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# THE STANDARDIZED AGREEMENT PHENOMENA IN THE RESTATEMENT (SECOND) OF CONTRACTS

*John E. Murray, Jr.*†

## OVERVIEW

The American Law Institute is committed to the self-evident truth that Restatements of the law must be kept current.<sup>1</sup> It has produced six completed revisions of Restatements of the law in less than a quarter century and more are on the way.<sup>2</sup> The most recent, completed revision is the Restatement (Second) of Contracts. It is important to evaluate this new version of the most revered Restatement of the law. The original Restatement of Contracts was unique not only because it was the first Restatement. It was largely the product of a contracts scholar who had been elevated to oracular standing before the original *Restatement* was completed. Inevitably, Professor Williston lent this Restatement of the law a strong presumption of reliability. It was destined to be a classic Restatement and it achieved that destiny. Notwithstanding the commitment to keep the Restatements current, how does one approach the modernization of a classic? The Director of the American Law Institute properly responds: with "respect and tenderness."<sup>3</sup> The extent of needed change cannot be known until the work of revision is underway. What did the revisers discover? The official response is revealing:

As the work proceeded, it uncovered relatively little need for major substantive revision . . . , although the Uniform Commercial Code inspired a number of significant additions. The opportunities presented for improving the black letter formulations involved primarily the mode of presentation: matters of organization, where changes in the ordering or scope of topics enhanced clarity or reduced redundancy, and matters of drafting, where revision served the interest of compression, simplification, precision or refinement of analysis. No less significant than alterations of this order was the profound shift in style inaugurated by Restatement, Second: the introduction of extensive commentary explaining and expounding the black letter; the publication of Reporter's Notes canvassing the leading authoritative

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<sup>1</sup> H. Wechsler, *Foreword* to RESTATEMENT (SECOND) OF CONTRACTS at vii (1979).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at viii.

sources; the description and analysis of widespread statutory development.<sup>4</sup>

This characterization of the revision is in keeping with what one would reasonably expect of the process of revising a classic work. Absent some statutory additions emanating primarily from the Uniform Commercial Code, the official characterization suggests that there was little need for substantive revision and that the primary opportunities for improvement were in the mode of presentation. The only "profound" change is one of "style." This view of the revision is difficult to reconcile with the official conclusion: "It does not denigrate the 1932 volumes to say that the revisions and additions here presented greatly augment their quality. This is, indeed, very close to a new work."<sup>5</sup>

How can a revision that does not involve any significant substantive change (apart from necessary statutory "additions") and that concentrates on editorial functions such as organization, simplification, the removal of redundancy, and stylistic modification be viewed as "greatly augmenting" the quality of a classic to such an extent that it becomes virtually a "new work"? This paradoxical description of the process and results of the revision is some evidence of the impossible task that the Reporters,<sup>6</sup> their consultants, and the advisers faced. The inevitable constraints under which they had to perform brings to mind the now overused observation of Dr. Johnson: It is not remarkable that they could not do it well; it is remarkable that they could do it at all.<sup>7</sup>

Chief among the constraints was the reconciliation of Williston's classical, monistic view of contract law, which allowed for a black-letter approach with little comment, with Corbin's view that rules of law are flexible and must take account of economic, social, moral, and ethical considerations. It was, therefore, essential that there be a "profound shift in style" through "the introduction of extensive commentary explaining and expounding the black letter."<sup>8</sup> The new style is highly reminiscent of the style of Article Two of the Uniform Commercial Code: when "an approach by statute . . . [is] dubious . . . and . . . awkward,"<sup>9</sup> the "official"<sup>10</sup> comments are of critical importance.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Professor Robert Braucher of the Harvard Law School served as Reporter until 1971. He was succeeded by Professor E. Allan Farnsworth of Columbia University School of Law, who completed the project.

<sup>7</sup> J. BOSWELL, *LIFE OF JOHNSON* 327 (2d ed. 1953) ("It is not done well; but you are surprised to find it done at all.").

<sup>8</sup> H. Wechsler, *supra* note 1, at viii.

<sup>9</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

<sup>10</sup> Although many courts have relied upon the Comments in construing and applying particular Code sections, they have not been enacted into law. Therefore, although the Comments may be useful in determining what was intended by a particular Code section, in case of any conflict between the Code language and a Comment, the Code must control.

With the success of the Uniform Commercial Code, it was inevitable that all contract law would be deeply influenced by that semi-permanent<sup>11</sup> piece of legislation, which insisted upon radical changes in classical contract law. It would be impossible to construct a new Restatement absent a careful recognition of Llewellynesque leeways.<sup>12</sup> Because the Code was co-sponsored by the American Law Institute<sup>13</sup> and was designed to control all contracts for the sale of goods, the influence of Llewellyn's radical views on our case law of offer and acceptance, as well as on other issues traditionally considered under the rubric of contract law, would have a significant effect on any meaningful new Restatement of Contracts.

Had anyone in the early sixties attempted to play the role of Williston, he or she would have failed. Williston was opposed to the enactment of the UCC,<sup>14</sup> principally because the underlying philosophy of Article Two and the express philosophy of Corbin favored pliable rules of law that could be modified or even discarded when they did not work. In Corbin's view, anything that sounded like a permanent rule was dubious.<sup>15</sup> And not only was Corbin a consultant to the new Restatement; those charged with its creation were, necessarily, heavily "Corbinized" before they assumed their new duties. Corbin was also much more tolerant than Williston of differences in case law.<sup>16</sup>

The case law that the *Restatement Second* drafters would have to consider was itself heavily influenced by Corbin. Nor were other influential voices in contract law to be ignored. The important work of Lon Fuller, for example, undoubtedly influenced the thinking of the Reporter and

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<sup>11</sup> U.C.C. § 1-102, Comment 1.

<sup>12</sup> See Carroll, *Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139 (1970); Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

<sup>13</sup> The American Law Institute is a voluntary organization composed of approximately 1,500 judges, law professors, and leading members of the Bar. In existence since 1923, the Institute was organized for the purpose of improving the law and is known primarily for its series of Restatements of the law on various subjects, including contracts, torts, agency, and trusts.

In 1940 the National Conference of Commissioners on Uniform State Laws adopted a proposal to prepare a uniform commercial code that would modernize and coordinate the Uniform Sales Act, the Uniform Negotiable Instruments Law, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act, and all other uniform acts existing on closely related commercial problems. The American Law Institute joined in the undertaking the following year, and the result, after many drafts and re-drafts, is the Uniform Commercial Code.

<sup>14</sup> Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

<sup>15</sup> 1 A. CORBIN, CORBIN ON CONTRACTS § 3, at 7-8 (1963).

<sup>16</sup> *Id.* § 23, at 67-70.

Advisers.<sup>17</sup> Finally, there was the constraint of working in the shadow of the first *Restatement*. To paraphrase the Director, it does not denigrate the other Restatements to suggest that the Restatement of Contracts—the singular, classic, original Restatement of the law—was, through the sheer authority of Samuel Williston, in a special class.

The Reporters and Advisers are to be commended for their diligence and patience in undertaking to produce a work which could not possibly have the impact of its predecessor. Compromise and reconciliation of worthy views are high values in any Restatement of the law. Absent the authority of Williston, however, and influenced by the philosophy of Corbin, compromise and reconciliation became the apotheosis of the *Restatement Second*. The standard of “all things to all men,” although dictated by the constraints, produced a *Restatement Second* that will have even less influence than would a new *Restatement*. The attempt to incorporate Corbin’s views, while paying deference to Williston’s, may have resulted in a *Restatement Second* that neither scholar would have preferred. One clear example of this result is found in the treatment of the parol evidence rule where, to the detriment of courts and lawyers who look to the *Restatement* for guidance, virtually every view appears to be represented.<sup>18</sup> Again, lacking the authority of Williston and pursuing the anti-dogmatic approach of Corbin, inevitably the drafters attempted to reconcile the irreconcilable with results that may suggest distinctions without differences.<sup>19</sup>

One of the most difficult tasks confronting the revisers was the integration of the new contract law of Article Two of the Uniform Commercial Code. Again, the official position of the American Law Institute was that the Code “inspired a number of significant additions.”<sup>20</sup> The challenge was to assimilate into the fabric of general contract law the sometimes radical changes embodied in a Code conceived to control contracts for the sale of goods. The challenge was simultaneously an opportunity to elaborate and to clarify the modifications of classical contract law in Article Two. Such elaboration and clarification can be extremely useful, particularly where a Code section manifests conceptual or drafting deficiencies. In isolated situations, the *Restatement Second* succeeds admirably in elaborating and clarifying the operative effect of a particular Code section.<sup>21</sup> Unfortunately, the *Restatement Second* does not meet this challenge or grasp this opportunity in the majority of in-

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<sup>17</sup> See, e.g., the Reporter’s notes in RESTATEMENT (SECOND) OF CONTRACTS §§ 50, 71, 73, 84, 87. See also the many other authorities cited in the Reporter’s Notes.

<sup>18</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 213-217 (1979). See also Murray, *The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975).

<sup>19</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 53, 130 (1979).

<sup>20</sup> H. Wechsler, *supra* note 1, at viii.

<sup>21</sup> Compare U.C.C. § 2-206 with RESTATEMENT (SECOND) OF CONTRACTS §§ 30, 32

stances in which the integration of Code concepts is essential. This Article will examine these lost opportunities as exemplified by the *Restatement Second*'s treatment of standardized agreements<sup>22</sup> and the related subjects of the nonmatching acceptance ("the battle of the forms")<sup>23</sup> and unconscionability.<sup>24</sup>

There may be no more perplexing current problems in contract law than those emanating from the massive use of standardized, printed ("pad") forms to evidence the contract. Standard forms are probably the evidence of the deal in up to ninety-nine percent of all contracts.<sup>25</sup> Allowing for some exaggeration, there can be no question that the overwhelming majority of contracts made daily in the United States are evidenced by printed forms. Among the plethora of problems that this development has created, the most difficult question can be stated rather simply: Since virtually no one (consumer or merchant) bothers to read the printed forms that are in regular use, is the non-drafting party bound by all of the terms contained therein? Even for those who would answer yes without hesitation, there must be exceptions.

One exception would reject those documents that cannot reasonably be viewed as contractual, *e.g.*, receipts, parcel checks, invoices, and the like.<sup>26</sup> A second exception would nullify a printed form signed by the non-drafting party under physical duress, fraud, or misrepresentation.<sup>27</sup> But what of those forms the parties intend to be the evidence of their contract although they neither read nor understand the entire form? One response which the classical approach favors may be called the flagellant view. This view binds the parties to the literal terms of the printed form; if the non-drafting party later objects to a term on the ground that he neither read nor understood it, he is told to live with the consequences of his negligence in the hope that he will never sin again.

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(1979). See also Murray, *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785 (1968).

<sup>22</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

<sup>23</sup> *Id.* § 59.

<sup>24</sup> *Id.* § 208.

<sup>25</sup> Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

<sup>26</sup> *Culbreth v. Simone*, 511 F. Supp. 906 (E.D. Pa. 1981) (condition on money order did not become term of contract); *Birmingham Television Corp. v. Water Works*, 292 Ala. 147, 290 So. 2d 636 (1974) (term on back of warehouse receipt not part of contract); *Goldstein v. Harris*, 24 Ala. App. 3, 130 So. 313 (term on storage receipt for coat not binding on bailor), *cert. denied*, 221 Ala. 612, 130 So. 315 (1930); *Iowa-Missouri Walnut Co. v. Grahl*, 237 Mo. App. 1093, 170 S.W.2d 437 (1943) (term on back of check did not become part of contract); *Charles v. Charles*, 478 S.W.2d 133 (Tex. 1972) (written statement on back of promissory note not part of contract); *Green's Ex'rs v. Smith*, 146 Va. 442, 131 S.E. 846 (1926) (terms on circulars enclosed with monthly bills under the contract did not become part of contract).

<sup>27</sup> *United States v. 1,557.28 Acres of Land*, 486 F.2d 445 (10th Cir. 1973); *Laemmar v. J. Walter Thompson Co.*, 435 F.2d 680 (7th Cir. 1970); *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 468 Pa. 103, 360 A.2d 200 (1976); *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971).

