

## Charting a Course: How Courts Should Interpret Course of Dealing in a Battle-of-Forms Dispute

*“A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .”*<sup>1</sup>

### I. INTRODUCTION

On February 25, 1999, an explosion erupted at the Jahn Foundry in Springfield, Massachusetts, causing extensive damage to the building and sending twelve foundry workers to the hospital with severe burns.<sup>2</sup> Three of the workers later succumbed to their injuries.<sup>3</sup> The injured parties, together with the heirs of the deceased, brought personal injury and wrongful death actions against one of Jahn’s chemical suppliers, Borden Chemical, Inc. (Borden), alleging that a shipment of resin supplied by Borden had caused the explosion.<sup>4</sup> In response to the allegations, Borden brought a third-party indemnification suit against Jahn Foundry, Inc. (Jahn), the owner of the foundry and purchaser of the resin, based on a clause in the resin sale contract.<sup>5</sup>

To adjudicate the dispute, the trial court applied Article 2 of the Uniform Commercial Code (U.C.C. or Code) because the contract at issue constituted a sale of goods.<sup>6</sup> The court granted summary judgment in favor of Jahn, holding that the indemnification provision was not part of the agreement between the

---

1. *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff’d*, 201 F. 664 (2d Cir. 1912), *aff’d* 231 U.S. 50 (1913).

2. Zachary R. Dowdy, *Springfield Blast Hurts 12, Sends Debris Flying*, BOSTON GLOBE, Feb. 26, 1999, at B2 (reporting foundry explosion).

3. *3rd Worker Injured in Foundry Fire Dies*, BOSTON GLOBE, May 1, 1999, at B5 (updating death toll from explosion taken nine weeks earlier).

4. *Borden Chem., Inc. v. Jahn Foundry Corp.*, 834 N.E.2d 1227, 1228 (Mass. App. Ct. 2005) (stating background information regarding contract claim at issue). Borden Chemical eventually settled the claims, paying a total of \$25 million to the nine injured workers and the heirs of the three men who perished in the blast. *See id.* at 1228 n.1 (noting settlement of Borden claims); *see also Foundry Victims Settle for \$25M*, MASS. LAW. WKLY., Sept. 1, 2003, at 2 (reporting details of settlement).

5. *Borden*, 834 N.E.2d at 1228 (announcing Borden’s claim for indemnification).

6. *See id.* at 1229-30 (discussing application of U.C.C. section 2-207 to legal issue before court). Massachusetts has codified all provisions of U.C.C. Article 2 relevant to this Note in chapter 106 of the Massachusetts General Laws. *See* MASS. GEN. LAWS ch. 106, §§ 2-101 to 2-725 (1999).

parties.<sup>7</sup> On appeal, Borden argued that the contract incorporated the indemnification clause because the same clause had appeared in previous contracts between the parties.<sup>8</sup> According to Borden, Jahn failed to object to the clause each time it appeared in Borden's invoices over the course of four years and dozens of separate transactions.<sup>9</sup> Thus, Borden contended that Jahn's silence over this period of time equated to implied acceptance of the additional terms or, at the very least, established that the terms did not constitute a material alteration to the contract.<sup>10</sup>

The U.C.C. characterizes the history of contracting between two parties as a "course of dealing."<sup>11</sup> In general terms, it represents the behavioral patterns exhibited by two parties over a course of previous contract performances.<sup>12</sup> While course of dealing has influenced contract interpretation to some degree for over one hundred years, its formal adoption by the U.C.C. significantly increased its role in resolving contract disputes.<sup>13</sup> Since that time, its role has only expanded.<sup>14</sup> Currently, a court's treatment of past conduct between two contracting parties may determine whether a party has complied with the terms of their agreement or, in the alternative, committed a breach.<sup>15</sup> This is a significant determination, as illustrated in *Borden*, where establishing a course of dealing might have saved Borden from a \$25 million judgment.<sup>16</sup>

This Note will first discuss the historical treatment of course of dealing in contract interpretation, from its common law formation to its present day treatment in the U.C.C.<sup>17</sup> This Note will then consider issues that arise under section 2-207 of the Code when parties invoke a course of dealing to resolve

---

7. *Borden*, 834 N.E.2d at 1229-30 (stating ruling of trial court based on application of section 2-207).

8. *Id.* at 1232-33 (discussing Borden's principal argument on appeal).

9. *Id.* (summarizing Borden's arguments based on existence of parties' course of dealing); *see also infra* Part II.C (discussing Borden's arguments).

10. *Borden Chem., Inc. v. Jahn Foundry Corp.*, 834 N.E.2d 1227, 1232-33 (Mass. App. Ct. 2005) (summarizing Borden's arguments for inclusion of indemnity clause); *see also infra* Part II.C (discussing Borden's arguments).

11. *See* U.C.C. § 1-205 (1999) (defining "course of dealing"). The American Law Institute (ALI) and National Conference of Commissioners on Uniform State Laws (NCCUSL) revised Article 1 in 2001 but left the definition of "course of dealing" essentially unchanged. U.C.C. § 1-303 (2001). The 2001 version moves the definition of "course of dealing" from section 1-205 to section 1-303. *See id.* When referring to "course of dealing," this Note cites to the version last promulgated before the 2001 revision.

12. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.17, at 166 (5th ed. 2003) (defining course of dealing).

13. *See infra* Part II.A (discussing evolution of course of dealing).

14. *See infra* Part II.A (comparing early case law treatment of course of dealing with more recent decisions).

15. *See infra* Parts II.A, II.C (citing examples of courts holding parties liable for breach based on prior course of dealing).

16. *See* Lisa Bruno, *\$35M to Victims of Explosion After Epic Discovery Phase*, MASS. LAW. WKLY., Oct. 6, 2003, at 1 (reporting parties' agreement to settle claims). In addition to Borden Chemical's payment of \$25 million to the victims of the blast, Atchison Casting Corp., owner of the Jahn Foundry, paid \$10 million for its role in the explosion. *Id.*

17. *See infra* Part II.A (tracing history of course of dealing and modern inclusion in U.C.C.).

contract formation and interpretation disputes.<sup>18</sup> In particular, this Note will review several of the most frequently litigated aspects of section 2-207 and discuss how the courts have inconsistently applied course of dealing to resolve these disputes.<sup>19</sup> Finally, this Note will attempt to synthesize a set of rules for how future courts should utilize course of dealing to decide section 2-207 contests.<sup>20</sup>

## II. HISTORY

### A. Course of Dealing Before and After the Code

Prior to the U.C.C.'s creation, many courts struggled to incorporate evidence of both trade custom and course of dealing into their interpretation of contracts.<sup>21</sup> While courts often discussed these concepts in their decisions, there developed "no unifying principle governing the admissibility of such evidence."<sup>22</sup> Ultimately, it was the litigant who relied on this evidence that suffered the consequence of its inconsistent application.<sup>23</sup> In response to a growing need for clarity in this and other areas of commercial law, a committee of scholars and practitioners convened in the early 1940s to begin drafting what would eventually become the U.C.C.<sup>24</sup>

---

18. See *infra* Part II.B (discussing purpose of section 2-207 and issues arising from its application).

19. See *infra* Part II.C (reviewing cases dealing with course of dealing as factor in section 2-207 disputes).

20. See *infra* Part III (advancing proper course of dealing analysis in section 2-207 disputes).

21. See *Barnard v. Kellogg*, 77 U.S. 383, 390 (1870) (noting inconsistent treatment of trade usage throughout courts); Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L. FORUM. 811, 819 (1977) (discussing historical backdrop to U.C.C. promulgation). The Supreme Court in *Barnard* expressed frustration in assessing the proper function of trade usage:

It is to be regretted that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle, as in the application of the rules of law.

77 U.S. at 390.

22. Kirst, *supra* note 21, at 819 (discussing justification for creating U.C.C.). Prior to the widespread adoption of the U.C.C., thirty-seven states followed the instruction of the Uniform Sales Act of 1906 (the Act). See Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 565 (1950). While the Act made several references to both custom and conduct, it failed to state clear principles governing their influence. See Kirst, *supra* note 21, at 812. For example, section 18(2) of the Act stated: "[f]or the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." UNIF. SALES ACT § 18(2) (1906).

23. See Kirst, *supra* note 21, at 812 (recounting litigants' uncertainty in light of inconsistent case law).

24. See DOUGLAS E. LITOWITZ, PERSPECTIVES ON THE U.C.C. 23 (2001) (discussing history of U.C.C. drafting process). When the Code was originally promulgated in 1951, its drafters worked from "a large body of precedent and attempted to codify what was good, reject what was bad, and explain what was unclear." Kirst, *supra* note 21, at 819. In 1953, Pennsylvania was the first state to enact the Code; since then, every state

At the time of its creation, the U.C.C. signified “a comprehensive modernization of the law governing commercial transactions, designed to simplify and clarify the law, and to secure uniformity in the adopting states.”<sup>25</sup> The U.C.C.—in particular Article 2—represented a fundamental change to contract law.<sup>26</sup> However, it did not make its mark through wholesale changes to black letter rules; rather, its real impact was in its shift to a new comprehensive theory of contract law.<sup>27</sup> This theory harmonized basic contracting principles with the commercial realities of modern-day business transactions.<sup>28</sup> The U.C.C. accomplished much of this by de-emphasizing the literal reading of contracts in favor of an increased focus on the circumstances surrounding contract formation in order to ascertain the parties’ true intent.<sup>29</sup> In doing so, the U.C.C. drafters gave new significance to the concepts of trade usage and course of dealing relative to contract interpretation—so much so that these concepts made their way into the Code’s very definition of “agreement.”<sup>30</sup>

Arguably, no provision of the U.C.C. better illustrates the goal of synthesizing established contract law with contemporary business practices than section 1-205.<sup>31</sup> Entitled “Course of Dealing and Usage of Trade,” section 1-205 defines these two historical concepts and directs parties on how to utilize

---

except Louisiana has adopted all or most of its provisions. See LITOWITZ, *supra*, at 23.

