Murray has well described the working of the common law rule; as his analy (and as *Princess Cruises* continues to demonstrate), the favored party was ty though not always — the seller.

> A typical variation of the problem occurs in innumerable contracts betwee ers and sellers of goods. The buyer sends its offer through its standardized purch der form. The seller replies and purportedly accepts the offer through its standa acknowledgment (acceptance) form. Usually, the only written or typewritten te either form set forth the description, price and quantity of the goods. The buyer which contains the offer may or may not indicate the quality of the goods ord no quality term is contained in the form, the buyer is entitled to goods of fair quality or merchantable goods. This is an implied warranty of merchantability set forth in the U.C.C. Often, the seller's form will contain a disclaimer of that i warranty of merchantability. The disclaimer will be contained in a printed pr among many others somewhere on the form. The forms are exchanged, the go shipped and, perhaps, even paid for by the purchaser. When the buyer attempt the goods, he finds them to be of inferior, nonmerchantable quality. The buye an action for breach of contract, specifically, breach of the implied warranty chantability. The seller argues that since his acknowledgment form did not match the terms of the buyer's offer, the form was not an acceptance of th Rather, it was a counter-offer which created a new power of acceptance in the offeror. When the goods were accepted and received by the purchaser, the cou fer was accepted. Therefore, the contract or deal was made on the terms set fort seller's form. In effect, the seller had the "last shot" since his form created the la of acceptance which the buyer exercised presumably by accepting and recei goods on the terms set forth in the seller's form. Under the matching acceptar this analysis was clearly correct. Yet, the buyer never read the seller's form, t never read the buyer's form and neither read their own forms. The printed for simply a convenient means of expressing assent to the "dickered" terms, i.e., ten or typewritten terms which described the goods, their quantity and the Quaere: did the parties intend to be bound by the terms on the forms and, eve did, which terms did they intend as binding? The question scarcely survives ment. In the typical exchange, the parties manifested no intention whatsoever printed provisions of their forms. Yet, they did physically exchange them and t constituted the only written evidence of their deal. The traditional judicial rea that the forms could not be ignored and since the terms thereon did not m last form had to be a counter-offer permitting the seller to have his "last sho prevail.

John Edward Murray, Jr., Contracts §54, at 112-113 (2d ed. 1974).

The court in *Princess Cruises* applies the classical last shot rule. H cluded that GE's response should be viewed as a counter-offer under the age rule, the court then goes on to hold that Princess Cruises accepted th offer by conduct: by not objecting to its terms; by accepting the services by GE; and by paying the price stated in GE's counter-offer. In support cites Restatement (Second) of Contracts §19(1), along with case law to t fect. Compare Sharp Electronics Corp. v. Deutsche Financial Services F.3d 388 (4th Cir. 2000) (manufacturer effectively accepted financer's sion of financing arrangement re customer's purchases of inventory by to ship inventory to customer with knowledge of terms of financer's cou

4. *Approach of the CISG.* Unlike UCC Article 2, discussed in the following Note, the Convention on Contracts for the International Sale of Goods appears to follow essentially the common law approach, as Professor Dodge has explained:

> The CISG . . . adopts what is essentially a mirror-image rule. Article 19(1) provides: "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Article 19(2) attempts to soften this rule a little by providing that if the additional or different terms are not material *and* the offeror does not object to them, then the purported acceptance is an acceptance and the additional or different terms become part of the contract. But Article 19(3) defines materiality so broadly that it is hard to imagine a change that the CISG would not consider material. This means that, in almost every case, an acceptance that varies the terms of the offer will be a counteroffer which will be accepted by the other party's conduct.

William S. Dodge, Teaching the CISG in Contracts, 50 J. Leg. Ed. 72, 82-83 (2000).

5. *Contrast with UCC Article 2.* On both points — the effect of a varying or qualified acceptance; the effect of performance on the issue of acceptance — the UCC in §2-207 takes a fundamentally different tack, as the following two cases and their supporting Notes will attest. Before you study the next case, read through §2-207, and its comments. (No, it's not easy going; we are well aware of that. Many courts have found this provision difficult to understand and apply.) Note that in Comment 1 to §2-207, the drafters identify two different situations which (somewhat awkwardly) they have attempted to cover in this single section. The first one mentioned in that comment, the use of "written confirmations," is exemplified by the *Dale Horning* case, later in this section. The second situation mentioned in Comment 1 is the "varying acceptance" case. (*Princess Cruises* would fall into this general category, although of course that was not regarded as a sale of goods.) The following case, Brown Machine, Inc. v. Hercules, Inc., well illustrates the UCC's handling of the "varying acceptance" situation under §2-207.