This is the view of those who insist that certainty and stability are the highest values in contract law. A child who touches the hot stove will be careful to avoid a repetition of that painful experience. A party who suffers a loss occasioned by a printed clause that he neither read nor understood, however, undoubtedly will enter into subsequent contracts evidenced by forms which he, again, will neither read nor understand. For consumers and merchants, the pain and suffering of attempting to read and understand every printed form would be greater than the pain they suffer as a result of occasionally being bound by unread and uncomprehended printed terms. After all, many contracts between merchants may not be contracts at the time the printed forms are exchanged,<sup>28</sup> but become contracts by conduct when the goods are shipped and accepted. More often than not, nothing goes awry. The exchange of printed clauses is, essentially, a waste of time. If lightning strikes and one is bound by a bizarre, oppressive, or unexpected term, so be it. The conclusion is inescapable: Merchants and consumers would not undergo the great suffering necessitated by a perusal of printed terms, even if time allowed—which, of course, it would not.

Because lawyers and judges deal with situations that go awry (the "hospital" cases in Llewellynese), it is unsatisfactory to insist that someone should always be bound by printed terms that he neither read nor understood, even if he would be willing, on balance, to assume such a risk in lieu of being forced to peruse the printed terms of every contract document that he encounters. The private law that a contract creates will be recognized as legally binding only if it conforms to some rational standard. The classic standard of contract enforceability is the manifestation of volition or free choice—the essence of agreement. As Professor Slawson suggests, "the 'government' it creates is by its nature 'government by and with the consent of the governed.'"<sup>29</sup> Because in many deals the printed form is created by one party with intent to benefit that party, the other party, who neither reads nor understands the printed form, is not exercising that quintessential element of contract formation—volition, or true assent. Even if all non-drafting form-signers were forced to read and understand the last scintilla of each printed clause, the drafting party typically would be in a superior bargaining position. This would enable him to dictate the terms of the private law to an adhering party. This process does not deserve to be called contractual. It is not democratic and, in a society based on mass production which requires standardized forms even among competitors, it is essentially unfair.<sup>30</sup>

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<sup>28</sup> C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 380 N.E.2d 571 (Ind. Ct. App. 1978).

<sup>29</sup> Slawson, *supra* note 25, at 530.

<sup>30</sup> *Id.* at 530-31.

Equally important is the necessity for a society espousing freedom of contract to insist upon communication of the terms of the contract. "[A] regime of contract could hardly function if the terms of an agreement were affected by an uncommunicated intention of one of the parties."<sup>31</sup> The exercise of individual choice is necessary to maintain one of the critical functions of social order: organization by reciprocity.<sup>32</sup> It is essential that courts establish effective rules for the operation of a society with divergent objectives.<sup>33</sup> At the time of the drafting of the *Restatement Second*, the courts had not met this challenge in the context of the printed form.

The recognition of these and related problems long antedated the Restatement (Second) of Contracts. The Uniform Commercial Code attempts to address them. The revisers of the *Restatement*, therefore, were forced to confront them. In evaluating the quality of their response, it is important to consider the Code response that they were required to reconcile.

## I

### CONTRACTS, AGREEMENTS AND BARGAINS

The attempt to reconcile the Llewellyn/Corbin views with the classical approach appears throughout the *Restatement Second*. The initial effort is found in the sections defining "contract," "agreement," and "bargain." The UCC defines "contract" in terms of effect—"the total legal obligation which results from the parties' agreement . . . (Compare 'Agreement')." <sup>34</sup> The Code delineates the essence of contract in its definition of "agreement": "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."<sup>35</sup> This fundamental concept of factual bargain underlies the philosophy of Article Two. Technical rules of classical contract law should not preclude the recognition of this factual bargain.<sup>36</sup> In terms of formation, courts

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<sup>31</sup> Fuller, *The Forms and Limits of Adjudication* (November 19, 1957) (unpublished paper), reprinted in H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 421, 424 (1958) (unpublished manuscript).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> U.C.C. § 1-201(11).

<sup>35</sup> U.C.C. § 1-201(3).

<sup>36</sup> For examples of the anti-technical nature of Article Two, see U.C.C. § 2-204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *id.* § 2-206, Comment 1 ("Formal technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected. . . ."); *id.* § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding."); *id.* § 2-309(1) ("The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time."). See also *id.* § 1-102(1) ("This Act shall be liberally construed and applied

shall recognize contracts made in any manner sufficient to show agreement.<sup>37</sup> Conduct is expressly recognized as a manifestation of agreement.<sup>38</sup> The difficulty or impossibility of determining the moment of formation is irrelevant and missing terms will not preclude recognition of a contract.<sup>39</sup> The Code standard, in effect, is indefiniteness be damned, as long as two critical elements are present: a manifested intention to make a contract and a reasonably certain basis from which a court may afford a remedy.<sup>40</sup>

The Code expressly rejects the "plain meaning" rule of interpretation<sup>41</sup> and limits the parol evidence process to the preclusion of prior understandings that *certainly* would have been included in the writing.<sup>42</sup> It is not necessary to show that language is ambiguous as a condition precedent to the admission of interpretation evidence (all language is presumptively ambiguous),<sup>43</sup> and the principal thrust is to reach the "true understanding" of the parties.<sup>44</sup> These principles form a consistent basis for the Code's treatment of printed forms in sections addressing the exchange of forms between merchants<sup>45</sup> and the power of courts to refuse to enforce some or all terms of a printed form on the ground of unconscionability.<sup>46</sup> In effect, the Code gives effect to written evidence of the deal containing those reasonable terms the parties would have included had they thought about them, and will not give effect to any terms the parties would not reasonably expect or terms to which assent had not been freely given.

The *Restatement Second* steadfastly defines a contract in terms of promises.<sup>47</sup> It recognizes the Code definition of contract as a "proper" alternate definition,<sup>48</sup> but insists upon a distinction between "bargain" and "agreement." "Bargain has a narrower meaning than agreement, since it is applicable only to a particular class of agreements."<sup>49</sup> The drafters felt compelled to make this distinction for two reasons: (1) the recognition that there are agreements that contemplate no legal relations (e.g., the social agreement); and (2) the recognition that "con-

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to promote its underlying purposes and policies."); *id.* § 1-103 (allowing for the use of supplementary general principles of law); *id.* § 1-106, Comment 1 ("to negate the unduly narrow or technical interpretation of some remedial provisions of prior legislation").

<sup>37</sup> *Id.* § 2-204(1).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 2-204(2)-(3).

<sup>40</sup> *Id.* § 2-204(3).

<sup>41</sup> *Id.* § 2-202, Comment 1.

<sup>42</sup> *Id.*, Comment 3.

<sup>43</sup> *Id.*, Comment 1.

<sup>44</sup> *Id.*, Comment 2.

<sup>45</sup> *Id.* § 2-207.

<sup>46</sup> *Id.* § 2-302.

<sup>47</sup> RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

<sup>48</sup> *Id.* § 1, Comment b.

<sup>49</sup> *Id.* § 3, Comment c.

tracts" under the *Restatement* include promises that, absent a bargained-for-exchange, are enforced on the basis of detrimental reliance, moral obligation, and other bases.<sup>50</sup> Because the Code concentrates primarily upon commercial deals, it can afford the narrower definition of contract and can relegate promises enforced through reliance and the like to extra-Code law.<sup>51</sup>

Notwithstanding this necessary distinction, the *Restatement Second* parallels the Code definition of "agreement" in that it recognizes some forms of non-language manifestations of assent.<sup>52</sup> The *Restatement Second* first alludes to the problem of the standardized form, however, in a Comment to the section defining "term."<sup>53</sup> The general rule that the parties themselves will choose the terms is subject to limitations of public policy, unconscionability, contra proferentem, and interpretations in the public interest. Moreover, "in some circumstances terms in standardized agreements will not be enforced despite the adhering party's manifestation of assent. . . ." <sup>54</sup> It is interesting to note that even at this definitional stage, the basic problem of the binding effect of printed terms is cast in terms of adherence.<sup>55</sup> "Adherence" by the disfavored party (the non-drafting party) suggests that volition, the essential ingredient of any agreement, is absent. The problem of adherence is not confined to standardized agreements, however. Because it may very well arise when each term of the arrangement is consciously adverted to and at least superficially negotiated,<sup>56</sup> the "contract of adhesion" may be more appropriately considered in connection with unconscionability.<sup>57</sup> Thus, in this early Comment as well as in the subsequent sections, persistent confusion surrounds the issue of adherence and its relation to unconscionability and standardized agreements. This confusion is explored in detail later in this Article.<sup>58</sup>

The comparison between the UCC and the *Restatement Second* to this point reveals the startling failure of the *Restatement Second* to assimilate the radical Code perspective. To the extent that the drafters expressly or impliedly mention or deal with the Code at all, they take a parochial

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<sup>50</sup> See *id.* §§ 82-90.

<sup>51</sup> U.C.C. §§ 1-103, 1-201(3). See also *Mercanti v. Persson*, 160 Conn. 468, 280 A.2d 137 (1971); *Jenkins & Boller Co. v. Schmidt Iron Works, Inc.*, 36 Ill. App. 3d 1044, 344 N.E.2d 275 (1976); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339 (Iowa 1979); *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976); *Fairway Mach. Sales Co. v. Continental Motors Corp.*, 40 Mich. App. 270, 198 N.W.2d 757 (1972); *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588 (1975); *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736 (N.D. 1976).

<sup>52</sup> RESTATEMENT (SECOND) OF CONTRACTS § 3 (1979).

<sup>53</sup> *Id.* § 5.

<sup>54</sup> *Id.* Reporter's Note.

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* § 203; *id.*, Comment f.

<sup>57</sup> *Id.* § 208.

<sup>58</sup> See Part III *infra*.

view consistent with classical contract law, or they view the Code as though they were comparing our contract law and some foreign system. The failure to recognize the search for the factual bargain at this definitional stage does not augur well for an effective assimilation of the underlying philosophy of Article Two in the *Restatement Second*.<sup>59</sup>

## II

### STANDARDIZED FORMS AND FORMATION PROBLEMS

Where there is only one printed form allegedly evidencing the contract, there may be a question whether any contract exists. Non-contractual documents such as receipts, invoices, and parcel checks do not qualify as evidence of a contract between the parties because the party who is sought to be bound would not reasonably understand the document to be contractual in nature. Misrepresenting a document as non-contractual to a party who has no reasonable means of reading or understanding its terms should not be regarded as evidence that any contract was formed. Even more obviously, physical duress vitiates even a signed document purporting to bind the parties. More realistic and common problems arise when the parties to the alleged contract exchange printed forms that resemble an offer and acceptance. Typically, certain terms of the exchanged forms do not match, and the matching acceptance (mirror image) rule of classical contract law precludes contract formation. Because the exchange of forms with non-matching terms arises in most deals between merchants, it was one of the more important problems that the drafters of the Uniform Commercial Code confronted in Article Two. Explorations of the Code analysis appear elsewhere<sup>60</sup> and are beyond the scope of this Article, except to the extent that analysis of Code treatment of non-matching terms leads to a better understanding of the *Restatement Second*'s attempt to deal with the problem.

The Code became effective in Pennsylvania in 1954; it was not until a decade later, however, that the membership of the American Law Institute completed the *Restatement Second* version of the non-matching acceptance solution. On the afternoon of Friday, May 22, 1964, the Institute approved new section 59 of the *Restatement Second*, the counter-

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<sup>59</sup> For the underlying philosophy of Article Two, see Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981); Murray, *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269 (1972). See also Murray, "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283 (1982); Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978).

<sup>60</sup> See Murray, *supra* note 59, 39 U. PITT. L. REV.; Murray, *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969); Taylor, *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 CIN. L. REV. 419 (1977).

part of section 2-207 of the Uniform Commercial Code.<sup>61</sup> The new section was "based on former § 60," which reads as follows:

A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.<sup>62</sup>

The Comment to former section 60 merely paraphrases the black letter and emphasizes that a difference between the purported acceptance and the offer turns the reply into a counter-offer.<sup>63</sup> The preceding section, former section 59, states the general principle that the "acceptance must comply *exactly* with the requirements of the offer."<sup>64</sup> Certainly, the two sections together may be viewed as stating the general principle of classical contract law that the acceptance must match exactly the terms of the offer before the contract is formed. The Reporter characterized the changes in these two sections as insignificant. With respect to former section 60, his sole statement was the stark conclusion that "Section 60 is substantially unchanged."<sup>65</sup> Of former section 59, which required the acceptance to comply *exactly* with the offer, the Reporter stated that he "left out the word 'exactly' on the representations of [his] Advisers and the Council that adverbs are to be left to a minimum, and that 'exactly' doesn't add anything to 'complying'. You either comply or you don't comply. Otherwise, . . . there is no change in substance."<sup>66</sup>

The new section 59, which replaces, but according to the Reporter does not substantially change, former section 60, retains the same caption as the old section—"Purported Acceptance Which Adds Qualifications." The language of the section, however, is considerably different:

A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.<sup>67</sup>

The redraft paraphrases section 2-207(1) of the Code. The old section focused upon a purported acceptance "which adds qualifications or requires performance of conditions."<sup>68</sup> It is a statement of the classical rule that a qualified or conditional acceptance is not an acceptance—it is a counter-offer, because the offeree indicates expressly that he is unwilling to make the exchange on the terms of the original offer. The new section does not mention "qualifications" although there is a Com-

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<sup>61</sup> 41 ALI PROCEEDINGS 342-43 (1964); *see* RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

<sup>62</sup> RESTATEMENT OF CONTRACTS § 60 (1932).