25. 15A AM. JUR. 2D *Commercial Code* § 1 (1964) (defining general purpose and content of U.C.C.).

26. Kirst, *supra* note 21, at 811 (noting few changes to traditional contract rules).

27. Kirst, *supra* note 21, at 811 (commenting on impact of U.C.C. on contract law).

28. See *Waukesha Foundry, Inc. v. Indus. Eng’g, Inc.*, 91 F.3d 1002, 1003 (7th Cir. 1996) (interpreting purpose of Article 2). In the words of the *Waukesha* court, “Article 2 of the Uniform Commercial Code reflects an effort to harmonize the law of contract with the complexities incidental to the purchase and sale of goods in today’s world of sophisticated commercial relationships.” *Id.*

29. See Kirst, *supra* note 21, at 812 (discussing principal aims and effects of U.C.C. on contract law). In the words of Professor Kirst, “[T]he Code reduced the emphasis on the written agreement, and required attention to the bargain of the parties in fact, as found not only in the language of the parties, but also in course of dealing, usage of trade, or course of performance.” *Id.* (footnote omitted). Article 2 moved contract law away from an emphasis on technicalities toward interpretation based on good faith. See Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 378-79 (1957) (illustrating benefits of U.C.C. over common law).

30. See U.C.C. § 1-201(3) (1999) (defining agreement to include course of dealing); PERILLO, *supra* note 12, § 3.17 (commenting on U.C.C.’s use of course of dealing and usage of trade in contract interpretation); David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 620 (2001) (discussing relevance of custom and conduct in contract interpretation under U.C.C.). “Agreement” is defined as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act.” U.C.C. § 1-201(3) (1999).

31. See Kirst, *supra* note 21, at 813 (claiming section 1-205 contains core of shift in contract theory). Kirst argues that “section 1-205 is the key provision that permits judges and juries to place the written agreement in context.” *Id.* at 869. While “course of dealing” appears in Article 1 of the U.C.C., its most significant applications occur in Article 2. See U.C.C. § 2-202 (1978) (allowing course of dealing to explain precise meaning of terms set forth in writing); U.C.C. § 2-208 (1978) (providing circumstance in which course of dealing may rebut express terms of agreement between parties).

them when resolving contract disputes.<sup>32</sup> According to section 1-205, a course of dealing represents a “sequence of previous conduct,” suggesting that contracting parties must engage in a minimum of two transactions before they can establish a course of dealing.<sup>33</sup> Section 1-205 then provides that a course of dealing can affect the interpretation of a contract in two distinct ways.<sup>34</sup> First, a course of dealing may provide the correct interpretation of an ambiguous term when evidence of prior dealings suggests the parties intended one meaning over the other.<sup>35</sup> Second, evidence of a course of dealing can

---

32. See U.C.C. § 1-205 (1999) (defining course of dealing and usage of trade). Section 1-205 states in full:

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

*Id.* According to Comment to section 1-205, “‘Course of dealing’ may enter the agreement either by explicit provisions of the agreement or by tacit recognition.” U.C.C. § 1-205 cmt. 3 (1999).

33. See U.C.C. § 1-205 (1999) (defining course of dealing). The authors of section 1-205 chose to leave open the exact number of times parties must engage before establishing a course of dealing between them, and as a result, courts have struggled to determine the precise degree of repetition required. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 276 (1985) (noting courts’ inability to establish consistent parameters for recognizing course of dealing). Goetz and Scott point out that section 2-208 of the Code, which defines a “course of performance” between contracting parties, offers little insight regarding the number of instances required to form this course of conduct. *Id.* at n.41. Comment 4 to section 2-208 states only that “[a] single occasion of conduct does not fall within the language of this section.” U.C.C. § 2-208 cmt. 4 (1978).

34. See PERILLO, *supra* note 12, § 3.17, at 166 (explaining course of dealing and trade usage may add terms or affect interpretation of terms); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-3 (4th ed. 1995) (discussing relevance of trade usage, course of dealing, and course of performance under U.C.C.).

35. See, e.g., *Brunswick Box Co. v. Coutinho, Caro & Co.*, 617 F.2d 355, 360 (4th Cir. 1980) (using course of dealing to modify standard U.C.C. definition of “F.A.S.”); *Amerine Nat’l Corp. v. Denver Feed Co.*, 493 F.2d 1275, 1278 (10th Cir. 1974) (using course of dealing to determine whether “Amerine turkeys” includes cross-breeds in addition to pure-breeds); *Baumgold Bros. v. Allan M. Fox Co., East*, 375 F. Supp. 807, 813 (N.D. Ohio 1973) (using course of dealing to give term “on memorandum” specific meaning).

supply additional terms to an existing contract even when those terms have been left out of the writing.<sup>36</sup>

Early judicial efforts to incorporate Article 2 into contract interpretation appeared to pay little regard to the newfound roles of trade custom and party conduct.<sup>37</sup> Specifically, courts refused to entertain evidence of custom or conduct when it would contradict the plain meaning of the terms in a written agreement.<sup>38</sup> The first significant opinion to breathe controversy into section 1-205 was the 1971 decision of *Columbia Nitrogen Corp. v. Royster Co.*,<sup>39</sup> in which the Fourth Circuit held that parties may introduce a course of dealing to override the plain and unambiguous meaning of a contract term.<sup>40</sup> After *Royster*, courts and scholars alike began to question the wisdom of assigning such importance to the roles of custom and conduct, touching off an ideological debate that has persisted to the present.<sup>41</sup>

Informally dubbed as a battle between “textualists” and “contextualists,” the debate over custom and conduct is a modern-day illustration of the centuries-old conflict between the subjective and objective theories of contract interpretation.<sup>42</sup> On one side, the textualists advocate strict adherence to the literal reading of a contract, stressing that courts should interpret a bargain

---

36. See WHITE & SUMMERS, *supra* note 34, § 2-10 (illustrating instance where course of dealing supports additional contract terms); see also *ITT Corp. v. LTX Corp.*, 926 F.2d 1258, 1268-69 (1st Cir. 1991) (using course of dealing to add term disclaiming implied warranty). But see *Bespress, Inc. v. Capital Bank*, 616 So. 2d 795, 798 n.1 (La. Ct. App. 1993) (holding course of dealing may only supplement or qualify existing terms). White and Summers refer to *Provident Tradesmens Bank & Trust Co. v. Pemberton*, 173 A.2d 780 (Pa. Super. Ct. 1961) (per curiam), where the court used evidence of a prior course of dealing to create a duty upon the plaintiff that did not exist in the written agreement between the parties. *Id.*

37. See *Kirst*, *supra* note 21, at 840 (detailing early judicial treatment of course of dealing and usage of trade).

38. See *Kirst*, *supra* note 21, at 840-42 (highlighting misinterpretation of section 1-205). The first significant misinterpretation of section 1-205 concerned usage of trade in the 1969 case of *Division of Triple T Service, Inc. v. Mobil Oil Corp.*, 304 N.Y.S.2d 191 (N.Y. Sup. Ct. 1969), *aff'd*, 311 N.Y.S.2d 961 (N.Y. App. Div. 1970). See *Kirst*, *supra* note 21, at 840-42 (recounting historic misinterpretation made in *Triple T*). There, the court construed section 1-205 to deny evidence of trade usage if it proved inconsistent with the terms of the agreement. *Id.* The few cases that debated course of dealing's proper application under section 1-205 were actually misapplications of contract law altogether and not misinterpretations of the statute. See *id.* at 860-63.

39. 451 F.2d 3 (4th Cir. 1971).

40. *Id.* at 9 (declaring evidence of prior dealings admissible to refute meaning of express contract term). In *Royster*, the plaintiff seller brought suit against the defendant purchaser for refusing to buy the goods at the price stated in their contract. *Id.* at 7. The *Royster* court ruled that evidence of the parties' prior dealings should have been admitted to establish whether the parties, over the course of a six-year relationship, tended to treat the prices as fixed terms or, alternatively, as mere estimates. *Id.* at 11.

41. See PERILLO, *supra* note 12, § 3.17, at 169-70 (identifying criticism aimed at section 1-205 roles); see also *Kirst*, *supra* note 21, at 869-71 (discussing certain judicial interpretations of section 1-205 proving injurious to intended roles).

42. See Omri Ben-Shahar, *Formalism in Commercial Law: The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 781 (1999) (describing conflict as one between formalism and pragmatism); Goetz & Scott, *supra* note 33, at 306-07 (explaining debate over purposes of contract interpretation).

between two parties only within the four corners of the written instrument.<sup>43</sup> On the other side, the contextualists advocate a subjective theory of contract interpretation.<sup>44</sup> They maintain that, because contract interpretation must ascertain the parties' true intentions, all circumstances leading to the formation of a contract—including prior course of dealing—are relevant in resolving a dispute.<sup>45</sup> The debate surrounding the proper function of custom and conduct has historically focused more attention on the extent to which these factors should influence the meaning of *existing* contract terms.<sup>46</sup> There is, however, a separate issue regarding the extent to which parties may use evidence of custom and conduct to add *new* terms to an existing contract.<sup>47</sup> A prime setting for this debate arises in situations where a contract comes into existence through the exchange of non-matching forms.<sup>48</sup>

### B. Section 2-207: Battle of the Forms

When Jahn purchased its shipment of resin from Borden, the two parties engaged in a typical modern-day exchange of forms.<sup>49</sup> In this type of exchange, the buyer sends a purchase order to the seller containing the essential terms of the transaction, such as price, quantity, and other “boilerplate” terms that appear on all of its orders.<sup>50</sup> In response, the seller sends back an invoice

---

43. See Goetz & Scott, *supra* note 33, at 306 (stating principal beliefs of objectivists). The tenets of objectivism aver that

[t]he language of a contract must be understood to mean what it clearly expresses. A court may not depart from the plain meaning of a contract where it is free from ambiguity. In construing the terms of a contract, where the terms are plain and unambiguous, it is the duty of the court to construe it as it stands, even though the parties may have placed a different construction on it.

