month prior to the final shipment, the plaintiff sent a letter to the defendant informing it of a general 7.2% price increase effective October 15, 1979.[18] Capital did not object and accepted delivery. A disagreement subsequently arose over the cost of the final shipment.[19] Clifford-Jacobs filed a complaint in the Circuit Court of Champaign County alleging breach of contract and asked for damages and interest for the amount owed under the contract.[20] Capital tendered the amount due prior to the price increase and contended that the increase was not part of the contract under section 2-207.[21] The

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for Appellant at 4, Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 437 N.E.2d 22 (1982).

13. The provision in Capital's purchase order stated: "If Seller's prices are higher than herein specified, Buyer must be so advised before shipment. If no prices are specified, goods will be billed at not more than the prices last quoted to or paid by Buyer, or at the prevailing market price, whichever is lower." 107 Ill. App. 3d at 30, 437 N.E.2d at 23.

14. *Id.*

15. *Id.*

16. The provision in Clifford-Jacobs' acceptance form stated:

> Prices stated herein are based on current labor, material, and overhead costs and, if any changes occur in such costs at any time prior to shipment, prices may be adjusted by the seller to reflect such cost changes. If such adjustments are not mutually satisfactory, either party may cancel on terms set forth in paragraph 10.

Id.

17. *Id.*

18. *Id.* The letter dated September 12, 1979, stated in part:

> Our last general price adjustment for labor and overhead cost increases was effective October 16, 1978. Substantial cost increases since that time have been incurred and absorbed by us. In order to partially recover these labor and overhead cost increases, our selling prices for forging shipped on and after October 15, 1979 will be increased by 7.2%.

Brief for Appellee at 3, Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 437 N.E.2d 22 (1982).

19. 107 Ill. App. 3d at 30, 437 N.E.2d at 23.

20. *Id.*

21. *Id.* at 30-31, 437 N.E.2d at 23.

trial court granted the plaintiff's motion for summary judgment.[22] The lower court concluded that the acceptance was conditional upon Capital's assent to the different terms and that Capital did so when it accepted the initial delivery.[23] It further concluded that Clifford-Jacob's price-adjustment provision did not conflict with Capital's terms in the purchase order.[24]

On appeal, the appellate court unanimously affirmed the trial court's order.[25] The issue before the court was whether the price-adjustment provision included in the standard acceptance form was part of the contract formed by the exchange of documents.[26] The appellate court found that Clifford-Jacobs' reply was not made expressly conditional on Capital's assent to any additional terms; the reply therefore operated as an acceptance and not as a counteroffer.[27] The court concluded that the controversial term was additional to and not different from Capital's offer.[28] It then determined as a matter of law that the additional term did not create an unreasonable surprise for Capital, and thus the price-adjustment provision did not materially alter the contract.[29] The court stated that no question of fact existed and

22. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., No. 80-L-16 (Cir. Ct. Ill. filed August 10, 1981). The trial court granted summary judgment under ILL. REV. STAT. ch. 110, § 57 (1981).

23. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., No. 80-L-16 at 3.

24. *Id.*

25. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 34, 437 N.E.2d 22, 25 (1982).

26. *Id.* at 30-31, 437 N.E.2d at 23.

27. *Id.* at 31, 437 N.E.2d at 24. Although the court did not address the trial court's application of § 2-207, its reasoning contradicts the lower court's analysis. The trial court believed that the last clause of § 2-207(1) controlled Clifford-Jacobs' acceptance and that the acceptance was actually a counteroffer. The judge interpreted the reply sent by Clifford-Jacobs to be expressly conditional on Capital's assent to the additional terms. The lower court further held that Capital had assented to the terms by accepting the shipments. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., No. 80-L-16 (Cir. Ct. Ill. filed August 10, 1981) at 1-3. The trial court's approach follows the interpretation of § 2-207 in Roto-Lith Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962). *Roto-Lith* stated that any condition materially altering another party's obligation to the sole advantage of the party introducing the provision was expressly conditional and prevented a responding document from operating as an acceptance. This interpretation has been overruled in most jurisdictions and highly criticized by commentators. The reason put forth for the criticism is that the analysis incorporates the common-law mirror-image doctrine into § 2-207. *See generally* J. WHITE & R. SUMMERS, *supra* note 1, § 1-2, at 28-29. *Cf.* Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537 (D. Mass. 1977) (following *Roto-Lith*; term in acceptance to disadvantage of offeror operates as counteroffer).

28. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 32, 437 N.E.2d 22, 24 (1982).

29. *Id.* at 33, 437 N.E.2d at 24.

upheld the summary judgment.[30]

The appellate court reasoned in syllogistic form to reach its conclusion that the extra term was additional rather than different.[31] Without relying on precedent, the court decided that additional terms do not conflict while different terms do.[32] The court then compared both documents and noted that each party had included a provision referring to higher prices.[33] Capital's provision required notice of any price increase prior to shipment. Clifford-Jacobs' provision allowed price adjustments reflecting any change in production and delivery costs any time prior to shipment. The only limitation on Clifford-Jacobs' term was that either party could cancel if not satisfied with any price adjustment.[34] The court also stated that because neither form prohibited an increase in the manner the plaintiff had attempted to use, the terms did not conflict. The appellate court then concluded that, because of the lack of conflict between the two terms, the term in the plaintiff's acceptance was additional.[35]

The court relied on the official comments to section 2-207 for its determination that the additional price-adjustment provision did not materially alter the agreement between the parties.[36] The comments suggest that an additional term would be a material alteration only if its inclusion in a contract would change the bargain resulting "in surprise or hardship" to an unsuspecting party.[37] The court noted that Capital had received notice of the

30. *Id.* at 34, 437 N.E.2d at 25. Capital argued that summary judgment was improper under the circumstances of this case. It contended that the determination of a material alteration presented a genuine question of fact which could only be resolved by a trial. Brief for Appellant at 8-9, Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 437 N.E.2d 22 (1982). After an examination of the Illinois summary judgment statute, ILL. REV. STAT. ch. 110, § 57 (1981), the court concluded that whether there had been a material alteration was a question of construction of the language of the parties. The court relied on Bates v. Select Lake City Theater Operating Co., 78 Ill. App. 3d 153, 397 N.E.2d 75 (1979), where it was held that construction of the language of a contract is a question for the court. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 33, 437 N.E.2d 22, 25 (1982).

31. 107 Ill. App. 3d at 31-32, 437 N.E.2d at 24.

32. *Id.* at 32, 437 N.E.2d at 24.

33. *Id.*

34. *Id.* at 30, 437 N.E.2d at 23.

35. *Id.* at 32, 437 N.E.2d at 24.

36. *Id.* at 32-33, 437 N.E.2d at 24-25.

37. ILL. ANN. STAT. ch. 26, § 2-207, UNIFORM COMMERCIAL CODE comments 3, 4 (Smith-Hurd 1963). The court also examined comments 4 and 5 for examples of materially-altering terms. Comment 4 lists typical clauses which normally are considered to materially alter an offer. Such clauses tend to increase the burden on and limit the rights of an offeror. Comment 5 lists typical clauses which are not material alterations of the offer. These clauses deal with controls on the performance of the contract rather than on the rights of the offeror. *Id.* at comments 4 & 5.

increase prior to the final shipment, referred to the lack of conflict between the terms, and then ruled, as a matter of law, that no unreasonable surprise could have occurred.[38] The court concluded that inclusion of the price-adjustment provision would be consistent with the purpose of section 2-207.[39]

The purpose of Illinois' section 2-207 is to prevent application of the inflexible common-law mirror-image rule.[40] Theoretically, section 2-207 allows parties to enforce their intended agreements regardless of the inclusion of additional terms in the acceptance.[41] Notwithstanding the drafters' intentions,[42] the statute has fallen prey to a variety of interpretations and inconsistent applications.[43] As a result, courts and commentators have criticized section 2-207 for its inability to provide for the satisfactory achievement of its purpose.[44] Most refer to the problems caused by the exclusion of the phrase "different from" from subsection 2.[45] Confusion arises over what "additional

38. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 33, 437 N.E.2d 22, 25 (1982).