<sup>63</sup> *Id.*, Comment a.

<sup>64</sup> *Id.* § 59 (emphasis added).

<sup>65</sup> 41 ALI PROCEEDINGS 343 (1964).

<sup>66</sup> *Id.*

<sup>67</sup> RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

<sup>68</sup> RESTATEMENT OF CONTRACTS § 60 (1932).

ment reference to “[q]ualified acceptance.”<sup>69</sup> On its face, the new section denies the operative effect of acceptance to a reply that is *conditioned* on the offeror’s assent to additional or different terms. However, if there are different or additional terms in the reply but the reply does not expressly condition acceptance on the offeror’s assent to such terms, does the reply form a contract? The first Comment to new section 59 answers as follows: “[A] definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms. See . . . Uniform Commercial Code § 2-207(1).”<sup>70</sup> If the additional or different terms do not preclude an operative acceptance because the acceptance is not made to depend upon the offeror’s assent to such terms, how are such terms to be viewed, *i.e.*, do they become part of the contract? The Comment answers: “The additional or different terms are then to be construed as proposals for modification of the contract,” citing UCC section 2-207(2).<sup>71</sup> Further clarification of the new section is found in Illustration 1, which is a modification of the first Illustration to the old section. It is useful to compare them:

- (Original): A makes an offer to B, and B in terms accepts but adds, “Prompt acknowledgment must be made of receipt of this letter.” There is no contract, but a counter-offer.<sup>72</sup>
- (New): A makes an offer to B, and B in terms accepts but adds, “This acceptance is not effective unless prompt acknowledgment is made of receipt of this letter.” There is no contract, but a counter-offer.<sup>73</sup>

The significant change in the new Illustration is the use of the express term of condition, “unless.” This makes the acceptance depend upon assent to the additional or different term and converts the purported acceptance into a counter-offer. Absent that express conditional term, presumably the acceptance would be operative notwithstanding the additional or different term. The Reporter’s Note to new section 59 cited the famous case of *Poel v. Brunswick-Balke-Collender Co.*<sup>74</sup> as providing “a statement of the basic ‘mirror image’ rule.”<sup>75</sup> Often used to introduce law students to the “battle of the forms,” *Poel* is a classic example

69 RESTATEMENT (SECOND) OF CONTRACTS § 59, Comment a (1979).

70 *Id.* U.C.C. § 2-207(1) reads as follows:

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.

71 RESTATEMENT (SECOND) OF CONTRACTS § 59, Comment a (1979).

72 RESTATEMENT OF CONTRACTS § 60, Illustration 1 (1932).

73 RESTATEMENT (SECOND) OF CONTRACTS § 59, Illustration 1 (1979).

74 216 N.Y. 310, 110 N.E. 619 (1915).

75 RESTATEMENT (SECOND) OF CONTRACTS § 59, Reporter’s Note (1979).

of how the unqualified application of the mirror image rule can work injustice. It presents the realistic problem of a buyer attempting to accept a seller's offer through the use of a printed purchase order form. A printed clause in the purchase order form is indistinguishable from Illustration 1 in the original *Restatement*:

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guarantee on your part of prompt delivery within the specified time.<sup>76</sup>

Upon receipt of the buyer's form, the seller obviously did not bother to read this provision. It would have been the simplest of tasks for the seller to have acknowledged this form. There was more than ample time to send such an acknowledgment. The seller failed to do so because, like the buyer, the seller reasonably believed that a contract had been formed. When, months later, the buyer sought to repudiate the arrangement, its first attempt was based upon an alleged lack of authority in its agent, who had signed the purchase order form. As an afterthought, it supplemented this flimsy argument with the claim that there was no contract because the purchase order form contained terms different from the terms of the offer, thereby violating the mirror image rule. The court held for the buyer, stating that the buyer's form "specified that the order therein given was conditional upon the receipt of its order being promptly acknowledged."<sup>77</sup> Yet there was no express term of condition in the purported acceptance.

Would the *Restatement Second* regard the reply in *Poel* as an acceptance notwithstanding the additional or different term? Because the Reporter's Note does not expressly reject the *Poel* analysis, we cannot be sure. On the other hand, it does not expressly adopt the *Poel* result or rationale; it merely suggests that *Poel* contains a "statement" of the mirror image rule. A later Comment in the Reporter's Note, however, inserted during a subsequent revision, provides further evidence of the *Restatement Second* view: "On the interplay of this rule [the mirror image rule] with Uniform Commercial Code § 2-207, see *Dorton v. Collins & Aikman Corp.* . . ."<sup>78</sup> In *Dorton*,<sup>79</sup> the seller used printed forms containing provisions printed on the face of the forms, beginning with the phrase: "The acceptance of your order is subject to all of the terms and conditions on the face and reverse side hereof. . . ."<sup>80</sup> One of the principal questions confronting the court was whether this phrase converted the seller's replies into counter-offers pursuant to the last proviso of section 2-207(1)—"unless acceptance is expressly made conditional on as-

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<sup>76</sup> 216 N.Y. at 317, 110 N.E. at 621.

<sup>77</sup> *Id.* at 318, 110 N.E. at 622 (emphasis omitted).

<sup>78</sup> RESTATEMENT (SECOND) OF CONTRACTS § 59, Reporter's Note (1979).

<sup>79</sup> 453 F.2d 1161 (6th Cir. 1972).

<sup>80</sup> *Id.* at 1164.

sent to the additional or different terms.”<sup>81</sup> Recognizing that the words “subject to” suggested that the acceptances were to some extent conditional, the court held that they were nevertheless not counter-offers: “In order to fall within this proviso, it is not enough that an acceptance is expressly conditional on additional or different terms; rather, an acceptance must be *expressly* conditional on the offeror’s *assent* to those terms.”<sup>82</sup>

After citing *Dorton*, the *Restatement Second* Comment removes the last scintilla of doubt about why Illustration 1 was changed: “Illustration 1 was Illustration 1 to former § 60, but is modified in the light of Uniform Commercial Code § 2-207.”<sup>83</sup> Presumably, the new Illustration 1 reflects the influence of *Dorton*. Yet it is interesting to consider what the effect would be of making a slight change in new Illustration 1. Illustration 1 finds a counter-offer when the purported acceptance contains a statement like the following:

This acceptance is not effective unless prompt acknowledgment is made of receipt of this letter.

Compare that to a paraphrase of the *Dorton* language:

This acceptance is subject to your prompt acknowledgment of receipt of this letter.

New Illustration 1 placed great emphasis upon the term “unless.” If *Dorton* controls, the substitution of “subject to” for “unless” will be insufficient to convert the purported acceptance into a counter offer. It is difficult to believe that the *Restatement Second* suggests a return to an archaic requirement that specific terms must be used to constitute a condition. Any doubt on this score is immediately overcome by reference to the new section captioned, “How an Event May Be Made a Condition.”<sup>84</sup> The first Comment to that section reaffirms the view that no particular form of language is essential to make an event a condition: “An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language.”<sup>85</sup> Al-

81 U.C.C. § 2-207(1).

82 453 F.2d at 1168 (emphasis in original).

83 RESTATEMENT (SECOND) OF CONTRACTS § 59, Reporter’s Note (1979).

84 “An event may be made a condition either by agreement of the parties or by a term supplied by the court.” *Id.* § 226.

85 *Id.*, Comment a:

*By agreement of the parties.* No particular form of language is necessary to make an event a condition, although such words as “on condition that,” “provided that” and “if” are often used for this purpose. An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language. Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation. That process is subject to the general rules that are contained in previous topics of this Chapter. For example, as in other instances of interpretation, the purpose of the parties is given great weight (§ 202(1)), and, in choosing between

though this section is concerned with conditional duties rather than conditional acceptances, unless a different and more than curious rule of interpretation governs the latter, no specific language is required to convert a purported acceptance into a counter-offer. Perhaps additional light may be shed on section 59 by considering recent judicial interpretations of UCC section 2-207(1). Such an analysis is reasonable, given the reference to section 2-207(1) in Comment a to new section 59.<sup>86</sup>

In *C. Itoh & Co. (America) Inc. v. Jordan International Co.*,<sup>87</sup> the Seventh Circuit Court of Appeals considered the following statement, printed on the face of the seller's form:

Seller's acceptance is, however, expressly conditional on Buyer's assent to the additional or different terms and conditions set forth below and printed on the reverse side. If these terms and conditions are not acceptable, Buyer should notify seller at once.<sup>88</sup>

Relying heavily on *Dorton*, the *Itoh* court had no difficulty in construing this provision as a counter-offer under the last proviso of section 2-207(1). After sending this form, the seller shipped the goods, which the buyer accepted and paid for. The court recognized that under the common law, as in the first *Restatement*, acceptance of the goods after receipt of a counter-offer would constitute acceptance of the counter-offer. The court rejected that result under section 2-207, however. It quoted that portion of the *Dorton* opinion which states, without any Code or extra-Code authority, that "when no contract is recognized under Subsection 2-207(1) . . . the entire transaction aborts at this point."<sup>89</sup> Such a view is diametrically opposed to the *Restatement Second* language in a Comment to section 39, which reiterates the usual view:

It is often said that a counter-offer is a rejection, and it does have the same effect in terminating the offeree's power of acceptance. But in other respects a counter-offer differs from a rejection. A counter-offer must be capable of being accepted; it carries negotiations on rather than breaking them off. The termination of the power of acceptance by a counter-offer merely carries out the usual understanding of bargainers that one proposal is dropped when another is taken under consideration. . . .<sup>90</sup>

Still another Comment to section 39 refers specifically to the type of

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reasonable meanings, that meaning is generally preferred which operates against the draftsman (§ 206). There are also some special standards of preference that are of particular applicability to conditions, and these are set out in § 227.

<sup>86</sup> See note 70 and accompanying text *supra*.

<sup>87</sup> 552 F.2d 1228 (7th Cir. 1977).

<sup>88</sup> *Id.* at 1230.

<sup>89</sup> *Id.* at 1236 (citing *Dorton v. Collins Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972)).

<sup>90</sup> RESTATEMENT (SECOND) OF CONTRACTS § 39, Comment a (1979).

counter-offer dealt with in section 59: "A common type of counter-offer is the qualified or conditional acceptance, which purports to accept the original offer but makes acceptance expressly conditional on assent to additional or different terms."<sup>91</sup> The Comment distinguishes such a true counter-offer from a mere inquiry or request for different terms. The conclusion is inescapable that the *Restatement Second* regards such an expressly conditional acceptance as a counter-offer, which creates a new power of acceptance in the original offeror. The intention is to carry negotiations forward rather than break them off. Thus, the whole transaction does not abort. Yet the *Itoh* court, following *Dorton*, felt compelled to hold, contrary to the common-law rule, that the buyer's acceptance and payment did not constitute acceptance of the counter-offer. There was, however, a contract by conduct; after delivery of the goods, the acceptance and payment by the purchaser created a contract recognized under section 2-207(3). Under that subsection, the terms of such a contract are those terms of the parties' forms that match. The terms that do not match are excised and the gaps are filled by various provisions of Article Two. As suggested elsewhere,<sup>92</sup> there is reason to believe that the holding of *Itoh* with respect to the normal effect of counter-offers is predicated upon an unarticulated sense that the buyer could not reasonably have understood the seller's acknowledgment to constitute a counter-offer, notwithstanding the expressly conditional language tracking the last proviso of section 2-207(1). That view is further supported by another section 2-207 case to which the *Restatement Second* refers in section 29, the counter-offer section.

In *Uniroyal, Inc. v. Chambers Gasket & Manufacturing Co.*,<sup>93</sup> the seller's acknowledgment of the buyer's order contained a conspicuous statement conditioning acceptance on the buyer's accepting the conditions of sale found on the reverse side of the printed form. Relying upon *Itoh* and *Dorton*, the court reached the same conclusion—that the seller's printed clause converted the purported acceptance into a counter-offer, but that the buyer's acceptance of the goods did not constitute an acceptance of the terms of the counter-offer. In support of its conclusion, however, the *Uniroyal* court quoted from a commentary on this section 2-207 problem. To permit the offeree to include additional or different terms that would be accepted by the seller's inaction "would allow the offeree . . . almost unilaterally to reinstate the common-law rationale, for the hypothesis of section 2-207 that businessmen do not read exchanged printed forms assumes that the offeror-buyer would not learn of the term."<sup>94</sup>

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<sup>91</sup> *Id.* § 39, Comment b.