## Brown Machine, Inc. v. Hercules, Inc.

***Missouri Court of Appeals***
***770 S.W.2d 416 (1989)***

STEPHAN, Judge.

Hercules Inc. ("Hercules") appeals from the judgment of the trial court awarding respondent Brown Machine $157,911.55 plus interest after a jury verdict in favor of Brown Machine in its action against Hercules for indemnification. We reverse.

In early 1976 Brown Machine had sold appellant Hercules a T-100 trim press. The trim press was a piece of equipment apparently used in manufacturing Cool Whip bowls. The initial sales negotiations between the two companies for the trim press began in October 1975. Bruce Boardman, an engineer at Hercules, asked Jim Ryan, Brown Machine's district sales manager, to send Hercules a quote for a trim press. On November 7, 1975, Brown Machine submitted its original proposal No. 51054 for the model T-100 trim press to Hercules. The proposal set out sixteen numbered paragraphs describing the machine to be sold. Attached to the proposal

was a printed form of fifteen paragraphs in boilerplate style captioned "TEI AND CONDITIONS OF SALE." The eighth paragraph provided as follows:

> 8. LIABILITY: The purchaser agrees to pay in behalf of BROWN all sums whic BROWN becomes legally obligated to pay because of bodily injury or property damag caused by or resulting from the use or misuse of the IOS [item of sale], including re: sonable attorneys fees and legal expenses. The purchaser agrees to indemnify and hol BROWN harmless from all actions, claims, or demands arising out of or in any way cor nected with the IOS, its operation, use or misuse, or the design construction or con position of any product made or handled by the IOS, including all such actions, claim or demands based in whole or in part on the default or negligence of BROWN.

Tim Wilson, Hercules' purchasing agent, reviewed the proposal submitte Brown Machine. On January 7, 1976, he telephoned Jim Ryan at Brown Macl Mr. Ryan's call report reflected that Hercules had prepared its purchase order 03361 in response to Brown Machine's proposal but that Hercules had objected t payment term requiring a twenty percent deposit be paid with the order. After ing with Mr. Fassett, Brown Machine's product manager, Mr. Ryan told Mr. Wi that Brown Machine could not waive the deposit and that an invoice for payı would be forwarded to Hercules.

Mr. Fassett issued a work order that day giving the shop instructions conc ing the trim press equipment, followed by a written order the next day. The wr order noted that "customer gave verbal P.O. [purchase order] for this stock chine. Will issue revision when formal purchase order received."

On January 19, 1976, Brown Machine received Hercules' written purchas der No. 03361 dated January 6, 1976. The order was for a "Brown T-100 Trim in accordance with Brown Machine quote # 51054. All specifications cited w quote except item # 6.1.1 which should read: 'Reverse trim' instead of 'Stan regular forward trim.'" In a blue box on the bottom left of the purchase order in bold print appeared "THIS ORDER EXPRESSLY LIMITS ACCEPTANCE THE TERMS STATED HEREIN INCLUDING THOSE PRINTED ON THE VERSE SIDE. ANY ADDITIONAL OR DIFFERENT TERMS PROPOSED BY SELLER ARE REJECTED UNLESS EXPRESSLY AGREED TO IN WRITING." reverse side of Hercules' purchase order, captioned "TERMS AND CONDITI( contained sixteen boilerplate paragraphs, the last of which provided:

> 16. OTHER TERMS: No oral agreement or other understanding shall in any way mc ify this order, or the terms or the conditions hereof. Seller's action in (a) accepting t order, (b) delivering material; or (c) performing services called for hereunder sh constitute an acceptance of the above terms and conditions.

The purchase order contained no indemnity provision.

Brown Machine received two copies of the purchase order. One had stamped "Vendor's Copy" at the bottom; the other was marked "ACKNOWL MENT," with a space labeled "accepted by" for signature by Brown Machine. B Machine did not return this prepared acknowledgment to Hercules.

The next day, on January 20, 1976, Mr. Fassett issued his second machine to the shop revising his description to reflect that Brown Machine had received cules' formal purchase order and that the machine was no longer inventorie Brown stock item. On January 21, 1976, Brown Machine sent Hercules an invoi questing payment of $4,882.00, the twenty percent deposit for the trim press.

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> 8. LIABILITY: The purchaser agrees to pay in behalf of BROWN all sums which BROWN becomes legally obligated to pay because of bodily injury or property damage caused by or resulting from the use or misuse of the IOS [item of sale], including reasonable attorneys fees and legal expenses. The purchaser agrees to indemnify and hold BROWN harmless from all actions, claims, or demands arising out of or in any way connected with the IOS, its operation, use or misuse, or the design construction or composition of any product made or handled by the IOS, including all such actions, claims, or demands based in whole or in part on the default or negligence of BROWN.