Cernohorsky v. N. Liquid Gas Co., 68 N.W.2d 429, 433 (Wis. 1955). See generally Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 716 (1999) (doubting wisdom of U.C.C.'s heavy reliance on custom to help interpret contracts); Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 808-814 (2002) (reviewing cases in support of “plain meaning” interpretation).

44. See Goetz & Scott, *supra* note 33, at 306-07 (explaining subjective nature of contextualist position).

45. See Snyder, *supra* note 30, at 636-43 (arguing “language” necessarily includes custom). According to Professor Snyder, the problem inherent in the opposing “plain meaning” approach to contract interpretation is that in a contract dispute, the person with the final say in the matter is not one of the parties to the contract, but rather the judge. *Id.* at 634. The judge's understanding of the term at issue may be very different than its meaning to two people who belong to a certain industry or who have formed a particularly long relationship. *Id.* Without extrinsic evidence, the parties have no opportunity to correct this potential discrepancy. *Id.*; see also Kirst, *supra* note 21, at 869 (identifying potential for inconsistency between judge's reading of contract terms and that of parties').

46. See Snyder, *supra* note 30, at 622-25 (assessing pros and cons of reading context into contract terms).

47. See WHITE & SUMMERS, *supra* note 34, § 3-3, at 116 (discussing effects of course of dealing).

48. See *infra* Part II.C (analyzing inconsistent application of course of dealing to resolve disputes in exchange-of-forms context).

49. Borden Chem., Inc. v. Jahn Foundry, Corp., 834 N.E.2d 1227, 1228-30 (Mass. App. Ct. 2005) (reviewing exchange of forms).

50. See Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2682-83

that confirms the essential terms of the transaction and also includes standard terms of its own, such as a disclaimer of warranties or an indemnity provision like the one at issue in *Borden*.<sup>51</sup> The standard language that each party adds to its forms is largely self-serving, and it is likely that neither party actually reads the other's fine print before completing the transaction.<sup>52</sup>

Under common-law contract principles, this exchange of forms presents a number of issues: first, it is questionable whether the parties have reached a true "agreement" because the purported acceptance deviates from the terms of the offer; second, even if a contract has been created, it is unclear which of the terms comprise the final agreement.<sup>53</sup> To provide stability in this area of commercial law, the drafters of the U.C.C. enacted section 2-207.<sup>54</sup> Representing a significant departure from the common law, section 2-207's primary goals at inception were to enable merchants to create contracts through the exchange of non-matching forms and to provide rules for determining which terms comprise the final agreement.<sup>55</sup> Known to scholars and practitioners alike as "the battle of the forms," section 2-207's complexity has led many to lament its existence; however, despite years of criticism, its significance has endured.<sup>56</sup>

---

(2000) (illustrating typical transaction by exchange of forms).

51. See *Borden*, 834 N.E.2d at 1228-29 (detailing preprinted terms and conditions on Jahn's purchase order and Borden's confirmatory invoice); Keating, *supra* note 50, at 2682-83 (illustrating typical transaction by exchange of forms); Colin P. Marks, *The Limits of Limiting Liability in the Battle of the Forms: U.C.C. Section 2-207 and the "Materially Alteration" Inquiry*, 33 PEPP. L. REV. 501, 506-07 (2006) (discussing issues arising when contracting parties use own forms to complete transaction).

52. See Keating, *supra* note 50, at 2682-83 (commenting how neither party typically reads other's preprinted terms). In his article, Professor Keating refers to research Professor John Murray performed, suggesting that not only do buyers and sellers not read the preprinted terms submitted by the other party, but the parties often do not even know the significance of their own terms. *Id.* at 2692.

53. See Keating, *supra* note 50, at 2683-84 (commenting on uncertainty of contract formation when exchanging variant forms). Under the common-law "last shot doctrine," the seller's non-matching acknowledgement form would turn into a counteroffer, which the buyer would then accept by completing the transaction, thus binding itself to the seller's additional terms. *Id.* This result dissatisfied critics because it seemed to reward the seller—the one who "fired the last shot"—at the expense of the unsuspecting buyer. See *id.* at 2684.

54. See Keating, *supra* note 50, at 2684 (noting section 2-207 responded to business community's concerns about "last shot doctrine"). The ALI and NCCUSL amended Article 2 in 2003, which included a new section 2-207. See U.C.C. § 2-207 (2003); 1 JAMES J. WHITE & ROBERT S. SUMMERS, REVISED ARTICLE 1 AND AMENDED ARTICLE 2—SUBSTANCE AND PROCESS SUPPLEMENT TO ACCOMPANY UNIFORM COMMERCIAL CODE app. IV, 413-14 (2005). Despite strong endorsement by the ALI and NCCUSL, no state has yet adopted the amendment. See COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES 1 (Douglas G. Baird et al. eds., 2005) (recounting recent history of Article 2); SELECTED COMMERCIAL STATUTES 1 (Carol L. Chomsky et al. eds., 2007). Accordingly, when referring to section 2-207, this Note cites to the pre-2003 version.

55. See 1 WILLIAM D. HAWKLAND, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 2-207:1 (2002) (characterizing section 2-207 as "radical provision"); Keating, *supra* note 50, at 2685 (claiming section 2-207 "reverses" common law's mirror image rule); Marks, *supra* note 51, at 510 (stating primary goal of U.C.C. drafters concerning section 2-207).

56. See John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1309 (1986) (characterizing section 2-207 as a "troublesome statute"); Robert K. Rasmussen, *Comments on Daniel Keating's "Exploring the Battle of the Forms in Action,"* 98 MICH. L. REV. 2748, 2751 (2000)

Section 2-207 first deals with the issue of contract formation: according to the language of subsection (1), a timely expression of acceptance will operate as such “even though it states terms additional to or different from those offered or agreed upon.”<sup>57</sup> Thus, even when a party submits additional terms in a written acceptance to an offer or in a written confirmation to an orally made agreement, the writing suffices to create a contract.<sup>58</sup> Once the parties form a contract, subsection (2) instructs which terms to include: between merchants, unless the offeror objects to additional terms in advance or shortly after receiving the acceptance, all additional terms will become part of the contract *unless* they “materially alter it.”<sup>59</sup> Even though the Code provides the elements of materiality, the precise meaning of materiality remains the subject of

---

(commenting on scholarly treatment of section 2-207); *see also* Keating, *supra* note 50, at 2682 (analyzing how battle-of-the-forms provisions affect commercial contracting). According to Professor Rasmussen, “[s]ection 2-207’s legendary opacity makes it an ideal doctrinal ‘nut’ to crack: a contracts professor’s dream, and a nightmare for students.” Rasmussen, *supra*, at 2751. In an empirical study to determine the impact of 2-207 on the average commercial contracting party, Professor Keating likened the “battle of the forms” to a game of tic-tac-toe: it is nearly impossible to win if both players use good strategy, yet almost as impossible to lose with the same effort. Keating, *supra* note 50, at 2682. Perhaps because of the sometimes frustrating nature of section 2-207’s operation, some commercial entities avoid the battle of forms issue altogether. *Id.* at 2696. Methods of avoiding section 2-207 include opting out of sending acknowledgment forms and fully negotiating all contract terms before an agreement is reached. *Id.* at 2697.

57. U.C.C. § 2-207(1) (1978) (establishing contract formation through exchange of non-matching forms). Section 2-207 reads in full:

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

U.C.C. § 2-207 (1978). There is one exception to section 2-207(1) contract formation when the offeree conditions his acceptance on the offeror expressly assenting to the additional or different terms. *See* U.C.C. § 2-207(1) (1978). Under this scenario, the offeree’s writing constitutes a counteroffer, which the original offeror can accept by a showing of express assent. *Id.* If the offeror does not give assent, section 2-207(3) instructs that a contract can still be formed by the conduct of the parties; however, the additional terms in the offeree’s counteroffer will not become part of the agreement. *See* U.C.C. § 2-207(3) (1978).

58. *See* U.C.C. § 2-207(1) (1978) (allowing contract formation despite offeree’s additional terms).

59. *See* U.C.C. § 2-207(2) (1978) (establishing procedure for determining whether contract incorporates additional terms). If either of the parties to the transaction are non-merchants, section 2-207(2) does not apply, and additional terms do not become part of the contract. *See id.*

countless legal disputes.<sup>60</sup>

The Official Comment to section 2-207 states that a contract term is materially altering if it results in “surprise or hardship if incorporated without express awareness by the other party.”<sup>61</sup> The drafters of the U.C.C. provided examples of both what they believed to be materially altering terms and what they considered to fall short of such a designation.<sup>62</sup> Since the Code’s enactment, courts have used their own varying approaches to determine whether a term constitutes a material alteration to the contract at issue.<sup>63</sup> While some courts have declared certain terms materially altering as a matter of law—the “per se” rule—other jurisdictions adhere to a case-by-case analysis of whether the term either surprises or incurs undue hardship upon the non-assenting party.<sup>64</sup> In identifying “surprise,” courts analyze the substance of the term and circumstances surrounding the transaction, such as the parties’ prior course of dealing, to determine whether one party unreasonably presumed the other’s assent.<sup>65</sup> To constitute “hardship,” courts typically require a term that

---

60. See WHITE & SUMMERS, *supra* note 34, § 1-3 (noting complexity in determination of materially altering terms); Marks, *supra* note 51, at 512 (describing determination of what constitutes material alteration as “complex matter”); *infra* note 61 and accompanying text (discussing U.C.C. essential elements of materiality).