<sup>92</sup> *See Murray, supra* note 59, 39 U. PITT. L. REV. at 638.

<sup>93</sup> 380 N.E.2d 571 (Ind. Ct. App. 1978).

<sup>94</sup> *Id.* at 578 (citing R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 3.06[4] (1977)) (emphasis added).

This explanation provides a clear path to an understanding of the otherwise convoluted rationales of *Dorton* and *Itoh*. Because businessmen do not read printed forms, they obviously do not read those parts of the form that expressly condition acceptance on the buyer's assent to any additional or different terms. Even if businessmen read such a clause, it is doubtful that the typical, reasonable businessman would understand that such a phrase could turn an apparent acceptance into a counter-offer. Students of the law spend many hours on the angular phraseology of the last proviso of section 2-207(1) before they begin to glimpse its intended meaning. To understand the intended effect of a clause tracking that language requires considerable legal education. Section 2-207 and the *Restatement Second* must permit parties to make counter-offers; indeed, the last proviso of section 2-207(1) was designed to permit this decision by any offeree. It is doubtful, however, that Karl Llewellyn, the principal draftsman of Article Two, intended that *any* printed form would be converted into a counter-offer by the use of the magic language of the last proviso of section 2-207(1). The whole thrust of section 2-207 is the prevention of the unfair "surprise and hardship" that occurs under a mechanical application of the mirror image rule.<sup>95</sup> If the offeree can win the battle of the forms merely by the insertion of an "expressly conditional" clause, the purpose of section 2-207 is frustrated. The *Uniroyal* court recognized this possibility and sought to avoid it. It is plausible to suggest that both the *Dorton* and *Itoh* courts sought the same result; unfortunately, however, both chose to use a "covert tool."<sup>96</sup> These courts failed to deal with the underlying problem of the reasonable understanding of the offeror who receives the acknowledgment containing the formula language of section 2-207(1). They felt compelled to construe such a clause as converting the purported accept-

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<sup>95</sup> U.C.C. § 2-207, Official Comment 1 (as amended in 1966):

This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like.

A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction.

<sup>96</sup> Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)) ("The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.").

ance into a counter-offer simply and solely because it contained language tracking the statutory proviso. Having taken this fatal step, they found themselves with another problem. *Dorton* and *Itoh* impliedly assume, and *Uniroyal* expressly admits, that the offeror will not read or understand this clause. Therefore, it would be unfair to enforce the seller's surprising and, perhaps, harsh terms against an offeror who merely accepts and, perhaps, pays for the goods without assenting expressly to the additional or different terms. Negating the normal effect of counter-offers—the acceptance of the goods and even payment by the purchaser do not constitute acceptance—avoids this unfair possibility. Rather, there is a contract by conduct under section 2-207(3) which, in effect, eviscerates the seller's form with respect to any materially burdensome term. The result is probably correct; the buyer and the seller probably thought that they had a closed deal when they exchanged their forms. Only when a dispute develops do the parties make arguments regarding the controlling form. Although the result is probably correct, the analysis raises numerous problems, not the least of which is whether the *Restatement Second* should be construed as approving this analysis.

One ramification that the *Itoh* court candidly addressed is the problem that arises if the seller simply does not ship the goods.<sup>97</sup> If the seller's form contains the formula language and therefore must, under the current judicial analysis, constitute a counter-offer, there is no contract. It is unlikely that the buyer would assent expressly to the seller's form, because the buyer probably assumes that there is a contract upon receipt of the seller's form. When the buyer learns that the seller will not ship the goods (for one of myriad reasons, but usually because it is in the seller's economic interest not to ship at the price in the purchase order and acknowledgment), the buyer is dismayed to discover that what he reasonably assumed to be a contract—and perhaps relied upon—is not a contract. This is the precise evil demonstrated by the infamous case of *Poel v. Brunswick-Balke-Collender Co.*,<sup>98</sup> the case analyzed annually by thousands of law students to emphasize the deficiency of the mirror image rule. Beyond this clear defect in the current analysis of section 2-207, the broader question arises: Does section 2-207, as suggested by these courts, significantly modify the normal operation of counter-offers? Although nothing in section 2-207 suggests such a modification, courts interpret section 2-207(3) as mandating this change.<sup>99</sup>

Does the *Restatement Second* acquiesce in this "exception" to counter-offer principles? Language in the Comments to section 39 refutes any such modification. Nothing in the *Restatement Second* "battle of the

<sup>97</sup> *C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d 1228, 1238 (7th Cir. 1977).

<sup>98</sup> 216 N.Y. 316, 110 N.E. 619 (1915).

<sup>99</sup> *See C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571 (Ind. Ct. App. 1978).

forms" section requires this change. However, the Reporter's Note in that section cites *Dorton*, and the Reporter's Note in section 39 cites *Uniroyal*. The Notes suggest that both citations are judicial elaborations of section 2-207. The Notes do not indicate, however, whether the analyses of these cases are reliable authorities or whether they should somehow be reconciled with *Restatement Second* sections 39 and 59. These citations raise still other difficult questions. Sections 39 and 59 were presented for approval at the ALI Annual Meeting in 1964. During subsequent revision of the Reporter's Notes, cases such as *Dorton* and *Uniroyal* were added. Although additional cases, particularly those citing or elaborating the *Restatement Second* position, are often very useful, cases such as *Dorton* and *Uniroyal* create ambiguities—those already suggested as well as others. *Quaere*: if these (and other) section 2-207 cases had been available at the time that the drafters assembled these *Restatement Second* sections, would the black letter and the Comments read as they now do? In 1964, the case law and scholarship dealing with section 2-207 were in a pre-embryonic state. Comment references to that section as well as to other UCC sections were limited to the conventional wisdom (if any) available at that time. The Reporter indicates clearly that there was no intention to change the substance of either section 39 or section 59, notwithstanding the Comment references to the problem of section 2-207.<sup>100</sup> Any changes were characterized as "stylistic" in 1964, and this official ALI characterization continues to the present time. As suggested earlier, there can be no question that the change in section 59 was substantive. Although the change in the counter-offer section (section 39) may be essentially stylistic, it does take a position on "expressly conditional acceptances," regarding them as counter-offers with the normal operation of counter-offers. Curiously, the only significant change in section 39, as the Reporter emphasized in 1964,<sup>101</sup> was the insistence that a counter-offer is more than a mere rejection, that it contemplates forward-looking negotiations. Again, this position contradicts judicial interpretations of section 2-207, *i.e.*, that a counter-offer causes the transaction to abort. Because of the subsequent judicial developments in section 2-207, some of which are cited in the Reporter's Notes, the guidance that the *Restatement Second* provides in this extremely difficult and critical set of problems involving the exchange of printed forms is thoroughly unclear and, perhaps, counterproductive.

The drafters of section 59 knew that the substance of that section was complicated by the "battle of the forms" phenomenon, yet there is no reference to the problem of the printed form in this section. There is not even a cross-reference to the section on standardized agreements (section 211), nor is there any reference back to section 59 in the stan-

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<sup>100</sup> 41 ALI PROCEEDINGS 329, 343 (1964).

<sup>101</sup> *Id.* at 329.

standardized agreements section. The Reporter and the Advisers probably had not yet consciously adverted to the standardized agreement problem at the time they were focusing upon section 59. The *Poel* case, however, which is cited as "a statement of the basic 'mirror image' rule . . . ,"<sup>102</sup> involved a printed form. It would have required little imagination to recognize that, to the extent courts require guidance beyond section 2-207 in such cases, section 59 would be viewed as the new *Restatement Second* authority. Although the Code preempts in this area with respect to contracts for the sale of goods, the massive use of printed forms with non-matching terms in transactions not involving sale of goods is undeniable; a purchasing agent is likely to use a purchase order to buy services as well as goods, and the supplier of the services is just as likely to respond with its printed form.

A related curiosity in new section 59 is the suggestion that additional or different terms in an otherwise definite expression of acceptance are to be treated as proposals for modification of the contract.<sup>103</sup> Code section 2-207(2) treats such terms as mere proposals only if the transaction involves a nonmerchant.<sup>104</sup> If parties to a contemplated contract for services exchange forms and both are merchants, will additional or different terms in the offeree's definite expression of acceptance be construed as mere proposals? If the Code applies analogously to such a case, the terms become part of the contract, subject of course to the exceptions in section 2-207(2). One of those exceptions, section 2-207(2)(b), excises any terms in the offeree's reply that materially alter the offer. Therefore, only immaterial terms become part of the contract between merchants. On this basis, the failure to distinguish between

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<sup>102</sup> *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915); RESTATEMENT (SECOND) OF CONTRACTS § 59, Reporter's Note (1979).

<sup>103</sup> RESTATEMENT (SECOND) OF CONTRACTS § 59, Comment a (1979):

*Qualified acceptance.* A qualified or conditional acceptance proposes an exchange different from that proposed by the original offeror. Such a proposal is a counter-offer and ordinarily terminates the power of acceptance of the original offeree. See §39. The effect of the qualification or condition is to deprive the purported acceptance of effect. But a definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms. See §61; Uniform Commercial Code §2-207(1). The additional or different terms are then to be construed as proposals for modification of the contract. See Uniform Commercial Code §2-207(2). Such proposals may sometimes be accepted by the silence of the original offeror. See §69.

<sup>104</sup> Section 2-207(2) provides:

(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.

U.C.C. § 2-207(2) (emphasis added).

merchants and nonmerchants in section 59 is arguably of little moment. Yet, a given case may depend upon whether a new term is held to be material. Another inference that arises from this failure to incorporate section 2-207 distinctions is that the *Restatement Second* drafters intended section 59 to apply only to transactions involving a nonmerchant and to leave to the Code not only those transactions to which section 2-207 technically applies, but also those to which it applies analogously. No sound reason exists, however, for so restricting the application of the *Restatement Second* in this area, nor should it be so restricted, notwithstanding the less-than-careful attention demonstrated by the Comment to section 59.<sup>105</sup>

The number of cases raising the question of a purported acceptance with additional or different terms when the document is not a printed form will be infinitesimal when compared to those involving printed forms. Courts currently manifest little difficulty with these questions when the means of communication are not standardized, printed forms.<sup>106</sup> Indeed, that courts have so little difficulty in cases involving letters and telegrams underscores the underlying problem that *Restatement Second* section 59 and the judicial analyses of section 2-207 do not recognize. Telegrams and mailgrams are usually brief and they carry an inference of importance. Personal letters are not drafted in legalese and are more likely to be read. The recipient of these kinds of communications will probably understand them, first, because he will read them, and second, because he will attempt to understand them. The normal operation of counter-offers works efficiently when the reply is unambiguous, unequivocal, easily read, and understood. Consider the following personal letter or similarly read response to a purchase order:

Thanks for your purchase order (900751A). Although we can deliver the described goods when you want them and at the price you are willing to pay, we cannot make a deal on your other terms. To accommodate you, we make this counter-offer: we can only warrant these goods for 6 months from the time they are delivered against defects and we cannot provide a merchantability warranty or any other kind. We can only be liable for defects in the goods for 6 months and we will repair or replace them if they are defective. We cannot be held for any other losses. To further accommodate you, we will ship the goods on these terms. If you do not want to accept them on these terms, just reject them and we'll take them back at no expense to you. If you want the deal on these terms, keep the goods and we will expect your payment within 30 days of delivery. Hope we have been helpful.

This reply is received and the goods are then shipped. The buyer

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<sup>105</sup> RESTATEMENT (SECOND) OF CONTRACTS § 59, Comment a (1979).