39. *Id. See generally* Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 408 N.E.2d 1041 (1980) (general purpose of § 2-207 is to allow parties to enforce their agreement).

40. Alan Wood Steel Co. v. Capital Equip. Enter., 39 Ill. App. 3d 48, 55, 349 N.E.2d 627, 634 (1976).

41. *See, e.g.*, Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 408 N.E.2d 1041 (1980); Tecumseh Int'l Corp. v. City of Springfield, 70 Ill. App. 3d 101, 388 N.E.2d 460 (1979); Alan Wood Steel Co. v. Capital Equip. Enter., 39 Ill. App. 3d 48, 349 N.E.2d 627 (1976). *See also infra* note 59.

42. *See generally* Weeks, *"Battle of the Forms" under the Uniform Commercial Code*, 52 ILL. B.J. 660 (1964) (technical rules should not prevent parties from fulfilling their contract expectations; § 2-207 allows for such fulfillment); *All Quiet, supra* note 2, at 689-90 (§ 2-207 eliminates potential injustice of common-law mirror-image doctrine).

43. *Compare* Roto-Lith Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (responding document which included a materially-altering term to the disadvantage of the offeror was not an acceptance, but operated as a counteroffer) *and* Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537 (D. Mass. 1977) (acknowledgement to offer which contained terms which would materially alter offer was not acceptance but counteroffer) *with* Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972) (acceptance under § 2-207 will operate as a counteroffer only when reply was made expressly conditional on assent by offeror to additional terms).

44. Boese-Hilburn Co. v. Dean Mach. Co., 616 S.W.2d 520, 527 (Mo. Ct. App. 1981) ("a prolific source of controversy"). *Accord* Southwest Eng'g Co. v. Martin Tractor Co., 205 Kan. 684, 473 P.2d 18, 25 (1970) (§ 2-207 is a "murky bit of prose"); J. WHITE & R. SUMMERS, *supra* note 1, at § 1-2, at 25-26 (§ 2-207 is "like the amphibious tank . . . designed to fight in the swamps, but . . . sent to fight in the desert" and has further trouble because the terrain is varied).

45. Subsection 1 covers terms "additional to or different from," while subsection 2 only mentions "additional terms." *See also* 1 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 7-5, at 291 (1973) (noting problem which arises when drafters' intentions as to what they intended "additional" to cover are explored); G. WALLACH, THE LAW OF SALES UNDER THE UNIFORM

terms" cover and what happens to "different terms."[46]

Clifford-Jacobs presented an Illinois appellate court with an opportunity to clarify the discrepancies between subsections 1 and 2 of section 2-207 and to declare what distinction should be made between different and additional terms in Illinois. Although the court reached the proper result, it did not confront the inconsistencies of subsections 1 and 2, and it avoided the inconsistencies by solving the question without fully explaining its choice of definitions. An analysis of related judicial decisions and scholarly commentary provides insight into the court's underlying rationale.

Courts and commentators tend to take two separate approaches to the discrepancies in section 2-207.[47] One approach stresses a strict adherence to the language of the statute.[48] This strict approach defines additional terms as those pertaining to something not included in the offer.[49] By definition, a different term conflicts with or contradicts the terms of an offer and consequently cannot be considered a contract provision.[50] The rationale behind this approach is that an offeror should not be subject to terms for which he did not bargain.[51] Different terms are excluded automatically because an offeror, as master of his offer, would object to them,[52] and because conflicting terms

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COMMERCIAL CODE ¶ 3.04(1), at 3-10 (1981) (§ 2-207 leaves the term "different from" undefined and courts have yet to resolve this issue).

46. Duesenberg, *General Provisions, Sales, Bulk Transfers and Documents of Title*, 29 BUS. LAW. 1243, 1248 (1974) (because § 2-207 is silent on what happens to different terms, major problem arises in deciding what term is different and what term is additional).

47. Boese-Hilburn Co. v. Dean Mach. Co., 616 S.W.2d 520, 527 (Mo. Ct. App. 1981) (court identifies two general interpretations of different versus additional terms problem).

48. American Parts Co. v. American Arbit. Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967) (only additional terms and not different terms could become part of a contract under § 2-207(2)).