61. U.C.C. § 2-207 cmt. 4 (1978) (illustrating examples of terms that normally materially alter agreements).

62. See U.C.C. § 2-207 cmts. 4-5 (1978) (listing common examples of what does and does not constitute material alterations). For instance, a term would be materially altering if it negated standard warranties of quality, such as the warranty of merchantability, in circumstances where such a warranty would normally apply. *Id.* at cmt. 4. Conversely, a term would not normally constitute a material alteration to an agreement if it reflected a common trade practice. *Id.* at cmt. 5.

63. See Marks, *supra* note 51, at 516-17 (identifying different judicial approaches to determine materiality of clauses limiting liability).

64. Compare *Winter Panel Corp. v. Reichhold Chems., Inc.*, 823 F. Supp. 963, 971 (D. Mass. 1993) (holding damage limitation clause constitutes material alteration as matter of law), and *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980) (holding warranty disclaimer “undoubtedly” qualifies as material alteration), with *Bayway Refining Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 224 (2d Cir. 2000) (pointing to surprise and hardship elements as determinants of materiality), and *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 712-13 (7th Cir. 1987) (stating material alteration occurs when additional term results in “surprise or hardship” without express awareness). See generally Marks, *supra* note 51, at 512-530 (comparing different judicial approaches to determining contract term materiality).

65. See Marks, *supra* note 51, at 525 (defining surprise in context of material alteration analysis). Among the factors Marks considers relevant to a court’s analysis of the surprise element are “the parties’ prior course of dealing . . . [the] number of written confirmations that they exchanged, industry custom and the conspicuousness of the term.” *Id.*; see also *LTV Energy Prods. Co. v. N. States Contracting Co. (In re Chateaugay Corp.)*, 162 B.R. 949, 957 (Bankr. S.D.N.Y. 1994) (factoring “parties’ prior dealings” into materiality assessment of term); *Barliant v. Follett Corp.*, 483 N.E.2d 1312, 1316 (Ill. App. Ct. 1985) (holding presumption of assent reasonable due to repeated use of same term). In *Barliant*, a book buyer refused to pay the seller certain charges in connection with a shipment of books. 483 N.E.2d at 1313. The seller submitted evidence that the same charge had appeared in twenty-four prior occasions over an eighteen-month period and that the buyer had never objected to the charge. *Id.* at 1316. The court ruled in favor of the seller, holding that the charge was part of the agreement. *Id.* According to the court, the charge did not constitute a material alteration to the agreement because its repeated appearance in prior invoices prevented it from creating an “unfair surprise” to the buyer. *Id.*

creates “an open-ended and prolonged liability” upon the non-assenting party.<sup>66</sup>

Even if a term appearing in a party’s written acceptance constitutes a material alteration, the U.C.C. provides that it may still become part of the agreement upon a showing of “express assent” by the other party.<sup>67</sup> The clearest manifestation of express assent arises when one party actually notifies the other that it has agreed to be bound to the additional term.<sup>68</sup> In terms of what does *not* constitute acceptance of a term, courts have commonly ruled that a party’s mere acceptance of goods does not equate to acceptance of additional terms.<sup>69</sup> Courts have further held that a party’s performance of a contract, without more, does not signify that party’s assent to an additional term, even when the party has actual or constructive knowledge of the additional term.<sup>70</sup> It remains uncertain, however, whether *repeated* performance of a contract—as evidenced by a prior course of dealing—can substitute for actual expressions of assent or, alternatively, affect the material nature of the term.<sup>71</sup>

---

66. See *Bayway*, 215 F.3d at 226 (discussing use of “hardship” as separate criterion for establishing material alteration); see also *St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc.*, 687 F. Supp. 820, 827 (S.D.N.Y. 1988) (holding hardship sufficient to constitute material alteration because of term’s risk-shifting effect), *aff’d*, 895 F.2d 1410 (2d Cir. 1989); *In re Chateaugay Corp.*, 162 B.R. at 957 (discussing problematic interpretation of hardship). More than one court has expressed doubt as to whether “hardship” should be a separate criterion for establishing material alteration. See *Bayway*, 215 F.3d at 226 (asserting one may not repudiate contract based merely on difficulty of performance); *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1336 (7th Cir. 1991) (stating “[h]ardship is a consequence, not a criterion”). The court in *Union Carbide* expressed, “[Y]ou cannot walk away from a contract that you can fairly be deemed to have agreed to, merely because performance turns out to be a hardship for you.” 947 F.2d at 1336.

67. See U.C.C. § 2-207 cmt. 3 (1978) (providing guidance on how materially altering terms may become part of agreement); see also *Air Prods. & Chem., Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414, 425 (Wis. 1973) (holding materially altering term requires express conversation between parties to become part of agreement). According to Comment 3 to section 2-207, “if [additional or different terms materially] alter the original bargain, they will not be included unless expressly agreed to by the other party.” U.C.C. § 2-207 cmt. 3 (1978).

68. See 2 LARY LAWRENCE, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-207:129, at 879 (3d ed. 2004) (discussing procedure for acceptance of materially altering terms). Parties should not confuse the requirement of assent in section 2-207(2) with the requirement in section 2-207(1), where the offeree has made a counteroffer. See U.C.C. § 2-207(1) (1978). In this context, at least one court has called for a strict showing of “specific and unequivocal assent.” See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1445 (9th Cir. 1986).

69. See LAWRENCE, *supra* note 68, at 883 (discussing what does not constitute acceptance of additional materially altering term). According to Lawrence, “the signing of a delivery order is merely acknowledging receipt of the goods and is not an assent to an additional term contained in the delivery order.” *Id.*

70. See LAWRENCE, *supra* note 68, at 883 (stating buyer’s notice of particular term located in invoice does not constitute acceptance); see also *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1108 (3d Cir. 1992) (holding mere knowledge of additional materially altering term does not equate to acceptance).

71. See *infra* Part II.C (examining cases where course of dealing has influenced showing of assent to additional terms).

### C. Borden and Related Case History

In *Borden*, the primary issue was whether the court should have incorporated an indemnity provision into the resin contract.<sup>72</sup> The provision had appeared in Borden's confirmatory invoices each time it sent a shipment to Jahn over the course of their contracting relationship.<sup>73</sup> Borden advanced multiple arguments as to why the indemnity language should have been included in the contract despite Jahn's lack of express agreement to add the provision.<sup>74</sup> First, Borden argued that by accepting its resin shipments over the course of several years without protesting any of the invoice terms accompanying each order, Jahn implicitly agreed to be bound to all of its terms, including the indemnity provision.<sup>75</sup> At the very least, Borden argued, the terms did not materially alter the contract because Jahn repeatedly accepted the invoices over a long period of time; thus, under section 2-207, the contract should have included the invoice terms.<sup>76</sup> The court ultimately rejected both arguments but not because the parties' course of dealing was insignificant; rather, the court pointed to contradictory language Jahn had added to its *own* purchase order shortly before Borden shipped the defective resin.<sup>77</sup>

---

72. *Borden Chem., Inc. v. Jahn Foundry Corp.*, 834 N.E.2d 1227, 1230 (Mass. App. Ct. 2005) (announcing primary issue at center of plaintiff's appeal).

73. *Id.* at 1229 (explaining procedure Borden followed when ordering resin from Jahn). The indemnity provision read as follows:

INDEMNITY AGREEMENT. Buyer shall defend, indemnify, and hold Seller harmless from and against all claims, liabilities, costs and expenses (including, but not limited to, those related to injury or to death of Buyer's employees) arising from or connected with the possession, handling, processing or use of the product by Buyer or others . . . .

*Id.*

74. *Id.* at 1232-33 (discussing Borden's arguments on appeal).

75. *See id.* at 1232 (stating Borden's first argument for why agreement should include indemnity provision).

76. *Borden*, 834 N.E.2d at 1233 (stating Borden's alternative position for why agreement should include indemnity provision).

77. *Id.* at 1233 (holding Jahn's purchase order terms inconsistent with Borden's indemnity terms, thus negating acceptance by course of dealing). Prior to the 1998 shipment of defective resin, Jahn added the following language to its standard purchase order terms:

1. WARRANTY. Seller expressly warrants that the goods covered by this order are of merchantable quality, free from defects in material or workmanship, confirming [sic] to the specifications and drawings, if any, approved in writing or furnished by Buyer and suitable for purposes intended by Buyer and Buyer may assume Seller knows the use intended unless Seller notifies Buyer in writing to the contrary prior to commencement of work and shipment, all without limitation or exclusion of any other warranty, expressed or implied.

. . .

5. CONFORMING GOODS. Acceptance of all or any part of the goods shall not be deemed to be a waiver of Buyer's right either to cancel or to return all or any portion of the goods because of failure to confirm [sic] to order, or by reason of defects, latest [sic] or patent, or other breach of warranty, or to make any claim for damages, including manufacturing costs and loss of profits or other special

Due to the particular facts in *Borden*, it is unclear whether an established course of dealing between Borden and Jahn would have sufficed to incorporate the indemnity provision into the agreement.<sup>78</sup> Nevertheless, the *Borden* court cited a number of prior decisions that did rule on this issue.<sup>79</sup> Each of these decisions entertained claims similar to those alleged by the plaintiff in *Borden*: that a course of dealing between two parties can either substitute for express assent to an additional term or affect the materiality of an additional term.<sup>80</sup> While some courts have endorsed an expansive interpretation of course of dealing, others have favored a more restrictive approach.<sup>81</sup>

### 1. Course of Dealing as a Substitute for Express Assent

In *Step-Saver Data Systems, Inc. v. Wyse Technology and The Software Link, Inc.*,<sup>82</sup> Step-Saver, a reseller of computer software, sued the software's manufacturer, TSL, on breach of warranty claims.<sup>83</sup> TSL defended the claim by arguing that its license agreement, which accompanied each shipment of software, disclaimed all warranties relating to the product.<sup>84</sup> While Step-Saver asserted that it had never expressly agreed to the disclaimer, TSL argued that Step-Saver's repeated purchase and acceptance of nearly 150 copies of the software, without objection to any of its terms, substituted for its express assent to the disclaimer.<sup>85</sup> The Third Circuit disagreed with TSL and ruled that the disclaimer was not part of the contract.<sup>86</sup> In its reasoning, the court noted that prior to commencing the lawsuit, the parties had neither taken any action with

---

damages occasioned [by] the Buyer. Such right shall be in addition to any other remedies provided by law.