<sup>106</sup> *See, e.g.,* Koehring Co. v. Glowacki, 77 Wis. 2d 497, 253 N.W.2d 65 (1977).

accepts the goods. Would a *Dorton, Itoh*, or *Uniroyal* court hold the buyer to the seller's terms under these facts? To hold that the terms of the counter-offer do not bind the buyer under these facts runs counter to the Code and to the *Restatement Second*. Code section 2-206 permits accommodation shipments of different goods.<sup>107</sup> Nothing prohibits an accommodation shipment of goods sought by the purchaser on different terms. If property is offered, the *Restatement Second* states, then "[a]n offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable."<sup>108</sup> The counter-offer terms in the example are not manifestly unreasonable. Since the counter-offer manifests a willingness to ship the goods as described in the buyer's offer, it is likely that the buyer would be more willing to purchase the goods described in the counter-offer than to purchase unordered goods. Therefore, there is no justification in treating a counter-offer differently from a mere unsolicited offer. If the current judicial analysis of section 2-207 were applied to this counter-offer, it could be easily circumvented by an initial rejection of the original offer followed shortly thereafter by an unsolicited, new offer from the seller. This merely emphasizes the mechanical nature of the current section 2-207 analysis when printed forms are used, and the absurdity of that analysis when the form of the reply is such that the terms are read and understood. In addition, current judicial analysis of section 2-207 conflicts with the common rule of interpretation, recognized by the Code and the *Restatement Second*, that separately negotiated terms are more likely to be consciously considered by the party to whom they are addressed.<sup>109</sup> Therefore, they are given more weight than are printed terms on a standardized form. All of these considerations point to the same crucial question: When the documentary evidence of a contract is a printed form, did the party against whom the form is to operate reasonably understand the meaning and consequences of that form?

The *Restatement Second* expressly addresses the question of the reasonable understanding of the offeror but, curiously, does not do so in either section 59 or 39. The Reporter confronted the question in revising section 58 of the first *Restatement*, which read as follows:

*Necessity of Unequivocal Acceptance* Acceptance must be unequivocal in order to create a contract.<sup>110</sup>

The Reporter confessed that he "ran into quite a lot of trouble" with this section.<sup>111</sup> Although his inclination was to leave the section alone, the advisers and Council objected on the ground that "unequivocal"

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<sup>107</sup> U.C.C. § 2-206(1)(b).

<sup>108</sup> RESTATEMENT (SECOND) OF CONTRACTS § 69(2) (1979).

<sup>109</sup> *Id.* § 203(d), Comment f.

<sup>110</sup> RESTATEMENT OF CONTRACTS § 58 (1932).

<sup>111</sup> 41 ALI PROCEEDINGS 341 (1964).

. . . doesn't say anything!"<sup>112</sup> The Reporter tried again,<sup>113</sup> and the result is new section 57:

*Effect of Equivocal Acceptance* Where notification is essential to acceptance by promise, the offeror is not bound by an acceptance in equivocal terms unless he reasonably understands it as an acceptance.<sup>114</sup>

Section 58 of the first *Restatement* clearly was designed to protect the offeror where the acceptance was equivocal. The Comment to that section states that the offeror is entitled to know, in clear terms, whether his offer was accepted.<sup>115</sup> Moreover, "[i]t is not enough that the words of a reply justify a probable inference of assent."<sup>116</sup> In Illustration 1, *A* offers to buy goods from *B* who replies "that the order will receive his attention."<sup>117</sup> There is no contract. New section 57 repeats the Comment language of the original section and then adds: "But the circumstances may make it proper to protect an offeror who acts on such an inference."<sup>118</sup> Illustration 1 to the new section is similar to the original Illustration 1:

A gives an order for goods to B's traveling salesman, subject to approval by B at his home office. B sends a letter to A stating that the order has been received and will receive B's attention. A promptly sends a letter of revocation to B, which B receives before doing anything further. There is no contract.<sup>119</sup>

Illustration 2, however, reflects the additional thought in the new Comment. The facts are the same as in Illustration 1, except that "A does not revoke, but after two months, when it is too late for A to procure substitute goods, B writes a letter to A stating that 'it is necessary to cancel this order.' B has broken a contract with A."<sup>120</sup>

The Comment<sup>121</sup> to section 57 makes the interesting observation that this section is a specific application of section 20, which restates the familiar rules on the effect of misunderstanding.<sup>122</sup> If both parties know or neither party knows the meaning attached by the other, there is no manifestation of mutual assent and no contract. However, if one party

<sup>112</sup> *Id.* at 341.

<sup>113</sup> "After I tried to work on it, it seemed to me that it needed a qualification anyway, where the offeror reasonably understands the communication to be an acceptance. The general principle that you take ambiguities against the person that created them would make an exception to the rule as stated in the original, and so I put that in."

*Id.*

<sup>114</sup> RESTATEMENT (SECOND) OF CONTRACTS § 57 (1979).

<sup>115</sup> RESTATEMENT OF CONTRACTS § 58, Comment a (1932).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*, Illustration 1.

<sup>118</sup> RESTATEMENT (SECOND) OF CONTRACTS § 57, Comment b (1979).

<sup>119</sup> *Id.*, Illustration 1.

<sup>120</sup> *Id.*, Illustration 2.

<sup>121</sup> *Id.*, Comment b.

<sup>122</sup> *Id.* § 20.

neither knows nor should reasonably know the meaning attached by the other, there is an operative manifestation of assent according to the meaning attached by the first (unknowing) party. The application of the equivocal acceptance situation is not difficult. If the offeree submits an equivocal acceptance, the situation may be one in which the offeror neither knows nor should know the meaning attached by the offeree; the offeror may reasonably understand the reply to be an acceptance. By applying the simple but workable test of the reasonable understanding of the offeror, the problem of the equivocal acceptance is solved efficiently.

Another relevant section is new section 61, which does not change the black-letter language of its predecessor, original section 62.<sup>123</sup> Section 61 states the familiar rule that an acceptance containing a mere request for additional or different terms is still an acceptance because the offeree does not make the acceptance depend upon the offeror's assent to different or additional terms. If the acceptance is made to depend upon such terms, it is not an acceptance. The Reporter presented this new section as unchanged from the old section. He mentioned that the Comment was changed although he did not elaborate.<sup>124</sup> It is important to consider this new Comment:

*Interpretation of acceptance.* An acceptance must be unequivocal. But the mere inclusion of words requesting a modification of the proposed terms does not prevent a purported acceptance from closing the contract unless, *if fairly interpreted*, the offeree's assent depends on the offeror's further acquiescence in the modification. See Uniform Commercial Code § 2-207(1).<sup>125</sup>

The new Comment is important for several reasons. The drafters expressly recognized the connection between the problem that section 61 addresses and the problem of interpreting a response to an offer under Code section 2-207(1). The language of section 61 contains a defect identical to one found in the last proviso of section 2-207(1). Curiously (although desirably), the defect is not repeated in *Restatement Second* section 59, which addresses the section 2-207 problem directly. Under section 61, an acceptance that merely requests new or different terms is still an acceptance. An acceptance that is made to depend on assent to the new or different terms is not an acceptance. Similarly, the last proviso of section 2-207(1) indicates that an acceptance which is expressly conditioned upon assent to new or different terms is not an acceptance. Thus, both the Code proviso and section 61 create the same ambiguity

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<sup>123</sup> "Acceptance Which Requests Change of Terms. An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." *Id.* § 61.

<sup>124</sup> 41 ALI PROCEEDINGS 343 (1964).

<sup>125</sup> RESTATEMENT (SECOND) OF CONTRACTS § 61, Comment a (1979) (emphasis added).

in using the term "acceptance" where there will be no acceptance.<sup>126</sup>

Section 59, on the other hand, uses the preferable term "reply,"<sup>127</sup> which immediately suggests the necessity of determining whether the reply or response to the offer is or is not an acceptance. This may appear to be mere quibbling. Yet, one of the basic problems in current judicial analyses of section 2-207(1) is the failure to recognize fully the threshold question in these cases, *i.e.*, the proper interpretation of the reply to the offer. Although the language of section 61 itself may be criticized, the Comment provides considerable assistance. The phrase "if fairly interpreted" emphasizes this vital point. To determine whether a reply to an offer merely requests new or different terms or whether it is conditional upon assent to such terms, new section 201, in the Topic dealing with interpretation, is highly significant if the usual rules of interpretation apply.

New section 201 is captioned "Whose Meaning Prevails."<sup>128</sup> Like section 57, it is expressly related to new section 20 on the effect of misunderstanding.<sup>129</sup> In essence, this interpretative section enforces the meaning of a term attached to it by the party who neither knew nor had reason to know of a different meaning if the other party had such knowledge or reason to know. No reference to section 2-207 appears in the Comments or Reporter's Note to section 201. Illustration 5, however, is a classic "battle of the forms" problem. The Reporter's Note indicates it is based upon a New York case<sup>130</sup> that arose prior to the effective date of the Code in New York, but the opinion explores the application of section 2-207 as an aid in holding an additional term in the seller's purported acceptance inoperative. If a printed form reply can be "fairly interpreted" as an acceptance by an offeror, a contract is formed. Under new section 201, such a fair interpretation requires a court to decide whose meaning prevails. If the offeror neither knows nor has reason to know that the reply contains different or additional terms on which the offeree intends to condition the acceptance, the offeror may "fairly interpret" the reply as an acceptance.<sup>131</sup> Therefore, in addition to characterizing the reply as an equivocal acceptance that the offeror may reasonably understand as an acceptance under section 57, it is essential that the offeree's reply be fairly interpreted according to the directions of section 201. Finally, assuming that a reasonable offeror would not read or expect to discover a printed clause in a form reply

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<sup>126</sup> See Murray, *supra* note 60, 37 FORDHAM L. REV. at 327-28.

<sup>127</sup> RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

<sup>128</sup> *Id.* § 201.

<sup>129</sup> *Id.*, Reporter's Note.

<sup>130</sup> *Id.*, Comment d, Reporter's Note (citing *In re Doughboy Indus., Inc. (Pantasote Co.)*, 17 A.D.2d 216, 233 N.Y.S.2d 488 (1962)).

<sup>131</sup> *Id.* § 201(2)(a) and (b).

that otherwise appears to be a definite expression of acceptance,<sup>132</sup> the offeror could properly be characterized as the party who neither knew nor had reason to know that the reply was not an acceptance. In essence, both sections 57 and 61, with appropriate assistance from section 201, lead to the same conclusion and analysis. Either approach supports the basic proposition that the printed form must be tested according to the reasonable understanding or fair interpretation of the offeror. With both approaches suggesting the same underlying purpose, the analysis is irresistible.

Interesting results follow from applying this analysis to new section 59, with the section 2-207 gloss suggested by the Comments and Reporter's Note. If the reply to an offer contains, in a printed form, the expressly conditional language of the section 2-207(1) proviso, can it be treated as an "equivocal acceptance" by the offeror which, if relied upon, converts it into an absolute acceptance? An affirmative answer is plausible. The offeror, again, does not read the proviso language in a printed form response and may infer assent by the offeree. The offeror should be able to treat such a response as an acceptance under new section 59. Certainly, if the offeror reasonably understands such a reply as an acceptance and relies thereon, section 57 binds the offeree to a contract. If the reasonable offeror fairly interprets the reply as an acceptance, under section 61 it is an acceptance. This application of sections 57 and 61, however, contradicts the section 2-207 interpretations discussed earlier, because those cases concentrate upon formula language that is construed as counter-offer language as a matter of law. This is precisely the deficiency of those judicial analyses. Rather than concentrating on whether an offeror could reasonably understand or fairly interpret a reply as an acceptance, they ignore the perception of the offeror and fasten on what they perceive to be a mandatory construction of language in the reply. If this language parrots the proviso language of section 2-207(1), it conclusively manifests a counter-offer—regardless of the reasonable understanding *of the offeror*. Under the *Restatement Second*, the effects of sections 57, 61, and 59 may be combined into a workable principle applicable to the "battle of the forms" problem. The text of section 59 itself suggests an equivocal acceptance and a need for fair interpretation. A reply that purports to accept an offer is not an acceptance if it is conditional on the offeror's assent to additional or different terms. If the offeror reasonably should have understood that the offeror's assent to any new or different terms was a condition of the acceptance, or if assent can be fairly interpreted as conditioned, the reply is not an acceptance. Regardless of the printed formula clause, however, if the offeror reasonably understands or fairly interprets the reply

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<sup>132</sup> *Id.* § 59, Comment a.

to be an acceptance, he may treat it as an acceptance under this reading of sections 57 and 61 as they qualify section 59.