49. *See* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1167 (6th Cir. 1972) (defining additional as term not discussed in offer). *But see* National Mach. Exch., Inc. v. Peninsular Equip. Corp., 106 Misc. 2d 458, 431 N.Y.S.2d 948 (1980) (a term mentioned in acceptance may conflict with term implied in the offer by other provisions of local commercial laws).

50. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977). In *Southern Idaho*, the acceptance of the offer changed the delivery date specifically set forth in the offer. The court concluded that this term was not additional; it contradicted the delivery term of the offer and could not be included. *Id.* at 505, 567 P.2d at 1253.

51. *See* Davenport, *supra* note 2, at 79-80.

52. Advocates of the strict approach to § 2-207 differ as to the effect of different terms on the offer. *See* J. WHITE & R. SUMMERS, *supra* note 1, § 1-2, at 27-30. Summers believes that a different term would be ejected from the acceptance. *See* American Parts Co. v. American Arbit. Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967). White, however, believes that comment 6 dictates that terms which conflict, or are different, cancel each other out. *See* Idaho

would prevent a definite expression of agreement.[53]

The other favored approach takes a practical view of section 2-207's language,[54] and recognizes no practical distinction between a different term and an additional one.[55] Advocates of this approach rely on the language of comment 3 to section 2-207 for support. Comment 3 refers to both different and additional terms under section 2-207(2).[56] A term may be additional to the offer because it was not expressed in the offer, but it may conflict with terms implied in the offer by other sections of the local commercial laws.[57] The practical view is that any extra term should be subjected to section 2-207(2) to decide if it should be included in the contract.[58]

Historically, Illinois courts, presented with the question of different versus additional terms under section 2-207(2), have held implicitly that no distinction should be made between the

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Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979); Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977).

53. Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975). The sellers in *Duval* gave the buyers a written offer for an output contract which specified no amount. Buyers accepted the offer, but added an estimate of the goods to be delivered. The sellers protested the addition and insisted that no contract had been formed. The court concluded that § 2-207 could not be applied to include the "added" terms in the contract; no definite and seasonable expression of acceptance existed where a reply included a conflicting provision. *Id.* at 786, 214 S.E.2d at 358.

54. *See, e.g.*, Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 569 P.2d 751, 141 Cal. Rptr. 157 (1977); Boese-Hilburn Co. v. Dean Mach. Co., 616 S.W.2d 520 (Mo. Ct. App. 1981). In *Boese-Hilburn*, the court reviewed both approaches to the problem of "different terms." Citing *Steiner* as a well-reasoned point of view, the court reviewed the three conclusions that *Steiner* reached. First, if a term conflicts, it will be a material alteration and will be excluded under § 2-207(2)(b). Second, the distinction between additional and different is ambiguous because any additional term in an acceptance which adds to an offer arguably makes that offer look different from the way it looked prior to the addition. This logic shows how ambiguous the distinction really is. Third, the offeror will retain control of his offer under § 2-207(2)(a). *Boese-Hilburn*, 616 S.W.2d at 527.

55. *See* Duesenberg, *supra* note 2, at 1249 (best interpretation of § 2-207 is that if term is different, it is implicitly objected to and will not become part of the contract under § 2-207(2)(c)). *See also* Murray, *supra* note 2, at 327-28 (probable intention of Code's drafters was to cover both additional and different terms in § 2-207(2)).

56. *See supra* note 37 and accompanying text.

57. *See* Air Products & Chem. Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973) (disclaimer for any consequential loss in the acknowledgment conflicted with implied terms in the offer and could not be included in the contract because the offeror objected to it).