*Id.* at 1229. The appearance of these additional terms prompted the court to hold that "[p]roof of prior dealings under Jahn's pre-1998 purchase orders . . . would not support a reasonable inference that Jahn accepted the indemnity agreement once Jahn started including in its purchase orders express provisions to the contrary." *Id.* at 1233.

78. See *Borden Chem., Inc. v. Jahn Foundry Corp.*, 834 N.E.2d 1227, 1233 (Mass. App. Ct. 2005) (ruling existence of prior dealings between parties ineffective in light of Jahn's purchase order terms).

79. See *id.* (noting several cases where courts relied on prior dealings to enforce contract terms); see also *Waukesha Foundry, Inc. v. Indus. Eng'g, Inc.*, 91 F.3d 1002, 1009 (7th Cir. 1996) (holding course of dealing provided adequate substitute for assent to additional material term); *Tupman Thurlow Co. v. Woolf Int'l Corp.*, 682 N.E.2d 1378, 1381 (Mass. App. Ct. 1997) (incorporating additional contract term into agreement based on course of dealing).

80. See *infra* notes 83-111 and accompanying text (reviewing case law on issue of course of dealing's application within context of section 2-207).

81. See *infra* notes 82-111 and accompanying text (illustrating different approaches to using course of dealing to resolve battle-of-forms disputes).

82. 939 F.2d 91 (3d Cir. 1991).

83. *Id.* at 94 (explaining history behind Step-Saver's breach of warranty claims).

84. *Id.* at 96-98 (detailing terms in license agreement and setting forth TSL's warranty disclaimer defenses).

85. *Id.* at 103 (stating TSL's course of dealing argument).

86. *Step-Saver*, 939 F.2d at 104 (holding repeated sending of terms alone not sufficient to incorporate into agreement between parties).

respect to the warranty disclaimer nor specifically addressed the presence of the warranty terms.<sup>87</sup> Therefore, the court held that the parties could not have incorporated the terms into the agreement regardless of how many times the terms appeared or how extensive the parties' course of dealing proved to be.<sup>88</sup>

Conversely, at least one circuit court has allowed an established course of dealing to substitute for actual expression of assent.<sup>89</sup> In *Waukesha Foundry, Inc. v. Industrial Engineering, Inc.*,<sup>90</sup> the Seventh Circuit considered the significance of a prior course of dealing to a dispute between the buyer and seller of steel castings.<sup>91</sup> At the time of the suit, Industrial, the buyer, had engaged in sixty separate transactions with Waukesha, the manufacturer.<sup>92</sup> As part of each product shipment, Waukesha included an invoice with a list of terms and conditions controlling the sale.<sup>93</sup> After a dispute arose between the parties over a change in payment terms, Industrial terminated the three-year relationship.<sup>94</sup> Waukesha responded by filing a lawsuit to recover unpaid

---

87. *Id.* at 103 (commenting on role and effect of course of dealing between contracting parties).

88. *Step-Saver Data Sys., Inc. v. Wyse Tech. & The Software Link, Inc.*, 939 F.2d 91, 104 (3d Cir. 1991) (announcing court's holding); *see also Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1108 (3d Cir. 1992) (following *Step-Saver* reasoning on course of dealing). The court in *Step-Saver* expressed its reasoning in the following manner:

[T]he repeated sending of a writing which contains certain standard terms, without any action with respect to the issues addressed by those terms, cannot constitute a course of dealing which would incorporate a term of the writing otherwise excluded under § 2-207. First, the repeated exchange of forms by the parties only tells Step-Saver that TSL *desires* certain terms. Given TSL's failure to obtain Step-Saver's express assent to these terms before it will ship the program, Step-Saver can reasonably believe that, while TSL desires certain terms, it has agreed to do business on other terms—those terms expressly agreed upon by the parties.

939 F.2d at 103. In *Altronics*, the court held that a limitation of liability clause in a series of purchase confirmation forms did *not* become part of the contract between the parties. 957 F.2d at 1107. Reiterating its ruling in *Step-Saver*, the court reasoned that a party's "continued performance with constructive or actual knowledge" of additional terms does not, on its own, demonstrate acceptance of those terms. *Id.* at 1108. When confronted with this issue, the First Circuit has also ruled against using course of dealing. *See Diskin v. J.P. Steven & Co.*, 836 F.2d 47, 51 (1st Cir. 1987) (stating mere repeated appearance of term in successive contracts does not amount to acceptance). In *Diskin*, the court ruled against enforcing an arbitration clause that had been unilaterally added by one of the parties. *Id.* at 50. The court held that "the mere use of the same ineffective form of contract is not the functional equivalent of evidence which affirmatively establishes a party's prior consent to arbitrate. Thus, we will not imply appellant's consent to arbitrate based only on appellee's vague assertion of prior dealings." *Id.* at 51.

89. *See infra* notes 90-100 and accompanying text (discussing case in which court allowed course of dealing to substitute for express assent).

90. 91 F.3d 1002 (7th Cir. 1996).

91. *Id.* at 1003 (discussing role of U.C.C. in adjudicating sale-of-goods disputes).

92. *Id.* at 1104 (reciting details of parties' transactional history).

93. *Id.* at 1103-04 (explaining typical transaction between parties). Not only did one of these terms disclaim all warranties on the castings, but instead of standard remedies, the terms provided specific remedial options if the castings proved defective. *Id.* at 1004. One of the options was for Industrial to repair the defective parts themselves, for which Waukesha would give Industrial a monetary credit. *Id.*

94. *Waukesha Foundry*, 91 F.3d at 1004-05 (stating Industrial's failure to comply with Waukesha's payment terms). For the first three years of the business relationship, Waukesha extended thirty payment terms

invoices totaling over a quarter million dollars.<sup>95</sup> Industrial counterclaimed that Waukesha committed breach of warranty on several occasions for shipping defective castings, to which Waukesha responded by pointing to the warranty disclaimer language it had inserted into the invoices.<sup>96</sup> In considering whether the disclaimer language ever became part of the final agreement between the parties, the court found it inconsequential that Industrial had never expressly assented to the additional terms in Waukesha's invoices.<sup>97</sup> Instead, the court focused on the parties' prior course of dealing and held that the additional terms had become part of the agreement.<sup>98</sup> The court reasoned that a course of dealing may imply consent to a term, especially when the dealing reveals a reasonable inference of the party's acceptance by its failure to object.<sup>99</sup> To support this statement, the court pointed to instances where Industrial had availed itself of the remedy provisions contained in the invoices, thereby manifesting its consent to the disclaimer language.<sup>100</sup>

## *2. Course of Dealing as a Factor Affecting the Materially Altering Nature of a Term*

In *Tupman Thurlow Co. v. Woolf International Corp.*,<sup>101</sup> the Appeals Court of Massachusetts considered whether an arbitration clause included in a meat seller's invoice became part of its contract with the purchaser after the same clause had appeared in sixty-five prior transactions over the course of two years.<sup>102</sup> The purchaser, Woolf, claimed that he should not have been bound by

---

to Industrial. *Id.* at 1005. After Industrial repeatedly failed to make timely payments, Waukesha decided to change the payment terms to collect-on-delivery. *Id.* Industrial refused to agree to the change of terms and terminated the relationship. *Id.*

95. *Id.* at 1005 (detailing Waukesha's claim against Industrial for nonpayment of invoices).

96. *Waukesha Foundry, Inc. v. Indus. Eng'g, Inc.*, 91 F.3d 1002, 1005 (7th Cir. 1996) (detailing Industrial's counterclaim). Industrial claimed it had suffered \$1.2 million in losses resulting from Waukesha's "failure to deliver confirming castings in a breach of the parties' contract." *Id.*

97. *Id.* at 1009 (determining whether contract included warranty disclaimer in Waukesha's invoices).

98. *Id.* (considering effect of sixty like contracts over four years).

99. *Id.* (quoting court's own ruling in previous case). To bolster its conclusion, the court referred to one of its earlier decisions, in which it stated the following:

Even if the alteration is material, the other party can, of course, decide to accept it. . . . Put differently, consent can be inferred from other things besides the unsurprising character of the new term: even from silence, in the face of a course of dealings that makes it reasonable for the other party to infer consent from a failure to object.

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

100. *Waukesha Foundry*, 91 F.3d at 1104 (implying consent to contract term in light of course of dealing and course of performance). Specifically, undisputed evidence demonstrated that Industrial had exchanged defective castings to Waukesha in return for a credit as provided by the remedy provisions. *Id.* at 1009.

101. 682 N.E.2d 1378 (Mass. App. Ct. 1997).