There is no reason to suggest that the drafters considered any connection between sections 57 and 59. Nothing in the sections, the Comments, or the Illustrations indicates any conscious linkage. Yet, the language of new section 57 may provide a simple and workable test for a resolution of the dominant problem of the "battle of the forms." Although there is an express reference to section 2-207 in the Comment to section 61, it does not appear to be an intentional effort to remedy the critical problem.<sup>133</sup> Yet, it could provide still another effective solution per se, or simply complement the section 57 analysis. A reply to an offer that purports to accept it is either an acceptance or a counter-offer. The only workable and fair test is whether the offeror reasonably understood or fairly interpreted the reply as an acceptance or a counter-offer. This is not the test currently applied by the recent interpretations of section 2-207(1); thus, an unjustified modification of pre-Code counter-offer rules results. To apply the *Restatement Second* sections consistently, however, the fair interpretation of a reply that purports to be an acceptance, although containing different or additional terms, must be controlled by how the offeror reasonably understood that reply. The presence of some formula language of condition in the printed form containing that reply is irrelevant to this issue. Had the *Restatement Second* drafters concentrated on the test of the reasonable understanding and fair interpretation of the offeror, only rather casually inserted in new section 57,<sup>134</sup> and contained only in an unexplained Comment to section 61, they might have provided great illumination for the diabolical "battle of the forms" problem.

In summary, the *Restatement Second* section that attempts to incorporate section 2-207 of the UCC is not only of little utility, but is also counterproductive. The inclusion of more recent interpretations of section 2-207 in the Reporter's Note exacerbates the problem. The irreconcilability of those interpretations regarding the effect of counter-offers with the *Restatement Second* section on counter-offers furthers the confusion. Whatever may have been said for the *Restatement Second* effort in 1964, by 1980 new section 59 needed more than mere stylistic changes. The prolonged process of revising a major Restatement of the law simply did not permit modification at that late date. This is, indeed, unfortunate for all who look to this Restatement for guidance in this particularly difficult area.

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<sup>133</sup> *Id.* § 61, Comment a.

<sup>134</sup> *See* 41 ALI PROCEEDINGS 341 (1964).

## III

## STANDARDIZED AGREEMENTS AND UNCONSCIONABILITY

The original *Restatement* section 70 took the uncompromising position that, absent fraud, duress, or mistake, one is bound by what one signs or adopts as the written evidence of the contract although one is ignorant of the terms of the writing or the proper interpretation of those terms.<sup>135</sup> The American Law Institute did not consider the problem of binding a party to the printed terms of a standardized writing until 1970. When addressing section 211, the Reporter characterized it as "an entirely new section, but it has a precedent of sorts in the original *Restatement* in Section 70. . . ."<sup>136</sup> The characterization of section 211 as "entirely new" with only an attenuated relation to original section 70 evidences the great difficulty that the Reporter and his Advisers undoubtedly faced in attempting to deal with the reality of unread, printed forms. At one end of the spectrum, there is the necessity of certainty and stability in viewing the adopted writing as the evidence of the contract. At the other end of the spectrum is the nagging suspicion that few if any contracting parties take the time or effort to read and understand the printed provisions. The first problem was where to put this new section. Should it be included with sections dealing with formation, sections discussing the effect of agreements, or sections concerned with interpretation? Corbin did not like the placement of original section 70 in the offer and acceptance portion.<sup>137</sup> Section 211 ended up in the topic captioned *Effect of Adoption of a Writing*.<sup>138</sup> Although inserting it in this part of the *Restatement Second* has some justification, considerable difficulty arises in treating the problem in conjunction with the concept of integration. Subsection (1) states the effect of assent to a standardized writing as a manifestation of intention to view that writing as a final (and perhaps complete) expression of the agreement of the parties:

- (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.<sup>139</sup>

The drafters' intention in so designing the new section on standardized agreements is revealed in the following statement by the Reporter: "I stated first a rather reactionary proposition, which is subsection (1); that is, that when you agree to a standard agreement, you agree to it,

<sup>135</sup> RESTATEMENT OF CONTRACTS § 70 (1932).

<sup>136</sup> 47 ALI PROCEEDINGS 524 (1970).

<sup>137</sup> *Id.*

<sup>138</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS Ch. 9, Topic 3.

<sup>139</sup> *Id.* § 211(1).

and that means everything that's in it, subject, of course, to qualifying terms."<sup>140</sup> This is the sole reference to subsection (1) at the 1970 meeting. If the intention was to bind a party to the terms of a standardized writing to which he assented but did not read, that intention is faithful to original section 70. Original section 70 had nothing to do with integration and, in light of the Reporter's explanation, new section 211(1) need not have referred to integration. The effect, however, goes well beyond the Reporter's explanation. Not only is the assenting party bound by the unread printed terms of the standardized writing; he is also precluded from introducing evidence of prior agreements that are inconsistent with the unread printed form.<sup>141</sup> Further, if the printed form is a completely integrated writing, any prior agreements within its scope are discharged.<sup>142</sup> This may have been the intention of the drafters, notwithstanding the Reporter's expression of a much more limited intention. It seems odd, however, to be concerned with integration in a section based upon the expressed and emphatic assumption that parties who use standardized forms to manifest their agreements do not understand or read the standard terms.<sup>143</sup> Thus, the central problem is not whether section 211 treats the standardized writing as the final or complete manifestation of agreement. The problem is whether all of the printed terms are operative, and if not, what is the test to determine whether one or more printed terms shall be inoperative? Under section 211, the assenting party is bound by all of the terms of the standardized

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<sup>140</sup> 47 ALI PROCEEDINGS 524 (1970).

<sup>141</sup> RESTATEMENT (SECOND) OF CONTRACTS § 210, Comment a (1979).

<sup>142</sup> *Id.* § 213. Section 213 provides:

§ 213. EFFECT OF INTEGRATED AGREEMENT ON PRIOR AGREEMENTS (PAROL EVIDENCE RULE).

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

<sup>143</sup> *Id.* § 211, Comment b provides:

*Assent to unknown terms.* A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.

form except as stated in subsection (3). In section 211(3) lies the test to determine the operative effect of printed terms:

Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.<sup>144</sup>

The Comment to this subsection expressly recognizes that subsection 3 is a specific application of the rules governing the effect of misunderstanding in section 20 and the rules determining whose meaning prevails in section 201.<sup>145</sup> The express or implied relationship to sections 57, 61, and 59 are, therefore, even more firmly established.<sup>146</sup> The original formulation of section 211(3) is much closer to the language of section 20:

Where the other party has reason to know that the party manifesting such assent believes or assumes that the writing does not contain a particular term, the term is not part of the agreement.<sup>147</sup>

The current and final version, however, requires the other party to have "reason to believe" that the assenting party would not have manifested such assent if he knew of the particular term. Professor Farnsworth suggested his preference for the original formulation because he could conceive of a situation in which that formulation would make a term inoperative while the current version would bind the assenting party to the term.<sup>148</sup> The responses to Professor Farnsworth's concern by the Reporter and Mr. Charles Willard, who was responsible for the new formulation, are difficult to understand:

- (1) Reporter: As I read Mr. Willard's formulation, it doesn't require the impossible showing of what the party would have done if. What it requires is that the stronger party, who submits the adhesion contract or prepares the standard form, have reason to believe that the party would not assent if he knew about this. I think it's an impossible burden of proof to put on somebody that he would have refused to sign if he had known about this. All this requires is that there be reason to believe that that's so. If so, the obvious remedy is to flag it in some way.
- (2) Mr. Willard: I think the answer may be, sir, that many of us have signed contracts containing provisions that we wish weren't in there, but on balance we

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<sup>144</sup> *Id.* § 211(3).

<sup>145</sup> *Id.* § 211, Comment f.

<sup>146</sup> Section 201 should also be considered in part in relation to § 61 with respect to rules of interpretation.

<sup>147</sup> RESTATEMENT (SECOND) OF CONTRACTS § 237(3) (Tent. Draft No. 5, 1970).

<sup>148</sup> 47 ALI PROCEEDINGS 528 (1970).

thought: All right, we want the contract, and we have to take the good with the bad. And I want to make it as clear as I can that when you get into the area of unconscionability, then you are under § [208].<sup>149</sup>

The Reporter responded further by referring to a case involving a bank signature card that contained a provision manifesting the signer's agreement to waive a jury trial.<sup>150</sup> Recalling the holding of the court that the clause was not unconscionable, the Reporter continued:

Whether it's unconscionable or not seems to me to depend on a whole series of value judgments that I wasn't able to get enough certainty on to include here, but I would hate to have that turn on the question whether the party assumed that there was no such waiver. Assuming it's a perfectly legible provision and it has not been concealed in any way and he signs the card, and there it is, it seems to me the proper thing to pay attention to is whether the clause is oppressive in some way, and not this notion that it's unexpected at that point.

I think the same thing would go for the stop payment clause, that most of the cases that threw out the stop payment disclaimer of liability on the part of the bank did so on the direct ground that it either was without consideration or it was against public policy, and not on the ground that it hadn't been agreed to; and that's what I think we're talking about here.<sup>151</sup>

These responses to Professor Farnsworth suggest a remarkable confusion of thought. Evidently, the Reporter would not place the burden on the apparently assenting party to prove that he would have refused to sign if he had known about a particular term. Rather the test is that the "stronger party," who submits the form, merely have reason to believe that the assenting party would not have agreed. If there is such "reason to believe," the "stronger party" may remedy that situation; he need only "flag" the particular term in some way. What kind of term would the stronger party have reason to believe the other party would not assent to? The answer is found in the Comment:

Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.<sup>152</sup>

A bizarre term may be viewed as a term that a reasonable party would not expect to find in the standard form evidencing the agree-

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<sup>149</sup> *Id.* at 528.

<sup>150</sup> *Id.* at 529.

<sup>151</sup> *Id.*

<sup>152</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211, Comment f (1979).

ment. An oppressive term would also be unexpected. These examples are reminiscent of the Comment language to the unconscionability section of the UCC, section 2-302. The *Restatement Second* quotes this UCC Comment in its unconscionability section, section 208: "The principle is one of the prevention of oppression and unfair surprise."<sup>153</sup> The Reporter's response to Farnsworth also alludes to the "stronger party who submits the adhesion contract." Again, the language suggests unconscionability. Yet both the Reporter and Mr. Willard insist upon a distinction between the application of the standardized agreement section (211) and the unconscionability section (208). The Reporter suggests a distinction between a term that is oppressive and one that is unexpected. If a term is perfectly legible, presumably it cannot be unexpected and, therefore, one should not concentrate on whether "it hadn't been agreed to," which is what section 211 is addressing. Rather, one should concentrate on whether it is "oppressive in some way," which is not within the ambit of section 211. Similarly, Willard seems to assume that the signer is consciously aware of the necessity "to take the good with the bad" and, having signed with an awareness of the bad clause, is in "the area of unconscionability." Yet, in delineating the kind of terms that would raise an inference of "reason to believe" that the party manifesting assent would not do so if he knew the writing contained a particular term, the Comment to section 211(3) first mentions the "bizarre or oppressive" term. The other examples—a term that eviscerates the non-standard terms explicitly agreed to, or a term that eliminates the dominant purpose of the transactions<sup>154</sup>—are equally oppressive. All of these examples suggest that the assenting party would be faced with material risks beyond the scope of his expectations when he signed or adopted the printed form as the evidence of the contract. Another portion of the Comment language to section 211 emphasizes this explanation:

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<sup>153</sup> U.C.C. § 2-302, Comment 1; *see* RESTATEMENT (SECOND) OF CONTRACTS § 208, Comment a (1979):

*a. Scope.* Like the obligation of good faith and fair dealing (§ 205), the policy against unconscionable contracts or terms applies to a wide variety of types of conduct. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. Policing against unconscionable contracts or terms has sometimes been accomplished "by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract." Uniform Commercial Code §2-302 Comment 1. Particularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation. Compare §211.

<sup>154</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211, Comment f (1979).

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.<sup>155</sup>

This part of the Comment suggests a rather simple test to determine the operative effect of terms in the printed form: one is not bound by any printed term that is unknown and beyond the reasonable expectation of the party who has apparently assented to the printed form as evidence of the contract. However, both the Reporter and Mr. Willard suggest that one may be bound by an oppressive term under section 211 if the term is "flagged" in some fashion, *i.e.*, if it is a "perfectly legible provision" so that it should have come to the attention of the assenting party who now must "take the good with the bad."<sup>156</sup> These statements suggest that an oppressive term may be enforceable, at least under section 211. Any attempt to render them inoperative would have to be considered under the unconscionability section (208), which is concerned with "whether the clause is oppressive in some way, and not whether it's unexpected at that point."<sup>157</sup> The views of the Reporter and Mr. Willard merely indicate a kind of conspicuousness requirement—"a perfectly legible provision" that will satisfy the requirements of section 211. Even in the Reporter's explanation, however, he begins with characterizations of "the stronger party who submits the adhesion contract. . . ."<sup>158</sup>

The Comment to section 211 explaining subsection (3) is consistent with this perplexing view. After setting forth the kinds of oppressive terms that may give rise to an inference that the other party had "reason to believe" that assent would not be forthcoming if the assenting party knew of such terms in the printed form, the Comment concludes:

The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.<sup>159</sup>

Suppose the "adhering party" *had* an opportunity to read the term which *was* legible and *not* hidden from view. Would such a party then, at least under section 211, be bound by such a term? The Comment language does not *require* the term to be unknown, illegible, or otherwise hidden from view to raise the inference of "reason to believe." Rather, the inference is simply *reinforced* if one or more of these conditions is met. According to the Comment language, the inference arises, *ab initio*, because the term is oppressive in some fashion. The failure of the Com-

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155 *Id.*

156 47 ALI PROCEEDINGS 528 (1970).