Tim Wilson, Hercules' purchasing agent, reviewed the proposal submitted by Brown Machine. On January 7, 1976, he telephoned Jim Ryan at Brown Machine. Mr. Ryan's call report reflected that Hercules had prepared its purchase order No. 03361 in response to Brown Machine's proposal but that Hercules had objected to the payment term requiring a twenty percent deposit be paid with the order. After talking with Mr. Fassett, Brown Machine's product manager, Mr. Ryan told Mr. Wilson that Brown Machine could not waive the deposit and that an invoice for payment would be forwarded to Hercules.

Mr. Fassett issued a work order that day giving the shop instructions concerning the trim press equipment, followed by a written order the next day. The written order noted that "customer gave verbal P.O. [purchase order] for this stock machine. Will issue revision when formal purchase order received."

On January 19, 1976, Brown Machine received Hercules' written purchase order No. 03361 dated January 6, 1976. The order was for a "Brown T-100 Trimpress in accordance with Brown Machine quote # 51054. All specifications cited within quote except item # 6.1.1 which should read: 'Reverse trim' instead of 'Standard regular forward trim.'" In a blue box on the bottom left of the purchase order form in bold print appeared "THIS ORDER EXPRESSLY LIMITS ACCEPTANCE TO THE TERMS STATED HEREIN INCLUDING THOSE PRINTED ON THE REVERSE SIDE. ANY ADDITIONAL OR DIFFERENT TERMS PROPOSED BY THE SELLER ARE REJECTED UNLESS EXPRESSLY AGREED TO IN WRITING." The reverse side of Hercules' purchase order, captioned "TERMS AND CONDITIONS" contained sixteen boilerplate paragraphs, the last of which provided:

> 16. OTHER TERMS: No oral agreement or other understanding shall in any way modify this order, or the terms or the conditions hereof. Seller's action in (a) accepting this order, (b) delivering material; or (c) performing services called for hereunder shall constitute an acceptance of the above terms and conditions.

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The next day, on January 20, 1976, Mr. Fassett issued his second machine order to the shop revising his description to reflect that Brown Machine had received Hercules' formal purchase order and that the machine was no longer inventoried as a Brown stock item. On January 21, 1976, Brown Machine sent Hercules an invoice requesting payment of $4,882.00, the twenty percent deposit for the trim press.



Rather than returning the acknowledgment of the purchase order prepared by Hercules, Mr. Fassett of Brown Machine sent Hercules an "ORDER ACKNOWLEDGEMENT" dated February 5, 1976. This letter stated as follows:

> Below in detail are the specifications covering the equipment ordered, and the equipment will be manufactured to meet these specifications. If these specifications and terms and conditions of Sale are not in accordance with your understanding, please ADVISE US WITHIN SEVEN (7) DAYS OF RECEIPT OF THIS ACKNOWLEDGEMENT. If we do not hear from you within this period of time, we are proceeding with the construction of the equipment as per these specifications and terms as being agreed; and any changes occurring later may result in additional charges.
>
> *ONE T-100 TRIM PRESS AS FOLLOWS . . .*

The paragraphs following set out the same sixteen specifications contained in Brown Machine's original proposal. Paragraph 6.1.1 of the specifications again provided for "Standard-regular forward trim." Page four of the acknowledgment contained the same "TERMS AND CONDITIONS OF SALE" which had accompanied Brown Machine's earlier proposal of November 7, 1975, including paragraph eight on liability and indemnity. Only two minor changes had been penned in on page four, neither of which has any bearing on the issues presented for appeal.

Hercules responded with a letter on February 9, 1976, to Mr. Fassett that "This is to advise you that Provision 6.1 of your order acknowledgment dated 2/5/76 should read 'Reverse Trim' instead of 'Standard-regular forward trim.' All other specifications are correct." On February 16, 1976, Mr. Fassett confirmed the change in provision 6.1.1 and informed the shop that same day of the requested modification to be made.

Hercules never paid the twenty percent deposit. Brown Machine sent Hercules an invoice dated April 14, 1976, requesting final payment of the total purchase price. Brown eventually shipped the trim press to Hercules and Hercules paid the agreed-upon purchase price.