58. *See* Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 569 P.2d 751, 141 Cal. Rptr. 157 (1977). *See also* Willamette-Western Corp. v. Lowry, 279 Or. 525, 568 P.2d 1339 (1977) (even if § 2-207(2) applied to different terms as well as additional terms, term in question would still be excluded because it materially altered agreement).

two when determining whether an extra term would become part of the contract. The cases usually involved an acceptance which contained terms that conflicted with or contradicted the terms in the offer.[59] While the courts referred to the distinction between the words different and additional, they did not explain why the distinction was made. Each court also found it unnecessary to adopt either the strict approach or the practical approach to the discrepancies in section 2-207 because each case could be decided under subsections 1 or 3 of section 2-207.[60]

Illinois courts have thus been hesitant to commit themselves to either the strict or practical approach.[61] By following this trend,[62] the *Clifford-Jacobs* court fulfilled its appellate function by remaining consistent with previous decisions.[63] After concluding that a contract was formed by the exchange of forms,[64] the court had an ideal opportunity to clarify the effect of "different terms" under section 2-207(2).[65] Instead, the court

59. *See* Gord Indus. Plastics, Inc. v. Aubrey Mfg., Inc., 103 Ill. App. 3d 380, 381-82, 431 N.E.2d 445, 447 (1982) (while buyer sent two purchase orders limiting seller's acceptance to terms in purchase orders, seller's acknowledgement form included term not mentioned in purchase orders); McCarty v. Verson Allsteel Press Co., 89 Ill. App. 3d 498, 499-504, 411 N.E.2d 936, 938-42 (1980) (offer to sell machine placed responsibility for obtaining safety equipment for the machine on buyer, while buyer's acceptance required seller to provide all necessary safety equipment); Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 339-45, 408 N.E.2d 1041, 1044-49 (1980) (buyer's offer was made with assumption that all expressed and implied warranties would be included, while seller's acceptance included disclaimer of warranty and limitation on liability); Tecumseh Int'l Corp. v. City of Springfield, 70 Ill. App. 3d 101, 101-02, 388 N.E.2d 460, 461-62 (1979) (offer to sell coal placed risk of loss on buyer while buyer's acceptance placed risk of loss on seller); Alan Wood Steel Co. v. Capital Equip. Enter., 39 Ill. App. 3d 48, 48-52, 349 N.E.2d 627, 630-32 (1976) (offer to sell disclaimed all warranties, while acceptance required all warranties to be included); Nitrin, Inc. v. Bethlehem Steel Corp., 35 Ill. App. 3d 596, 596-600, 342 N.E.2d 79, 80-84 (1976) (offer to purchase contained guarantees for materials and workmanship, while acceptance limited seller's liability to replacement of non-conforming parts).

60. *See supra* cases cited at note 59.

61. *See supra* text accompanying notes 59-60.

62. *Id.* The trend could be considered to be one of avoiding any clarification of the ambiguities between §§ 2-207(1) and (2).

63. *See* Parker, *Improving Appellate Methods*, 25 N.Y.U.L. REV. 1 (1950) (a function of the appellate court is to uniformly administer justice throughout the state).

64. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 31-32, 437 N.E.2d 22, 24 (1982). The textbook formula for a § 2-207 problem is to set forth the purpose of § 2-207 and then discover if the reply to the offer was a definite and seasonable expression of acceptance. The reply will not operate as an acceptance if it lacked this definite and seasonable expression or if it was expressly made conditional on the offeror's assent to it. *See* J. WHITE & R. SUMMERS, *supra* note 1, § 1-2, at 24-39.

65. Clifford Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 30-32, 437 N.E.2d 22, 22-24 (1982). Unlike the previous Illinois deci-

demonstrated an acrobatic ability to walk a fence while standing on both sides by choosing to incorporate implicitly both approaches in its interpretation of section 2-207(2).

The *Clifford-Jacobs* court followed the strict approach when it addressed the status of the price-adjustment provision.[66] The court reasoned that, before a provision can be scrutinized under section 2-207(2), it must not be different from any provision in the offer;[67] a different term would be excluded from the contract.[68] Simultaneously, the court used the practical approach. The court used the same language to define both "different" term and "materially altering" term.[69] By finding no distinguishing definition, the court implied that a different term materially alters the offer and should be excluded. It also implied that a materially-altering term is different from the offer and also should be excluded.[70]

Clifford-Jacobs began as an authoritative expression of the operation of section 2-207. The court eventually stumbled into a confusing analysis of the effect of the price-adjustment provision on the contract. While the court identified, with its language, a distinction between different and additional terms, its definitions indicate that no distinction exists between different and additional terms. Consequently, the holding is clear while the reasons for the decision are not.