157 *Id.* at 529.

158 *Id.* at 528.

159 RESTATEMENT (SECOND) OF CONTRACTS § 211, Comment f (1979).

ment language to distinguish between substantive oppression and procedurally inconspicuous oppression is not remarkable in light of the confusion manifested by the Reporter and by Mr. Willard, the proponent of the draft of section 211(3). Moreover, the drafters need hardly have added the last sentence of the Comment: "This rule is closely related to the policy against unconscionable terms. . . ." <sup>160</sup> Unfortunately, we are left with little guidance as to the precise distinction between this rule and the policy against unconscionability.

At this point it is important to return to section 57 (equivocal acceptance), the Comment to section 61 ("fairly interpreted"), and the test stated therein: if the offeror reasonably understands the reply to the offer as an acceptance. As suggested earlier, section 211(3) is a specific application of the general principles of section 20 and 201. Similarly, section 57 is expressly presented as "a particular application of the general principles stated in §20."<sup>161</sup> The connection between section 20 and sections 57, 201, and 211 is based on the concept of fault underlying section 20. If both or neither of the parties know or have a reason to know that they attach different meanings to the same manifestation, there is no contract; the parties are equally at fault. However, if one party either affirmatively knows or negligently should know the other's meaning, and manifests apparent assent to the other's meaning while intending to insist on a different meaning, there is a contract according to the meaning attached by the unknowing, innocent party.<sup>162</sup> The translation of this familiar rule into the equivocal acceptance situation is relatively simple. The offeree who submits an equivocal acceptance is at fault in the sense that the innocent offeror could view the reply to the offer as an acceptance. The application of the same rule to determine the operative effect of a term in a standardized form is equally simple. If the party who submits the form knows or should know that the form contains terms that will unfairly surprise the other party, the first party is at fault and the form will have the normal and natural meaning that the innocent party would reasonably expect in forms of that kind. The "fair interpretation" command of section 61, in conjunction with the interpretation rules of section 201, supports the same analysis. The "reason to believe" test of section 211(3) is reconcilable with this analysis; when the printed form contains an unfairly surprising term, the party who submitted the form has "reason to believe" that the other party would not have assented to that term if he knew or should have known that the writing contained such a term. The critical question, however, is whether a conspicuous term ("a perfectly legible provision") conclusively establishes that the party submitting the form did not have any

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<sup>160</sup> *Id.*

<sup>161</sup> RESTATEMENT (SECOND) OF CONTRACTS § 57, Comment b (1979).

<sup>162</sup> *Id.* § 20, Comment d.

“reason to believe” the other party would not have assented to the term. Is section 211 to be relegated to a test of procedural conspicuousness? It is at least plausible to interpret the remarks of the Reporter and Mr. Willard as suggesting that if the term is conspicuous, section 211 is satisfied and assent to even a bizarre or oppressive term is established. Under this view, assent could be overcome only by a judicial determination that the term is unconscionable.

A similar problem is found in the warranty disclaimer provision of the Code. Section 2-316(2) of the Code requires that a written disclaimer of the implied warranty of merchantability mention “merchantability” and be conspicuous. The Code defines “conspicuous” as a term or clause “so written that a reasonable person against whom it is to operate ought to have noticed it.”<sup>163</sup> The purpose of section 2-316 is expressed in Comment 1 to that section: “to protect a buyer from unexpected and unbargained language of disclaimer. . . .”<sup>164</sup> The particular requirements of the merchantability disclaimer are “safeguard[s]”<sup>165</sup> designed to effectuate that purpose. These safeguards may be viewed as a particular application of the principle of unconscionability—“the prevention of oppression and unfair surprise . . . .”<sup>166</sup> Even if a printed clause disclaiming the implied warranty of merchantability meets the requirements of section 2-316(2), courts do not conclusively presume that the party against whom the clause is to operate has assented to that clause. With respect to consumers, courts have recognized that the consumer may not have understood such a clause although it meets the statutory formula. Thus, it may be deemed inoperative because it is unconscionable.<sup>167</sup> In merchant transactions involving the battle of the forms, a clause on the reverse side of the acknowledgment form meeting the required formula sent in response to a purchase order form will not be operative. The acknowledgment will be treated as a definite expression of acceptance, and the disclaimer clause will be eliminated as a materially altering term under section 2-207(2)(b).<sup>168</sup> Some

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<sup>163</sup> U.C.C. § 1-201(10).

<sup>164</sup> *Id.* § 2-316, Official Comment 1 provides:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

<sup>165</sup> *Id.* § 2-316, Official Comment 3.

<sup>166</sup> *Id.* § 2-302, Official Comment 1.

<sup>167</sup> *See, e.g.,* Gladden v. Cadillac Motor Car Div., 83 N.J. 320, 416 A.2d 394 (1980); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

<sup>168</sup> *In re* John Thallon & Co., 396 F. Supp. 1239 (E.D.N.Y. 1975); Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849 (Okla. 1979). *But see* Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537 (D. Mass. 1977).

courts currently recognize the need to consider whether a reasonable party would have understood a particular provision in a printed form. These courts will not necessarily find that such a party understood a clause simply because it meets certain physically conspicuous safeguards.

The inextricable relationship between the *Restatement Second* sections on standardized agreements and unconscionability became reasonably clear even during the discussion of these sections at the 1970 ALI Meeting. The membership raised many questions and comments concerning standardized forms during the discussion of the unconscionability section (208). Consequently, Mr. Willard, the successful proponent of the new draft of section 211, requested that the Reporter proceed directly to a discussion of section 211 after discussing section 208 because "standardized contracts are more closely related to [unconscionability] than they are to integration."<sup>169</sup> The Reporter was quick to agree "because [211] does, obviously, tie in with [208]."<sup>170</sup> The distinction Mr. Willard and the Reporter would attempt to draw between the two sections was not long in coming. A member of the institute, Judge Comford, suggested the illustration of a case

where the court felt that from the experience of the average person buying a home owner policy, he would expect to be covered on workmen's compensation for people working for him, but where a close reading of the contract revealed that the contract did not include that coverage. The court said that the coverage was included in the contract, if the contract would have been expected to include the coverage.

MR. WILLARD: I agree entirely.

There is just one further thing I would like to say. Nothing in here undercuts the unconscionability section. This [the standardized agreement section] is talking about terms that a man just plain doesn't know. They may be a little rough, but they fall short of unconscionability. If you get really unconscionable, then you fall back on [211], and this [§ 208] is not material.

[REPORTER]: I agree with that.<sup>171</sup>

Notwithstanding these and other efforts to distinguish the intended scope of section 208 and section 211, the members of the Institute pressed on. Mr. Charles T. Breeching, Jr. asked whether section 211(3) would cover any situations not otherwise covered by the unconscionability concept. Mr. Breeching explained: "It seems to me, particularly from the comment, if you are inquiring primarily whether or not any reasonable man would have expected the term to be either included or

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<sup>169</sup> 47 ALI PROCEEDINGS 523 (1970).

<sup>170</sup> *Id.* at 524.

<sup>171</sup> *Id.* at 526-27.

not, you are primarily talking about unconscionability.”<sup>172</sup> Mr. Willard responded with an illustration concerning whether interest runs on a note over a holiday, though the maturity of the note is suspended during the holiday. He recalled a New York statute providing that, unless otherwise agreed, interest would not run. To defeat the effect of the statute, banks inserted a printed clause saying that interest should run. Mr. Willard concluded: “There is no unconscionability, and this is the kind of thing which I think my language was designed to take care of.”<sup>173</sup> The Reporter then referred to the case of an auction sale of real estate subject to restrictions contained in certain pages of the real estate records. The court felt that the restrictions that were sought to be incorporated by reference were not within “reason or precedent.” They were “unusual” restrictions and, since they were not “flagged,” they were not operative terms.<sup>174</sup> The Reporter conceded that “maybe that could have been handled under unconscionability. . . .” In any event, he concluded, “[t]hat’s the sort of thing we have in mind here.”<sup>175</sup>

Although the unconscionability section of the *Restatement Second* is not limited to situations involving standardized forms, the Comments to that section emphasize the use of the unconscionability concept in printed form situations. The first Comment repeats the familiar UCC narrative that courts in pre-UCC cases often policed against unconscionable bargains through adverse construction of the contract language, manipulation of formation rules, or through ruling that particular clauses were contrary to that ultimately ambiguous phenomenon, public policy.<sup>176</sup> In emphasizing the importance of the new unconscionability section, the Comment states that “[p]articularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation. Compare § 211.”<sup>177</sup> Of seven Illustrations to the unconscionability section, three expressly refer to the use of a “standard printed form,”<sup>178</sup> and the remaining Illustrations also appear to involve the use of a printed form. One of the Illustrations is based upon the well-known case of *Williams v. Walker Thomas Furniture Co.*<sup>179</sup> In that case, Mrs. Williams signed a printed form containing a clause permitting the seller to repossess all of the household goods purchased from the seller. Mrs. Williams would not have reason-

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<sup>172</sup> *Id.* at 532.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 533.

<sup>175</sup> *Id.*

<sup>176</sup> *See* note 153 and accompanying text *supra*.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*, Illustrations 1, 2 & 6.

<sup>179</sup> *Id.*, Illustration 5 is based on *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

ably expected such a clause in the printed form. She signed the form upon purchasing the final item from the seller. In his discussion of this Illustration, the Reporter referred to the contracts as "very complex and intricate and, indeed, incomprehensible. . . ."<sup>180</sup> If the standards of section 211(3) were applied to this Illustration, certainly the seller would have "reason to believe" that Mrs. Williams would not have manifested assent to this bizarre and oppressive term had she known of its presence in the form. The statements of Mr. Willard and the Reporter tend to indicate that the Reporter would have permitted the application of either section to invalidate the add-on clause in the *Williams* Illustration. Mr. Willard, however, attempts to distinguish between the applicability of the two sections. He seems to suggest two kinds of terms: (1) those that are "a little rough" but not unconscionable, and (2) those that are "really unconscionable."<sup>181</sup> He would apply section 211(3) to the first kind of term to determine whether the seller had reason to believe that Mrs. Williams would not have assented. Presumably, he would suggest some kind of conspicuousness test. If the term were conspicuous, he would, again under section 211, conclude that Mrs. Williams would have to "take the good with the bad."<sup>182</sup> A court could excise that clause from the agreement only if the court determined that such a clause is of the second type—in Willard's terminology "really unconscionable."<sup>183</sup> While the Reporter seems more dubious about the clarity of this distinction, his suggestions about "perfectly legible provisions" and "flagging" certain clauses tend to support the same distinction.

The four Illustrations to section 211(3) are not particularly helpful. Two deal with forms that attempt to incorporate other terms by reference.<sup>184</sup> A third deals with a contract for the sale of goods governed by the Code and supplies no guidance as to the intended operation of the subsection.<sup>185</sup> The remaining Illustration involves a printed form bid that contains a limitation of liability clause in print which "cannot be read without a magnifying glass."<sup>186</sup> Not remarkably, the Illustration concludes that the clause "is ineffective." *Quaere*, however, if a court deemed such a clause unconscionable rather than violative of section 211, would it be committing a grievous error under the *Restatement Second* classifications? Remember that the *Williams* Illustration in section 208 characterizes the litigated clause as "800 words in extremely fine print. . . ."<sup>187</sup> Although the *Restatement Second* version of unconsciona-

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<sup>180</sup> 47 ALI PROCEEDINGS 512 (1970).

<sup>181</sup> *Id.* at 527.

<sup>182</sup> *Id.* at 528.

<sup>183</sup> *Id.* at 527.

<sup>184</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211, Illustrations 5-6 (1979).

<sup>185</sup> *Id.*, Illustration 8.

<sup>186</sup> *Id.*, Illustration 7.