Sometime later, James Miller, an employee of Hercules, and his wife sued Brown Machine because of injuries he sustained while operating the trim press at Hercules' plant in Union, Missouri. Brown Machine demanded that Hercules defend the Miller lawsuit, but Hercules refused. Brown Machine eventually settled the Millers' lawsuit. Brown Machine later initiated this action against Hercules for indemnification of the settlement amount paid the Millers. Brown Machine claimed a condition of the original sales contract for the trim press required Hercules to indemnify Brown Machine for any claims arising from operation or misuse of the trim press.

Hercules' four points on appeal challenge the submissibility of Brown Machine's case, the verdict director given by Brown Machine, admission of certain allegedly prejudicial testimony and, finally, an instructional error. The dispositive issue on appeal is whether the parties had agreed to an indemnification provision in their contract for the sale of the T-100 trim press.

Hercules' first point disputes Brown Machine's contention that its initial proposal on November 7, 1975, constitutes the offer and that Hercules verbally accepted the offer by the telephone call on January 7, 1976, followed by its written purchase order dated January 6, 1976, which Brown Machine received January 19, 1976.

Article 2 of the Uniform Commercial Code governs transactions involving the sale of goods. UCC §2-102 (1977). Because the term "offer" is not defined in the

code, the common law definition remains relevant. UCC §1-103. An offer is made when the offer leads the offeree to reasonably believe that an offer has been made. Gilbert & Bennett Manufacturing Co. v. Westinghouse Electric Corp., 445 F. Supp. 537, 545[3] (D. Mass. 1977). Restatement (Second) of Contracts §24 (1981) defines "offer" as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."

The general rule is that a price quotation is not an offer, but rather is an invitation to enter into negotiations or a mere suggestion to induce offers by others. Maurice Electrical Supply Co. v. Anderson Safeway Guard Rail Corp., 632 F. Supp. 1082, 1087[3] (D.D.C. 1986); USEMCO, Inc. v. Marbro Co., 60 Md. App. 351, 483 A.2d 88, 93[1] (1984). However, price quotes, if detailed enough, can amount to an offer creating the power of acceptance; to do so, it must reasonably appear from the price quote that assent to the quote is all that is needed to ripen the offer into a contract. Quaker State Mushroom Co. v. Dominick's Finer Foods, Inc., 635 F. Supp. 1281, 1284[3] (N.D. Ill. 1986); see Boese-Hilburn Co. v. Dean Machinery Co., 616 S.W.2d 520, 524-25 (Mo. App. 1981).

In this case Hercules could not have reasonably believed that Brown Machine's quotation was intended to be an offer, but rather an offer to enter into negotiations for the trim press. The cover letter accompanying the proposal mentioned that Brown Machine's sales representative would contact Hercules "to discuss this quote" and that the quotation was submitted for Hercules "approval." The sale price as quoted also included the notation "We have included a mechanical ejector (item 9.1.2) because we understand this unit may be used for development of many items that would require this option. However, if you decide this is not necessary $2,575.00 could be deducted from the above price for a total of $21,835.00." Most importantly, paragraph three of the terms and conditions of sale attached to the proposal expressly provided: "No order, sale, agreement for sale, accepted proposal, offer to sell and/or contract of sale shall be binding upon BROWN unless accepted by BROWN . . . on BROWN standard 'Order Acknowlegment' [sic] form." Thus, because the quotation reasonably appeared to be an offer to enter into negotiations for the sale of a trim press with a mechanical ejector for $24,410.00 with acceptance conditioned upon Brown's order acknowledgment form, no firm offer existed. Accord, Quaker State Mushroom, Inc., 635 F. Supp. at 1285. Brown's price quote was merely a proposal, not an offer, because of its provision that Hercules' acceptance was not binding upon Brown until Brown acknowledged the acceptance.

Even if we were to accept Brown Machine's characterization of its proposal as an offer, the quotation by its own terms and conditions expired thirty days after its issuance ("All quoted prices are subject to change without notice except those written proposals which shall expire without notice . . . thirty (30) calendar days from date issued . . ."). Hercules' written purchase order was dated January 6, 1976, and their telephone conversation of January 7, 1976, were both well beyond the expiration of the quote. Thus, even if the quotation were construed as an offer, there was no timely acceptance. See Gilbert & Bennett, 445 F. Supp. at 545[4].

If the acceptance of a price quotation, sufficiently detailed to constitute an offer, is not binding on the seller because the time within which it could have been accepted has lapsed, the purchase order, not the price quotation, is treated as the offer since the purchase order did not create an enforceable contract. McCarty v. Verson Allsteel Press Co., 89 Ill. App. 3d 498, 44 Ill. Dec. 570, 411 N.E.2d at 936,



943[5] (1980). Thus, we believe Hercules' purchase order constitutes the offer. As a general rule, orders are considered as offers to purchase. Aaron E. Levine & Co. v. Calkraft Paper Co., 429 F. Supp. 1039, 1048[15] (E.D. Mich. 1976).