102. *Id.* at 1378-79 (introducing claims on appeal). The seller, Tupman, commenced arbitration proceedings after the buyer, Woolf, failed to pay for a shipment of meat. *Id.* at 1379. Although Woolf refused to participate in the proceedings, the arbitrator ruled that the arbitration clause had become part of the contract

the clause because he had neither signed an agreement to arbitrate nor even read the clause as it appeared in the invoices.<sup>103</sup> The court determined that, at least on its face, an arbitration clause contained in an order acknowledgment form materially alters a contract.<sup>104</sup> However, it then referred to two cases suggesting that a prior course of dealing between two parties could suffice to incorporate an otherwise materially altering term in their agreement.<sup>105</sup> In light of the case law support and extensive course of dealing between Woolf and Tupman, the court concluded that the arbitration clause did not materially alter the contract and therefore was an enforceable provision of the agreement.<sup>106</sup>

While the *Tupman* court suggested that a long history of transactions can erode the materiality of an additional contract term, other courts have required more than just a high number of exchanges to affect the term's significance.<sup>107</sup>

---

between the parties due to "a long course of commercial dealings" between the parties. *Id.* In the opinion of the arbitrator, Woolf's failure to object to the clause over the course of his contracting relationship with Tupman rendered it an enforceable provision. *Id.*

103. *Id.* at 1379, 1381 n.10 (explaining grounds for Woolf's objection to arbitration clause).

104. *Id.* at 1380 (reviewing section 2-207(2) and related case law). The court referred to *Marlene Industries Corp. v. Carnac Textiles, Inc.*, 380 N.E.2d 239, 242 (N.Y. 1978), which held that an arbitration clause printed on an order acknowledgment form constituted a material alteration to the contract in question. *Id.*

105. *Tupman*, 682 N.E.2d at 1380-81 (discussing previous cases involving significance of course of dealing on arbitration clauses). The court first relied on *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154 (N.Y. 1979). *Tupman*, 682 N.E.2d at 1380-81. According to the *Tupman* court, *Schubtex* stood for the proposition that "a written provision for arbitration could be incorporated into an oral agreement on the basis of evidence of a prior course of dealings between the parties." *Id.* at 1381. However, the court appeared to misinterpret the significance of *Schubtex*, implying that the number of prior transactions alone could affect the materiality of the term at issue. *Id.* at 1380-81. In truth, the court in *Schubtex* required more than a tally of exchanges to alter a contract term's materiality. See *Schubtex*, 399 N.E.2d at 1156; *supra* notes 110-111 and accompanying text (discussing *Schubtex* court's additional evidentiary requirements). The *Tupman* court then referred to *Hatzlachh Supply, Inc. v. Moishe's Electronics, Inc.*, 828 F. Supp. 178, 184 (S.D.N.Y. 1993), *vacated*, 848 F. Supp. 25 (S.D.N.Y. 1994), *aff'd*, 50 F.3d 4 (2d Cir. 1995), a case that was later vacated on procedural grounds. See *Tupman*, 682 N.E.2d at 1381. The subject of dispute in *Hatzlachh* was an arbitration clause that appeared in forty-two prior invoices over the span of seventeen months. 828 F. Supp. at 183. The court concluded that the term did not materially alter the agreement because the respondent could not have been surprised by its appearance, especially because the respondent had admitted it was the petitioner's practice to include such a provision in its contracts. *Id.* at 184.

106. *Tupman*, 682 N.E.2d at 1381-82 (ruling in favor of enforcing arbitration clause); see also *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 714-15 (7th Cir. 1987) (incorporating additional term into parties' agreement by virtue of repeated appearance in prior transactions). In *Schulze*, a dispute arose regarding the enforceability of a pre-printed term that appeared in a series of invoices between a food products seller and one of its buyers. 831 F.2d 709 at 711. The seller had included the same term in nine prior transactions, to which the buyer had never objected. *Id.* Declaring the term non-materially altering, the *Schulze* court reasoned that the buyer had "ample notice" that the same term would appear in the tenth invoice and needed only voice its objection to prevent its inclusion in the agreement. *Id.* at 715.

107. Compare *Schulze*, 831 F.2d at 714-15 (asserting ten transactions sufficient to remove materiality of additional term), and *Tupman Thurlow Co. v. Woolf Intl Corp.*, 682 N.E.2d 1378, 1381 (Mass. App. Ct. 1997) (incorporating additional terms based on extensive history of prior contracting), with *Trans-Aire Int'l, Inc. v. N. Adhesive Co.*, 882 F.2d 1254, 1262 n.9 (7th Cir. 1989) (suggesting more than "number of forms exchanged" required to create course of dealing), and *Schubtex*, 399 N.E.2d at 1156 (holding repeated appearance of material term insufficient to overcome requirement of express assent).

For example, in *Schubtex, Inc. v. Allen Snyder, Inc.*,<sup>108</sup> the seller of synthetic textiles, Snyder, sued to enforce an arbitration clause it always included in its invoices when shipping goods to the buyer, Schubtex.<sup>109</sup> While the lower court held that the arbitration clause became part of the contract by way of the parties' course of dealing, the Court of Appeals for New York reversed on the grounds that the parties failed to establish a sufficient course of conduct to support inclusion of the clause.<sup>110</sup> In essence, the *Schubtex* court accepted the notion that a course of dealing could erode the material nature of a contract term—which would otherwise prevent such a term from becoming part of the contract—but only where the parties have somehow acknowledged by their conduct that the term became part of the agreement.<sup>111</sup>

### III. ANALYSIS

The circumstances in *Borden* relieved the court from having to resolve whether a course of dealing can substitute for express assent to an additional material term or, alternatively, diminish the term's designation as material.<sup>112</sup> As illustrated in the preceding sections, the courts that have addressed these issues have come to different conclusions, leaving course of dealing with an uncertain significance when operating within the boundaries of section 2-207.<sup>113</sup> Underlying this uncertainty is perhaps a more fundamental

---

108. 399 N.E.2d 1154 (N.Y. 1979).

109. *Id.* at 1155 (discussing procedural history). After Snyder sought arbitration over an alleged breach of contract, Schubtex denied the existence of any agreement to arbitrate. *Id.*

110. *Id.* at 1156 (ruling prior dealings cannot imply acceptance of materially altering terms without proof of conforming conduct).

111. *See id.* (refusing to include arbitration clause because parties never exhibited agreement to arbitrate). The court determined that “[a]lthough evidence of a prior course of dealing is relevant in determining whether the parties have agreed to submit their dispute to arbitration . . . such a determination must be supported by evidence which affirmatively establishes that the parties *expressly agreed* to arbitrate their disputes.” *Id.* (emphasis added). Applying this rationale to the facts at hand, the *Schubtex* court held that the parties' course of dealing did not incorporate the arbitration clause into their agreement:

[I]n each of the two prior dealings relied upon by the courts below, the only reference to arbitration appears in the written confirmation of order form sent to the buyer after the negotiation of an oral contract. There is no evidence that in their prior dealings the parties ever arbitrated any dispute pursuant to the arbitration clause or that the clause was material in their negotiations. In this situation . . . no binding agreement to arbitrate could have arisen.

*Id.*

112. *See supra* note 77 and accompanying text (highlighting court's refusal to recognize defendant's arguments).

113. *See supra* notes 79-111 and accompanying text (examining cases in which course of dealing has received inconsistent treatment). Compare *Waukesha Foundry, Inc. v. Indus. Eng'g., Inc.*, 91 F.3d 1002, 1009 (7th Cir. 1996) (holding course of dealing can substitute for express assent to materially altering terms), and *Tupman Thurlow Co. v. Woolf Int'l Corp.*, 682 N.E.2d 1378, 1380-81 (Mass. App. Ct. 1997) (allowing evidence of repeated transactions to affect material nature of additional contract terms), with *Step-Saver Data Sys. v. Wyse Tech. & The Software Link, Inc.*, 939 F.2d 91, 103-04 (3d Cir. 1991) (calling for term-by-term

disagreement over what constitutes a course of dealing in the first place.<sup>114</sup> Each new ruling that takes a different direction on this issue stands to leave contracting parties with less certainty as to their rights and obligations.<sup>115</sup> While the states are undoubtedly entitled to interpret the U.C.C.'s provisions however they see fit, parties who rely on the Code to enforce their contractual rights will nevertheless benefit from a more uniform and consistent statement of law.<sup>116</sup>

#### A. What Constitutes a True Course of Dealing?

Beyond its purely quantitative description as a "sequence of conduct," section 1-205 provides that a course of dealing represents behavior establishing "a common basis of understanding for interpreting [the parties'] expressions and other conduct."<sup>117</sup> This language seems to suggest a qualitative requirement to establishing a valid course of dealing; however, the Code authors did not elaborate on exactly what it takes for the parties to form that common understanding.<sup>118</sup> Therefore, it remains unsettled whether the Code requires *more* than just a repetitive exchange of contracts before a course of dealing can influence the meaning of its terms or impose additional obligations upon the parties.<sup>119</sup> As is often the case with matters of statutory interpretation,

---

analysis before acknowledging existence of course of dealing), and *Schubtex*, 399 N.E.2d at 1156 (denying inclusion of materially altering term without express assent).

114. See *infra* notes 122-129 and accompanying text (discussing inconsistent treatment of course of dealing formation).

115. See Keating, *supra* note 50, at 2688 (discussing uncertainty of outcomes when commercial parties rely on section 2-207).

116. See Keating, *supra* note 50, at 2688 (cautioning uncertain application of section 2-207 principles promotes increased litigation). Although the ALI and NCCUSL amended section 2-207 in 2003, the new section does not resolve these issues. See WHITE & SUMMERS, *supra* note 54, § 6-2, at 184-85 (predicting course of dealing will continue to impact contract formation issues under amended section 2-207). Amended section 2-207 states, in part, "[I]f . . . a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are . . . terms, whether in a record or not, to which both parties agree . . ." U.C.C. § 2-207(3) (2003) (emphasis added). According to Comment 4 of amended section 2-207, "[a]n 'agreement' may include terms derived from a course of performance, a course of dealing, and usage of trade." U.C.C. § 2-207 cmt. 4 (2003). Further, Comment 3 states that "[t]here is a variety of verbal and nonverbal behavior that may suggest agreement to another's record." U.C.C. § 2-207 cmt. 3 (2003). In assessing the potential issues presented by amended section 2-207, White and Summers offer that the new section language should give

courts latitude to find agreement in the verbal and nonverbal behavior of the parties even when the terms to which they have agreed is not included in the records that either has sent, and even when the term agreed to is contradicted by the other's form. We predict that this will be the battlefield under amended section 2-207.