The court should have followed only one approach in reaching its conclusion. It could have followed the strict approach, relying on the duty not to add or subtract words from the language of a statute,[71] but the court then would have had to define the distinction between different and additional terms. *Clifford-Jacobs*, like other previous Illinois decisions, concluded that the term was additional apparently to avoid the task of defining this distinction.[72]

Conversely, the court could have followed the practical approach by relying on the policy of commercial law to construe

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sions, the court could not rely on § 2-207(1) or (3) to reach a decision, but had to rely on § 2-207(2).

66. *Id.* at 30-31, 437 N.E.2d at 24.

67. *Id.* at 31, 437 N.E.2d at 24.

68. *Id.* at 32, 437 N.E.2d at 25.

69. *Id.* at 31-33, 437 N.E.2d at 24-25.

70. *Id.* at 32, 437 N.E.2d at 25.

71. *See* Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968) (courts should not use creative interpretations in applying a fully integrated and comprehensive regulation or statutory command).

72. Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill. App. 3d 29, 31-33, 437 N.E.2d 22, 23-25 (1982).

liberally the meaning of section 2-207.[73] The court then would have had to state expressly that no distinction existed between different and additional terms; section 2-207(2) would dictate the fate of the extra term.[74] The *Clifford-Jacobs* court implicitly recognized this approach when it used the same concept to define different as well as materially-altering terms.

The value of *Clifford-Jacobs* can be questioned because of the lack of definitional clarity expressed in reaching its conclusions. The court uses both the strict and the practical approaches without identifying the authority upon which it relied. The opinion should have been a thoughtful review of the facts,[75] an authoritative expression of the law relating to those facts,[76] and a clear statement of the legal rules, standards, principles, and policies which the court used to preserve predictability in the law.[77] *Clifford-Jacobs*, however, is not a thoughtful review of the law. It does not include an analysis of the law leading to its conclusions, and therefore cannot add to the predictability of the law. It is quite possible that the judges believed that the inconsistencies and ambiguities are a problem the legislature should clarify,[78] but if that is true the court should have so stated.[79]

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73. "This Act shall be liberally construed and applied to promote its underlying purposes and policies." ILL. REV. STAT. ch. 26, § 1-102 (1981). *See also* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) ("father" of Uniform Commercial Code talks about simple construction and liberal interpretation).

74. ILL. ANN. STAT. ch. 26, § 2-207, UNIFORM COMMERCIAL CODE comment 3 (Smith-Hurd 1963).

75. *See* Tate, *The Justice Function of the Judge*, 1 SOUTHERN U. L. REV. 250 (1975) (justice function should not involve judicial impressionism, but should be an authoritative review of facts and law).

76. *Id.*

77. *See* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 2-4 (1976) (appellate courts should announce, clarify, and harmonize the rules of decision employed by the legal system).

78. It should be noted that two state legislatures saw fit to insert the phrase "different terms" into subsection 2 of their statutes comparable to § 2-207. Both statutes' comments reflect the practical approach that no distinction should be made between "additional" and "different." IOWA CODE ANN. § 554.2207 (West 1967); WIS. STAT. ANN. § 402.207 (West 1981). Ironically, both legislatures have since deleted the phrase "different terms" from subsection 2 without any comment, Iowa in 1974 and Wisconsin in 1969. IOWA CODE ANN. § 554.2207 (West Supp. 1982); WIS. STAT. ANN. § 402.207 (West Supp. 1982).

79. *See generally* Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957) ("The responsibility to keep the law straight is a high one . . . . [Courts] should not be misled by the cliche that policy is a matter for the legislature and not the courts. There is always an area not covered by legislation . . . .").

Section 2-207 was designed to solve the contract problems encountered with standard-form contracting. Because of the inconsistencies in its language, section 2-207 has yet to fulfill its supporters' expectations. The *Clifford-Jacobs* court could have clarified the mechanics of section 2-207 under Illinois law, but, by failing to set forth a clear decision, the court did not achieve that goal. Because the Illinois Supreme Court has denied *certiorari* in this case, it appears that Illinois' section 2-207 is condemned to a future of inconsistent application until some court decides to confront the inconsistencies within the section and resolve them through an authoritative analysis.

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