The question then arises whether Brown Machine's acknowledgment containing the indemnity provision constitutes a counter offer or an acceptance of Hercules' offer with additional or different terms. Section 400.2-207, RSMo 1986, which mirrors §2-207 of the Uniform Commercial Code provides the workable rule of law addressing the problem of the discrepancies in the independently drafted documents exchanged between the two parties. . . .

Under subsection (1) an offeree's response to an offer operates as a valid acceptance of the offer even though it contains terms additional to, or different from, the terms of the offer unless the "acceptance is expressly made conditional" on the offeror's assent to the additional or different terms. Where the offeree's acceptance is made "expressly conditional" on the offeror's assent, the response operates not as an acceptance but as a counter offer which must be accepted by the original offeror. Falcon Tankers, Inc. v. Litton Systems, Inc., 355 A.2d 898, 906[7] (Del. Super. 1976). Restatement (Second) of Contracts §59 (1981) expresses it succinctly: "[A]n offeree's reply which purports to accept an offer but makes acceptance conditional on the offeror's assent to terms not contained in the original offer is effective as a counteroffer rather than acceptance."

The general view held by the majority of states is that, to convert an acceptance to a counter offer under UCC §2-207(1), the conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract. See Annot., "What Constitutes Acceptance 'Expressly Made Conditional' Converting it to Rejection and Counteroffer under UCC §2-207(1)," 22 A.L.R. 4th 939, 948-49 (1983) and cases cited therein. The conditional assent provision has been construed narrowly to apply only to an acceptance which clearly shows that the offeree is unwilling to proceed absent assent to the additional or different terms. Id.; see Challenge Machinery Co. v. Mattison Machine Works, 138 Mich. App. 15, 359 N.W.2d 232, 235[3] (1984) citing Idaho Power Co. v. Westinghouse Electric Corp., 596 F.2d 924 (9th Cir. 1979); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972).

We find nothing in Brown Machine's acknowledgment of February 5, 1976, which reflects its unwillingness to proceed unless it obtained Hercules' assent to the additional and different terms in Brown Machine's acknowledgment, that is, page four of the acknowledgment styled "TERMS AND CONDITIONS OF SALE" which contained the indemnity provision. Brown Machine's acknowledgment was not "expressly made conditional" on Hercules' assent to the additional or different terms as provided for under §2-207(1). Acceptance will be considered a counteroffer only if the acceptance is expressly made conditional on assent to the additional terms. Clifford-Jacobs Forging Co. v. Capital Engineering & Mfg. Co., 107 Ill. App. 3d 29, 62 Ill. Dec. 785, 787, 437 N.E.2d 22, 24 (1982). We conclude Brown Machine's acknowledgment did not operate as a counter offer within the scope of §2-207(1).

Having determined that Brown Machine's order acknowledgment is not a counter offer, we believe that Brown Machine's acknowledgment operates as acceptance with additional or different terms from the offer, since the purchase order contained no indemnity provision. Under §2-207(2), additional terms become a part of the contract between merchants 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 given. Hercules' purchase order here expressly limited acceptance to the terms of its offer. Given such an express limitation, the additional terms, including the indemnification provision, failed to become part of the contract between the parties.

We can conclude Hercules intended the indemnity provision to become a part of the parties' contract only if Hercules, as offeror, expressly assented to the additional terms, and, thus, effectively waived its condition that acceptance be limited to the terms of its offer, the purchase order. While the text of §2-207 does not incorporate such a provision, Official Comment 3 to §2-207 states: "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." The indemnification provision was clearly a material alteration to the parties' agreement.

The evidence does not establish that Hercules expressly assented to the additional terms contained in Brown Machine's order acknowledgment. Brown Machine's order acknowledgment of February 5, 1976, indicated that "[i]f these specifications and terms and conditions of Sale are not in accordance with your understanding, please ADVISE US WITHIN SEVEN (7) DAYS OF RECEIPT OF THIS ACKNOWLEDGMENT." Hercules replied by letter four days later advising Brown Machine that provision 6.1.1 should provide for reverse trim instead of standard regular forward trim, followed by "all other specifications are correct." Hercules' use of the term "specifications" is unambiguous and clearly refers only to the protocol for the machine's manufacture. Nothing in its response can be construed as express assent to Brown Machine's additional "terms and conditions of sale." Express assent under §2-207(2) cannot be presumed by silence or mere failure to object. N & D Fashions, Inc. v. DHJ Industries, Inc., 548 F.2d 722, 726-27[5] (8th Cir. 1977).