WHITE & SUMMERS, *supra* note 54, § 6-2, at 184-85.

117. See U.C.C. § 1-205(1) (1978) (defining course of dealing).

118. See Goetz & Scott, *supra* note 33, at 276 (noting difficulty in distinguishing patterns of conduct from spurious instances).

119. See *Trans-Aire Int'l, Inc. v. N. Adhesive Co.*, 882 F.2d 1254, 1262 n.9 (7th Cir. 1989) (questioning

the courts have not always agreed on the significance of section 1-205.<sup>120</sup>

One approach to establishing a course of dealing focuses solely on the number of prior transactions that contain the term.<sup>121</sup> This approach is demonstrated in *Tupman*, where the court ruled on the existence of a course of dealing based primarily on the quantity of transactions the parties completed.<sup>122</sup> The court found it irrelevant that the buyer had never read or acted on the terms appearing in the series of invoices, concluding that he was bound by the conditions set forth therein.<sup>123</sup>

Another approach to recognizing a course of dealing looks not only to the number of transactions, but also to the parties' actual awareness of the terms.<sup>124</sup> The courts in *Schubtex* and *Step-Saver* demonstrated this approach by requiring more than just a repeated exchange of invoices to establish a course of dealing between the parties.<sup>125</sup> In *Schubtex*, the court refused to add an arbitration clause to the parties' agreement on the basis that no course of dealing existed with respect to that term in particular.<sup>126</sup> The court held that there was no evidence of past arbitration pursuant to the clause and that the term was not material in the parties' negotiations.<sup>127</sup> Likewise, the court in *Step-Saver* held that no course of dealing existed between the parties with respect to a disclaimer of warranties inserted into a series of invoices because there had never been a disagreement over the presence of this term.<sup>128</sup> Because the parties never acted in recognition of the term, the court surmised that section 1-

---

whether number of forms exchanged alone can establish course of dealing between contracting parties).

120. See *Step-Saver Data Sys., Inc. v. Wyse Tech. & The Software Link, Inc.*, 939 F.2d 91, 104 (3d Cir. 1991) (requiring party's express assent or action before recognizing course of dealing); *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979) (limiting impact of course of dealing on disputed terms). Compare *Trans-Aire*, 882 F.2d at 1262 n.9 (requiring more than sheer number of transactions to recognize course of dealing between parties), with *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 714-15 (7th Cir. 1987) (asserting high number of transactions presumes parties' acceptance of additional terms), and *Tupman Thurlow Co. v. Woolf Int'l Corp.*, 682 N.E.2d 1378, 1381-82 (Mass. App. Ct. 1997) (focusing primarily on quantity of prior transactions to establish course of dealing).

121. See *infra* note 122-123 and accompanying text (explaining purely qualitative approach).

122. See *Tupman*, 682 N.E.2d at 1381-82 (ruling additional term became part of parties' contract by operation of section 2-207); see also *Schulze*, 831 F.2d at 715 (presuming buyer assented to additional terms after receiving same invoice ten times without objection).

123. *Tupman* at 1381 (pointing to existence of "many other prior sales" as primary basis for enforcing provision). The court was persuaded by the fact that the seller had followed the same procedure in every one of the sixty-five transactions with the buyer. *Id.*

124. See *infra* notes 125-129 and accompanying text (explaining approach requiring recognition of additional term)

125. See *Step-Saver*, 939 F.2d at 104 (requiring express assent or action with respect to additional term); *Schubtex*, 399 N.E.2d at 1156 (requiring express assent to additional term).

126. See *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979) (pointing to lack of evidence necessary to establish course of dealing).

127. *Id.* (stating reasons for not recognizing course of dealing between parties).

128. See *Step-Saver Data Sys., Inc. v. Wyse Tech. & The Software Link, Inc.*, 939 F.2d 91, 103 (3d Cir. 1991) (considering whether parties' conduct with respect to warranty disclaimer created course of dealing).

205 could not add it to the contract.<sup>129</sup>

Courts should adopt the latter approach because the courts in *Schubtex* and *Step-Saver* correctly ruled that a course of dealing cannot arise on the basis of quantitative analysis alone.<sup>130</sup> To recognize a course of dealing as a mere tally of exchanges between two contracting parties would undermine the central purpose of section 2-207 because it would perpetuate the problem of giving one of the parties the “last shot.”<sup>131</sup> Under the common law, conduct alone can trigger acceptance of *all* additional terms contained in a counter-offer; however, section 2-207 aims to mitigate this effect in situations involving the exchange of non-matching forms.<sup>132</sup> Terms that are materially altering are excluded under section 2-207, absent a showing by the accepting party that it agrees to be bound by more terms.<sup>133</sup> Enforcing *all* terms—regardless of materiality—simply because the accepting party received them in a series of prior exchanges unreasonably assumes that the party not only acknowledged their existence but also acceded to the obligations therein.<sup>134</sup> This would violate the essential purpose of section 2-207 and arguably restore the “last-shot” nature of common law contract interpretation that the Code authors sought to eliminate.<sup>135</sup> Accordingly, courts should determine the existence of a course of dealing on a term-by-term basis: only when there is evidence that the parties have acted by words or actions to acknowledge a specific term should a court allow their prior dealings to impact the term’s enforcement.<sup>136</sup>

---

129. *Id.* at 105 (ruling course of dealing not applicable to facts before court).

130. *See supra* notes 126-129 and accompanying text (explaining proper analysis of actual conduct between parties before granting significance to course of dealing).

131. *See Keating, supra* note 50, at 2684-85 (explaining section 2-207’s remedial purpose of preventing either party from getting “last shot”).

132. *See Keating, supra* note 50, at 2684 (explaining common law mirror image rule and enactment of section 2-207 as necessary response); *see also supra* note 55 and accompanying text (discussing purpose behind enactment of section 2-207).

133. *See* U.C.C. § 2-207 cmt. 3 (1978) (providing instruction on treatment of additional terms).

134. *See Step-Saver Data Sys., Inc. v. Wyse Tech. & The Software Link, Inc.*, 939 F.2d 91, 104 (3d Cir. 1991) (explaining limited significance of additional terms standing alone). According to the Third Circuit in *Step-Saver*,

[t]he repeated exchange of forms by the parties only tells Step-Saver that TSL *desires* certain terms. Given TSL’s failure to obtain Step-Saver’s express assent to these terms before it will ship the program, Step-Saver can reasonably believe that, while TSL desires certain terms, it has agreed to do business on other terms—those terms expressly agreed upon by the parties.

*Id.*

135. *See Keating, supra* note 51, at 2684 (explaining “last shot” doctrine and its effect on contract formation).

136. *See Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979) (requiring parties to show actual conduct before recognizing course of dealing).

### B. Course of Dealing as a Substitute for Express Assent

The next issue to address is what role a true course of dealing should play in deciding whether a materially altering term should become part of an exchange-of-forms contract.<sup>137</sup> Under section 2-207, materially altering terms do not become part of the agreement unless “expressly agreed to by the other party.”<sup>138</sup> However, as illustrated by court decisions over the years, the existence of a course of dealing between parties has cast doubt on whether express assent is truly required.<sup>139</sup> In light of these cases, courts will have to decide whether course of dealing’s role in this context is appropriate.<sup>140</sup>

One justification for requiring express assent to the addition of a materially altering term is to protect the party from unbargained-for liability.<sup>141</sup> Oftentimes, a materially altering term seeks to limit the range of remedies a party can pursue in the event of the other’s breach.<sup>142</sup> As a consequence, courts commonly find it unjust to enforce such terms upon anything less than the clearest expression of assent.<sup>143</sup> Nevertheless, the U.C.C. provides that an established course of dealing can operate to supply additional contract terms when the writings between the parties are silent on the issue.<sup>144</sup> At some point, these two principles clash and create uncertainty on the issue of when an established course of dealing should supersede the protective requirement of express assent.<sup>145</sup>

The case of *Waukesha* elucidates this point of conflict.<sup>146</sup> The parties disputed the effect of warranty disclaimers appearing in invoices the seller used

---

137. See WHITE & SUMMERS, *supra* note 34, § 3-3, at 119 (listing course of dealing’s role in determining section 2-207 materiality). White and Summers contend that course of dealing “may define a material alteration under section 2-207,” but do not expound on the circumstances giving rise to such an application. *Id.* (emphasis added).

138. See U.C.C. § 2-207 cmt. 3 (1978) (providing guidance on how materially altering terms may become part of agreements).

139. See *Waukesha Foundry, Inc., v. Indus. Eng’g, Inc.*, 91 F.3d 1002, 1009 (7th Cir. 1996) (allowing course of dealing to imply assent to additional terms where express assent otherwise required); see also *supra* Part II.C.1 (discussing cases ruling on course of dealing’s impact on express assent requirement).

140. See *infra* notes 146-153 and accompanying text (discussing proper formation of course of dealing between parties).

141. See Marks, *supra* note 51, at 516-29 (reviewing different tests to determine whether remedy limitation terms constitute material alteration).

142. See Marks, *supra* note 51, at 525 (citing shift in legal liability as common characteristic of materially altering terms).

143. See *Diskin v. J.P. Stevens & Co.*, 836 F.2d 47, 51 (1st Cir. 1987) (declining to enforce agreement to arbitrate due to lack of express assent).

144. See *supra* note 36 and accompanying text (explaining circumstances under which course of dealing supplies additional contract terms).

145. See *infra* notes 146-151 and accompanying text (discussing case in which course of dealing satisfied express assent requirement).