We believe it is clear as a matter of law that the indemnification clause cannot be held to be part of the contract agreed upon by the parties. The judgment of the trial court is reversed. We need not address the remaining points raised by Hercules.

Reversed.

SMITH, P.J., and SATZ, J., concur.

### Notes and Questions

1. *The Code's treatment of the "varying acceptance."* Courts and commentators frequently begin discussion of UCC §2-207 by noting that it appears to have as one of its principal purposes the amelioration of a strict "mirror image" approach to contract formation, by permitting nonmatching communications to form a contract if the parties apparently intended that they should. E.g., Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir. 1994) (§2-207 has jettisoned mirror image rule); Superior Boiler Works, Inc. v. R. J. Sanders, Inc., 711 A.2d 628 (R.I. 1998) (§2-207 effects "radical departure" from common law rule). The Code's rejection of the mirror-image rule is stated in §2-207(1): "A definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered. . . ." (If this seems to be merely a tautology, it may help to read the first use of the term *acceptance* as meaning, essentially, *assent,* and



the second as meaning *legal acceptance.*) It seems clear that the Code's drafters did intend to do away with the mirror-image rule, partly to avoid the "reneging" problem in cases where one party denies the existence of a contract. However, hardly any of the cases in which §2-207 has been invoked appear to have presented that issue. Instead, most §2-207 cases have—like *Brown Machine*—involved situations in which the parties initially proceeded to perform but later differed over the terms of their contract. As the *Brown Machine* case demonstrates, in such a case each party is likely to assert that a contract does indeed exist, but on the terms which that party proposed. In that event, §2-207 directs the court to discover the terms of agreement by applying the rules of offer-and-acceptance, as modified by that section to accommodate the practice of doing business on standardized forms.

2. *Finding the first offer.* Under §2-207, as in the classical approach to agreement-formation, the first step is to ascertain at what point an "offer" was first made by one party to the other. (Section 2-207(1) does not use the term "offer," but note §2-207(2)(a) and Comment 1.) The court in *Brown Machine* thus begins by examining the communications between the parties and concludes that the first offer was the buyer's purchase order of January 6; the seller's "proposal" (or "quote") of November 7 was not an offer, but merely an invitation to the buyer to submit an offer. Although a price quotation is often held to be only a preliminary negotiation, it may in some cases amount to an offer. The *Brown Machine* court recognizes this possibility but concludes that in this case the buyer could not have reasonably understood that the seller was making an offer. In reaching that conclusion, however, the court relies in part on the language of the seller's form regarding the need for further acceptance by the seller. This is of course "boilerplate," about which §2-207 might suggest we should be somewhat skeptical. (Do you think the buyer read that language?) If the seller's initial proposal had not contained that provision, would the court's characterization of it as a mere invitation for an offer still be persuasive?

3. *Testing the response.* Having established that the buyer's purchase order was the first operative offer, the court then proceeds to apply the test of §2-207(1) to the seller's reply. If the seller had (as requested) merely signed and returned the buyer's form, then presumably the offer-and-acceptance analysis would cease at this point, and the terms of the purchase order would constitute the contract. But—as in *Princess Cruises*—each party preferred to use its own forms, so the seller responded with a form of its own, an "Order Acknowledgment." Assuming that this form demonstrated sufficient assent to the buyer's order to be regarded as potentially an "acceptance," the next issue under §2-207(1) is whether the seller's acceptance was "expressly conditional" (in which case, as the court declares, it functions not as an acceptance, but as a "counter-offer").

One approach to the issue of what amounts to an expressly conditional acceptance is exemplified by an early §2-207 decision, Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962). In *Roto-Lith* the First Circuit held that a seller's acknowledgment containing terms that materially altered the terms of the buyer's offer to the disadvantage of the offeror (in that case a disclaimer of warranties by the seller) amounted to an "expressly conditional acceptance" under §2-207(1) and therefore functioned as the equivalent of a counteroffer. The court went on to hold that the buyer's acceptance of the goods shipped by the seller with knowledge of the terms of the seller's expressly conditional acceptance constituted assent to the terms of the seller's conditional acceptance. Id. at 500. The court's interpretation of §2-207 effectively recreated the two central components of the common law system of

offer and acceptance: (1) the mirror image rule, and (2) implied assent to the terms of a counteroffer by acceptance of the goods, with its consequence of favoring the "last shot." The *Roto-Lith* case was widely criticized for adopting a statutory interpretation that was inconsistent with the philosophy of §2-207, which was to reform the common law rules. E.g., White & Summers, Uniform Commercial Code §1-3 (5th ed. 2000). In Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184 (1st Cir. 1997), the First Circuit recognized the error in *Roto-Lith* and overruled the decision.

Since *Roto-Lith* has been overruled, it now seems well established that an acceptance does not amount to an expressly conditional acceptance simply because it contains terms that materially differ from the terms of the offer. But when is an acceptance expressly conditional? Most courts have focused on the language of the acceptance. If the acceptance uses very clear language indicating that the offeree's assent is expressly conditional on the offeror's agreement to the terms of the offeree's document, then the acceptance will be treated as expressly conditional, even if the language is essentially boilerplate. E.g., Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986) (seller's response expressly conditional; its "form tracks the language of the section"). The language, however, must be very clear. If the offeree simply states that its acceptance is "subject to the following terms and conditions" or equivalent conditional language, that is generally held not to be sufficient to treat the acceptance as expressly conditional. See Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1167 (6th Cir. 1972) ("subject to all of the terms and conditions on the face and reverse side hereof, including arbitration, all of which are accepted by buyer" held not to be an expressly conditional acceptance). Under this test Brown's order acknowledgment was not an expressly conditional acceptance. How could you redraft Brown's form to turn it into an expressly conditional acceptance?

It should be noted that a few courts go beyond the language of the acceptance to determine whether it should be treated as expressly conditional, examining all the facts and circumstances, including trade usage and course of dealings between the parties. See Gardner Zemke Co. v. Dunham Bush, Inc., 850 P.2d 319 (N.M. 1993). See also John E. Murray, Jr., The Chaos of the "Battle of the Forms": Solutions, 39 Vand. L. Rev. 1307, 1330-1343 (1986) (acceptance should be regarded as "conditional" and therefore as a counteroffer based on reasonable understanding of response to offer — not merely because it contains boilerplate language). Which test for an expressly conditional acceptance do you find more persuasive?

4. *Have the additional terms been expressly assented to?* If it concludes that the offeree's response was indeed an "acceptance" but not a "conditional" one, the court must in most cases go on to determine whether the additional terms in that acceptance have become part of the parties' agreement under §2-207. At this point, the §2-207 analysis proceeds to §2-207(2), which declares that the additional terms are to be viewed as "proposals for addition to the contract." The logical first question under §2-207(2) would be, therefore: Has the offeror assented to the offeree's proposed additional terms? In *Brown Machine*, the seller argued that the buyer had in effect accepted the seller's terms by indicating (in writing) that, with one exception, "all other specifications are correct." Was the court right to reject that argument? In another case involving a similar seller-indemnification clause, the seller contended that a "course of dealing" between the parties established that the clause had indeed been assented to by the buyer, the parties having "exchanged the same forms on prior occasions." The court rejected that argument because there was no showing that any employee of the buyer had ever read such a form, or that a previous dispute had called the clause at issue to the buyer's attention. The mere use or even



repeated use of forms implies nothing about the parties' awareness of their contents, the court asserted, because such forms are never read. Maxon Corp. v. Tyler Pipe Industries, Inc., 497 N.E.2d 570, 575-576 (Ind. Ct. App. 1986). As the *Brown Machine* opinion puts it, "*express* assent under §2-207(2) cannot be presumed by silence or mere failure to object" (emphasis supplied).

5. *Do the additional terms become part of the contract anyway?* If the additional terms have not been expressly assented to, might they nevertheless in some cases become part of the contract? Section 2-207(2) provides for this possibility, in a case where the parties are both merchants. This will happen, however, only if the terms in question have not been objected to (either in advance — through language in the offer or otherwise — or thereafter) *and* if the terms in question are not "material." (See Comment 3 to §2-207; compare the first sentence to Comment 6, which is misleading in its omission of the requirement of nonmateriality.) Did the buyer in *Brown Machine* sufficiently object to the seller's additional terms? In the absence of such an objection, could the seller's indemnification clause have been deemed part of the parties' contract by operation of §2-207(2)? Or was it "material"? Other courts have held similar provisions to be material and thus to require express assent by the offeree before they will become part of the contract. E.g., Trans-Aire International Inc. v. Northern Adhesive Co., 882 F.2d 1254 (7th Cir. 1989) (clause in buyer's form requiring seller to indemnify buyer held material where seller had already effectively disclaimed warranties); Palmer G. Lewis Co. v. ARCO Chemical Co., 904 P.2d 1221 (Alaska 1995) (while materiality generally a question of fact, indemnification clause held to be material as a matter of law). In the next principal case and the Notes that follow it, we will consider further what goes into the determination of "materiality" under §2-207(2)(b).