146. See *Waukesha Foundry, Inc., v. Indus. Eng’g, Inc.*, 91 F.3d 1002, 1009 (7th Cir. 1996) (enforcing materially altering term based on evidence of implied assent).

over the course of their relationship.<sup>147</sup> While the buyer denied ever expressly assenting to the disclaimers, the court pointed to prior instances in which the buyer had actually availed itself of the specific remedies provided in the additional language.<sup>148</sup> While the court upheld the warranty provision in the contract, it ruled this way not because the buyer had given express assent, but because of the buyer's affirmative *conduct* showing its intent to comply with the additional terms.<sup>149</sup>

The *Waukesha* court correctly found no justifiable reason to require express assent where conduct unequivocally indicates intent to be bound.<sup>150</sup> To require express assent in these circumstances would potentially allow one party to benefit from contract provisions when convenient, only to escape liability when circumstances change.<sup>151</sup> More importantly, strictly enforcing an express assent requirement would seem to ignore the U.C.C.'s philosophy of contract interpretation—to ascertain the true intent of the parties.<sup>152</sup> Therefore, where a course of dealing establishes that the parties have acted in compliance with a material term, even without express assent, the conduct should suffice to incorporate the term into the parties' agreement.<sup>153</sup>

### C. Course of Dealing's Effect on the Materiality of a Contract Term

Even if a court determines that nothing short of express assent will suffice to add a materially altering term to a contract, the party seeking to enforce that term can still attack its designation as "material" through the existence of a true course of dealing.<sup>154</sup> Essentially, the party can argue that even though the term would be material if analyzed in the context of an isolated transaction, its repeated appearance in prior transactions would reduce it to nothing more than another non-material addition to the agreement.<sup>155</sup> The validity of this argument has found support in the courts; in fact, several jurisdictions have recognized the potential for a course of dealing to erode the material nature of a contract term.<sup>156</sup> In each of these cases, however, the courts confirmed the

---

147. *Id.* at 1005 (detailing dispute over inclusion of warranty disclaimers in contract).

148. *Id.* at 1009 (noting buyer's actions in compliance with limited remedy provisions).

149. *Id.* (concluding buyer's actions constituted acceptance of warranty terms).

150. *See Waukesha*, 91 F.3d at 1009 (inferring consent based on prior dealings).

151. *See id.* (explaining justification for not requiring express assent). The court reasoned that, because of the buyer's prior conduct, it could not now "foist its own financial difficulties onto Waukesha's shoulders." *Id.*

152. *See Kirst*, *supra* note 21, at 825 (asserting U.C.C. requires parties' intent to control contract interpretation).

153. *See Waukesha Foundry, Inc., v. Indus. Eng'g, Inc.*, 91 F.3d 1002, 1009 (7th Cir. 1996) (concluding party's conduct more than adequate to substitute for express assent to additional terms).

154. *See Borden Chem., Inc. v. Jahn Foundry Corp.*, 834 N.E.2d 1227, 1233 (Mass. App. Ct. 2005) (stating defendant's claim that course of dealing reduced significance of warranty disclaimer).

155. *See id.* (summarizing argument for immateriality of term based on prior dealings).

156. *See Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 714-15 (7th Cir. 1987) (incorporating term into parties' agreement after evidence showed same term appeared in numerous prior transactions); *Tupman Thurlow Co. v. Woolf Int'l Corp.*, 682 N.E.2d 1378, 1381 (Mass. App. Ct. 1997)

existence of a course of dealing based upon the number of exchanges the parties completed and gave no further attention to the parties' actual conduct as it related to the disputed term.<sup>157</sup>

Under the more exacting materiality standard set forth in *Schubtex* and *Step-Saver*, perhaps these courts would have refused to acknowledge a course of dealing had ever existed.<sup>158</sup> In *Tupman*, for example, the court relied only upon the fact that the buyer and seller had previously engaged in sixty-five identical transactions before declaring an arbitration clause to be non-materially altering.<sup>159</sup> Neither party, however, produced evidence that the parties had acted upon the arbitration clause in any of their previous dealings; in fact, the buyer claimed he had never even read the invoices.<sup>160</sup> In light of these facts, the court should have refused to recognize that a true course of dealing existed with respect to the arbitration clause because the parties never acted in recognition of the term.<sup>161</sup> Without recognition as required in *Schubtex* and *Step-Saver*, the parties' prior course of dealing would have had no significance on the clause's materiality, and the clause presumably would have been excluded from the agreement.<sup>162</sup>

In the event that a court *can* recognize a true course of dealing with respect to a disputed contract term, it logically follows that the term should lose its material designation.<sup>163</sup> Under U.C.C. section 2-207, a term "materially alter[s]" a contract if it results in surprise or hardship upon the non-assenting party.<sup>164</sup> Where evidence shows that a non-assenting party complied with a disputed term, it would be difficult for that party to claim surprise if the same

---

(including arbitration clause into contract based on extensive prior dealings between parties).

157. See *Schulze*, 831 F.2d at 715 (presuming term not materially altering based on party's failure to object in nine prior instances); *Tupman*, 682 N.E.2d at 1381 (relying on evidence of overall history between parties).

158. See *supra* notes 125-129 and accompanying text (endorsing additional analysis before recognizing true course of dealing in exchange-of-forms scenario).

159. See *Tupman*, 682 N.E.2d at 1381 (focusing reasoning on length of history and quantity of prior transaction).

160. See *id.* at 1381 n.10 (noting buyer never read terms on seller's invoice).

161. See *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979) (requiring evidence of actual conduct between parties to recognize valid course of dealing).

162. See *id.* at 1156 (holding prior dealings alone insufficient to impact contract term's materiality). In contrast to *Tupman*, the court in *Schubtex* correctly inquired into the parties' actual conduct before deciding whether their course of dealing affected the materiality of an arbitration clause added to the seller's invoices. Compare *Tupman Thurlow Co. v. Woolf Int'l Corp.*, 682 N.E.2d 1378, 1380-81 (Mass. App. Ct. 1997) (focusing on number of prior transactions in recognizing existence of parties' course of dealing), with *Schubtex*, 399 N.E.2d at 1156 (requiring evidence of conduct with respect to specific term before course of dealing could arise). Due to the lack of evidence suggesting the buyer was even aware of the term, the *Schubtex* court refused to recognize a course of dealing as it pertained to the arbitration clause. 399 N.E.2d at 1156. As a result, the past dealings between the parties did not influence the court's finding that the clause represented a material alteration. See *id.*

163. See *infra* notes 164-167 and accompanying text (arguing valid course of dealing should undermine materiality of additional contract terms).

164. See U.C.C. § 2-207 cmt. 4 (1978) (elaborating on characteristics of materially altering terms).

term appeared in identical future transactions.<sup>165</sup> Likewise, it would be just as difficult for a party to establish undue hardship where the party had previously acknowledged the term's presence without objection.<sup>166</sup> For these reasons, a properly established course of dealing should relieve a contract term of its material designation.<sup>167</sup>

#### IV. CONCLUSION

The addition of Article 2 to the U.C.C. represented a much needed revision of common-law contract interpretation. Of all its important provisions, section 1-205 may be the most significant to accomplishing the intentions of its authors. As both a safeguard for innocent parties and a restraining device against opportunistic behavior, it should continue to guide contract interpretation for years to come.

When properly applied in contract interpretation, an established course of dealing between two parties can protect their bargained-for interests in the event the terms of their written agreement fail to do so. When applied improperly, however, recognition of a course of dealing can just as easily misrepresent those interests and impose unintended obligations upon a party. Such misapplication poses the most trouble under section 2-207. Here, the Code not only allows two parties to contract through the exchange of non-matching forms, but further provides that additional terms unilaterally submitted by one of the parties may become part of the contract in certain circumstances. By design, the rights and liabilities of the parties hinge on the court's interpretation of multifaceted words such as "express," "material," "hardship," and "surprise." When considered in the context of the parties' contracting history, these words subject themselves to different meanings. Consequently, courts must avoid the temptation to prematurely recognize a course of dealing when no such implication exists.

Without question, a properly established course of dealing should play a significant role within the boundaries of section 2-207. Where an undisputed pattern of conduct indicates acceptance of an additional term, courts should not require express assent. Likewise, where the parties have repeatedly and without objection recognized the existence of a specific term, a court should

---

165. See *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir. 1987) (doubting possibility of surprise where buyer knew of term's appearance in previous transactions); *Barliant v. Follett Corp.*, 483 N.E.2d 1312, 1316 (Ill. App. Ct. 1985) (holding clearly marked terms appearing in twenty-four prior invoices precluded recipient's claim of surprise).

166. See *Union Carbide Corp. v. Oscar Mayer Food Corp.*, 947 F.2d 1333, 1336-37 (7th Cir. 1991) (withholding objection to materially altering term over numerous transactions relieves term of material designation). The court in *Union Carbide* did not reject the possibility that situations might arise in which a party is ultimately relieved of performing the contract in dispute; however, even in these rare cases, excess hardship would not form the legal grounds for such relief. See *id.*

167. See *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979) (asserting evidence of proper course of dealing may suffice to incorporate additional terms).

2008] *INTERPRETING COURSE OF DEALING IN A BATTLE-OF-FORMS DISPUTE* 695

not hesitate to strip that term of its materiality. In each case, the spirit of section 2-207 is satisfied, even if its rigid application is not, and it is the former that courts should enforce. To rule differently, in either situation, would preserve the formalities of contract interpretation that the Code sought to eliminate. After all, the Code itself requires the *essence* of the rules to control their application and not their literal meaning.<sup>168</sup>

*Stephen W. Ranere*

---

168. See U.C.C. § 1-102 (1999). Section 1-102 states that the Code “shall be liberally construed and applied to promote its underlying purposes and policies,” one of which is “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.” *Id.*