6. *Has a counter-offer (conditional acceptance) been accepted?* Because it finds the seller's response not to be a conditional acceptance, the court in *Brown Machine* does not have to face the other tough issue frequently raised in §2-207 cases: What constitutes effective assent to a counter-offer expressed in the form of a "conditional acceptance?" When will the additional terms it contains be binding on the other party? It is possible, of course, that the offeror could expressly agree to the terms of the offeree's counter-offer. E.g., In re Mostek Corp., 502 N.Y.S.2d 181 (App. Div. 1986) (seller had signed buyer's purchase order form with arbitration clause). In the absence of such express assent, can agreement be found in the offeror's subsequent conduct? Section 2-207 itself gives no clear answer to that question. In the notorious *Roto-Lith* case, discussed in Note 3 above, the court, having found that the seller made only a conditional acceptance because of the warranty disclaimers and remedy limitations in its form, went on to hold that the buyer had in effect accepted those terms by proceeding to perform (accepting the goods). On this point, the clear consensus of courts and commentators is that once again the *Roto-Lith* court swung and missed: To find assent to a counter-offer in mere performance is to continue in effect the common law's "last shot" approach, which the drafters of §2-207 clearly were attempting to abrogate. See, e.g., Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1445 (9th Cir. 1986) (buyer did not agree to terms of conditional acceptance containing disclaimer of warranties and limitation of consequential damages by continuing to receive and pay for goods; policy of Code requires "specific and unequivocal expression of assent"); White & Summers, Uniform Commercial Code §1-3, at 39-40 (5th ed. 2000). In the absence of real assent to the proposed additional terms, what then? In that case, even if the documents of the parties have not formed a contract, their actions (shipment and receipt of the

goods) may establish a contractual relationship under §2-207(3), and Comment 7 to §2-207. If the seller in *Brown Machine* had by tracking the statutory language succeeded in making only a "conditional acceptance" (and thus in effect a counter-offer), would its proposed indemnification clause have become part of the contract under §2-207(3)?

7. *What are "supplementary terms" under §2-207(3)?* If an offeree's response is deemed to be at most an "expressly conditional" acceptance, and thus in effect a counter-offer, but the parties proceed to performance without an express acceptance of the counter-offer's terms, what then? Under §2-207(3), the contract will 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 [i.e., the UCC]." Clearly those "supplementary terms" would include such implied terms under Article 2 as the implied warranties of merchantibility and fitness (§§2-314 and 2-315) and the damages provisions, including seller liability for consequential damages (§2-715), along with more innocuous "gap-filler" provisions of Article 2 (§§2-307, 2-308, etc.). They also may include terms that are deemed part of the parties' agreement by virtue of the Code's provisions regarding "course of performance," "course of dealing," and "usage of trade" (§§1-205, 2-208). See Coastal & Native Plant Specialties, Inc., v. Engineered Textile Products, Inc., 139 F. Supp.2d 1326, 1337 (N.D. Fla. 2001). But mere receipt of forms without objection may not be held to constitute a course of dealing or course of performance sufficient to establish assent to the terms of those forms, under §2-207, even where forms are repeatedly sent over time:

> ... [A] course of dealing may become part of an agreement, via a type of estoppel, when one party fails to object to the manner in which the other party performs under the agreement. Terms and conditions contained in a form continually sent by one party do not constitute performance and cannot become binding as a course of dealing. . . . The reason for this distinction between (a) a repeated manner of performance and (b) the repeated sending of forms is pragmatic. A party will certainly be cognizant of the manner in which the other side continually performs under the agreement, and if there is no objection to that performance by the first party, over a sufficient period of time, the first party is assumed to have acquiesced to the second party's manner of performance. The same cannot be said of forms continually sent by one party to the other, which are often not read until a dispute arises.

Premix-Marbletite Mfg. Corp. v. SKW Chemicals, Inc., 145 F. Supp.2d 1348, 1356 (S.D. Fla. 2001), citing and quoting Step-Saver Data Systems, Inc. v. Wyse Tech., 939 F.3d 91 (3d Cir. 1991); In re CFLC, Inc., 166 F.3d 1012 (9th Cir. 1999). In later sections of these materials we will return to a closer examination of the concepts of course of performance, course of dealing, and usage of trade.

## Dale R. Horning Co. v. Falconer Glass Industries, Inc.

*United States District Court*
*730 F. Supp. 962 (S.D. Ind. 1990)*

McKinney, District Judge.

This cause comes before the Court after a two day bench trial on the merits on December 18-19, 1989. The plaintiff's complaint seeks recovery of consequential damages for breach of warranty under the Uniform Commercial Code. After hearing