<sup>187</sup> *Id.* § 208, Illustration 5.

bility merely repeats some of the conventional wisdom developed under the UCC to 1970, it does suggest that one of the factors that may contribute to a finding of unconscionability is the inability of the weaker party to the agreement to understand the language of the agreement.<sup>188</sup> Another relevant element would be a finding that the weaker party "did not in fact assent or appear to assent to unfair terms."<sup>189</sup> These elements of unconscionability clearly intersect with similar or identical elements in section 211.<sup>190</sup>

Other elements emphasized in the unconscionability section, however, form no part of the standardized agreement section. The black-letter statement of unconscionability in section 208 suggests no elements. In keeping with the Code version, it merely indicates what a court may do once it finds that a clause or a contract is unconscionable.<sup>191</sup> The 1970 Comments to this *Restatement* section on unconscionability provide precious little more insight than the Code Comments, despite sixteen years' experience under the Code at the time the *Restatement* section was drafted. Beyond those suggestions repeated from the Code Comments, the *Restatement Second* suggests only familiar factors and those already mentioned. Thus, "gross disparity in the values exchanged may be an important factor" in determining unconscionability in a given case.<sup>192</sup> Similarly, "gross inequality of bargaining power" and terms that are "unreasonably favorable to the stronger party . . . may show that the weaker party had no meaningful choice."<sup>193</sup> The stronger party may believe that the weaker party will not be able to perform the contract. Thus, in the *Williams* Illustration the seller probably knew that Mrs. Williams would face great difficulty in making payments on a new stereo set because she was separated from her husband and was supporting herself and seven children on only \$218 per month.<sup>194</sup> The stronger party may be aware that the weaker party is physically or mentally infirm or may suffer from ignorance or even illiteracy.<sup>195</sup> Curiously, another Comment refers to the terms that are not enforced regardless of the context of the transaction, such as unreasonably large liquidated damages or limitations on the debtor's right to redeem collateral. These

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<sup>188</sup> *Id.*, Comment d. See also *id.*, Illustration 3 (buyer "literate only in Spanish" signs a complex contract printed in English).

<sup>189</sup> *Id.*, Comment d.

<sup>190</sup> *Id.* § 211, Comment f.

<sup>191</sup> *Id.* § 208 provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

<sup>192</sup> *Id.*, Comment c.

<sup>193</sup> *Id.*, Comment d.

<sup>194</sup> *Id.*, Illustration 5.

<sup>195</sup> *Id.*, Comment d.

terms are often statutorily unenforceable.<sup>196</sup> Yet, they differ in this Comment from other terms that may be unconscionable in some contexts but not in others.<sup>197</sup> It is of particular importance to compare the *Restatement Second* recitation of unconscionability factors with the standardized agreement section.

As suggested earlier, it is not difficult to find language in the Comments to section 211 that could easily be inserted in the Comments to section 208. There is one troublesome distinction, however, that must be considered. Section 211(2) states that a standardized writing "is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing."<sup>198</sup> The ALI discussion of this subsection is frugal. The Reporter merely thought of it "as part of the law of nature . . . that is that when you have a standardized agreement, one of the things about it is that it's supposed to be standard, and treat everybody the same way."<sup>199</sup> The standard is simply "the average member of the community who is likely to use this kind of agreement."<sup>200</sup> This immediately raises the question: Should one's education, experience, or particular knowledge of the printed form be a factor in determining the operative effect of one or more printed terms? In dealing with the meaning of "reason to believe" in subsection (3),<sup>201</sup> the Reporter emphasized that it is an objective standard requiring the exercise of reasonable judgment in the light of the facts available to the party whose "reason to believe" is at issue. If a seller submits a printed form to a customer who is knowledgeable and sophisticated regarding such forms, the seller may very well have reason to believe that such a customer is aware of certain clauses in the form. If that customer assents with presumed knowledge of these clauses, the seller would then have reason to believe that the buyer intended to assent to them. Yet, the Comment attempting to explain section 211(2) states: "[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it. The result may be to give the advantage of a restrictive reading to some sophisticated customers who contracted with knowledge of an ambiguity or dispute."<sup>202</sup>

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<sup>196</sup> *Id.*, Comment e.

<sup>197</sup> *Queare*: Are the drafters suggesting that unreasonably large liquidated damage clauses or limitations on a debtor's right to redeem collateral are a species of unconscionability?

<sup>198</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(2) (1979).

<sup>199</sup> 47 ALI PROCEEDINGS 524 (1970).

<sup>200</sup> *Id.* at 524-25.

<sup>201</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979) provides: "Where the other party has reason to believe the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not a part of the agreement."

<sup>202</sup> *Id.* § 211, Comment e.

Another obvious inconsistency is the repudiation of the principles of sections 20 and 201. These principles would require that a party who either knew or had reason to know the meaning of a particular term or clause may not have the advantage of the meaning he asserts. Thus, section 211(2) applies a test that cannot be reconciled with those sections of the *Restatement Second* (20 and 201) upon which the next subsection, 211(3), is expressly based.

In addition to the internal inconsistency evidenced by an objective "reason to believe" test in section 211(3) and an equality of treatment test in section 211(2), more confusion attends the attempt to reconcile section 211 with section 208. A plausible application of these notions under section 211 alone suggests a number of curious results. For example, if a lawyer who drafts form agreements for suppliers of goods were, as part of his practice, to sign such a form in his capacity as a customer, arguably he would not be bound by any terms that an average customer would not expect to find in such a form. If a person with limited education signed a form containing a substantively incomprehensible clause (such as the *Williams* clause) that was physically conspicuous, such a person would be bound by that clause. Section 208 considers factors such as limited education, ignorance, and the like; a court may deem the latter clause unconscionable if it created overall imbalance in the bargaining process. Once the lawyer takes advantage of the "average consumer" standard under section 211, however, it would turn section 208 on its head to allow the seller to enforce the printed term against the lawyer. That the excision of the clause under section 211 is unconscionable to the seller under section 208 makes a fascinating argument. Such a silly construction was certainly not intended in the assembly of section 211, and courts will not likely face that argument. The basic question remains, however: How do courts reconcile sections 208 and 211 and avoid these and other unintended effects?

An attempt to draft a highly effective section on unconscionability, even with the advantage of case law and scholarly comment on the Code section, was fraught with peril. It is extremely difficult to reduce the elements of unconscionability to even a long, black-letter statement. As the Reporter suggested, "Who knows what is 'unconscionable'? How do you measure the length of the Chancellor's foot?"<sup>203</sup> The safe course was to paraphrase the Code language, although the Reporter and others knew it had provided no assistance to courts and lawyers. Apparently, it was too risky to attempt any other kind of black-letter statement. Additional assistance might have been provided through the Comments but, as we have seen, the Comments are of little further assistance. Had the Reporter and Advisers not attempted a new section on standardized

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<sup>203</sup> 47 ALI PROCEEDINGS 507 (1970).

agreements, the new unconscionability section would probably have left the users of the *Restatement Second* no worse off. The inclusion of the new section on standardized agreements, however, increases the confusion geometrically. The confusion is due principally to the failure to distinguish two basic aspects of unconscionability, unexpected terms and lack of choice, both of which are directed toward a determination of the quintessential element of any agreement: assent.

The first concept occurs frequently in agreements evidenced by standardized, printed forms. When confronted with such purported agreements, the Uniform Commercial Code, the *Restatement Second*, and the courts recognize that parties do not read these printed forms. Faced with this reality, courts must determine which of the unread printed terms will be operative. There is no conscious or real assent to these unread terms. Yet, printed forms are used and will continue to be used without conscious aversion to certain terms; courts must have a workable test to determine their operative effect. The most comfortable test is familiar. A classic statement of the purpose of contract law is to fulfill the reasonable expectations of the parties to a contract.<sup>204</sup> The manifested intention of the parties determines the scope of the expectation interest. In the context of a printed form, that manifestation of actual assent or volition is typically limited to those "dickered" terms of the deal that the parties consciously considered. These consciously adverted terms form the foundation of the contract. A court may have to add terms to fill gaps or subtract from the printed form terms that interfere with the reasonable expectation of the party against whom they would otherwise operate. In this way, the court prevents enlargement of the risks of that party beyond his expectations. Section 211 best recognizes this in a Comment which states that a party is "not bound to unknown terms which are beyond the range of reasonable expectation."<sup>205</sup> A court must determine what a particular party, in the context of the particular transaction, reasonably expected beyond the "dickered" terms. Unread terms in the form that are consistent with that expectation should be operative; those that are inconsistent should be inoperative. The conspicuousness of the print as well as the character of the document should be considered. Baggage and parcel checks, invoices delivered after the contract is formed, and similar documents generally are not viewed as contractual by the parties to whom they are submitted. Therefore, courts have little difficulty in holding that any alleged contractual terms in such documents are inoperative. Parties typically read telegrams,

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<sup>204</sup> See, e.g., *Adams v. Waddell*, 543 P.2d 215 (Alaska 1975) (per curiam); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975); *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 361 N.E.2d 999, 393 N.Y.S.2d 350 (1977). See also 1 A. CORBIN, *supra* note 15, § 1; J. MURRAY, *PRINCIPLES OF THE LAW OF CONTRACTS* (2d rev. ed. 1974).

<sup>205</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211, Comment f (1979).

mailgrams, and personal messages. Consequently, courts generally give such communications operative effect. While conspicuousness of the printed clause should be a factor, conspicuousness alone should not be determinative of the operative effect of the printed clause. To the extent that section 211 makes printed terms operative on the basis of conspicuousness alone, that section is fatally flawed.

If a material, risk-shifting, and unexpected clause is in print so small that no reasonable party could read it absent artificial assistance, the court should excise it from the operative terms of the agreement for that reason alone. To hold a party to such a clause would be oppressive. The party would, obviously, be unfairly surprised because such a term would not reasonably be expected. If a fair and expected term in the printed form appears in equally small print, there is no reason not to enforce it because the party probably would not have read it had the print been legible. The drafter of a printed form should not include any clause in extremely fine print because of the superficial appearance of concealment, but if the term is not a material, risk-shifting, unexpected, and therefore necessarily unfair term, it should be made operative. If the term is material, unexpected and, therefore, excised from the operative terms, there is no harm in calling the term unconscionable. To the extent that the concept of unconscionability is understood, it is equated with unfair surprise, hardship, and oppression. This type of unconscionability is based on the assumption that a reasonable party would not have read or understood the term that the other party later seeks to enforce. This analysis does not consider, however, whether the unknowing party had any choice with respect to that term. He is not bound by it simply and exclusively because he reasonably should not have seen it or expected to be bound by it. He did not consciously assent to it, nor should a court deem that he assented to it.

The second concept of unconscionability has nothing to do with awareness of the terms of the contract. Assume the unusual situation of the party who reads and understands every scintilla of the printed form. He signs this document as the exclusive evidence of the deal. All courts admit evidence of misrepresentation, fraud, or duress to vitiate this apparent contract. Similarly, evidence of interference with the bargaining process falling short of these startling possibilities will also permit a court to refuse to enforce the contract or a part of the contract. The party who requires goods or services important to his physical or economic well-being may have little or no choice but apparently to assent to the terms of a printed form dictated by the party with superior bargaining power. Even where other sources of supply are available, there may be conscious parallelism resulting in virtually identical printed forms offered by all available suppliers. The phrase "contract of adhesion" and the evil it suggests have been familiar for many years. The

terms of these contracts do not surprise the weaker party because they were read and understood—perhaps even explained by the dictatorial supplier. Assent and volition and, therefore, agreement are absent. The weaker party should not suffer the hardship that such clauses create. For this type of unconscionability, that the clauses are printed on standard forms is irrelevant. Presumably, the clauses are as clearly understood as they would be in the form of a personal letter or telegram. The difficulties that courts must confront in determining whether a particular clause is oppressive can be enormous. For example, a court must determine whether a party had any genuine choice, whether there was gross disparity in bargaining power, and the like. The problems should not be exacerbated, however, by confusing unconscionability because of unexpected terms with unconscionability due to a lack of choice. Either *unexpected* or *no-choice* unconscionability should make the term or contract inoperative because of the lack of genuine or reasonably presumed assent. Yet, a clear distinction between the types of unconscionability would provide considerable assistance to those who must confront the problem. Unfortunately, the *Restatement Second*, although sometimes recognizing the concepts in myopic fashion, fails to provide the necessary and desirable delineations.

In the context of standardized forms, most of the unconscionability cases will involve the *unexpected* term, whether or not they also involve the *no-choice* problem, because the printed forms are rarely read and understood. In the *Williams* case and virtually all other consumer cases, there is little need to consider the no-choice variety of unconscionability; undoubtedly the consumer has not read or understood the printed terms. To hold such a consumer to a conspicuously printed clause that the consumer could not understand is reprehensible. Even on these facts, the question of choice does not arise. The courts may feel compelled to deal with the “contract of adhesion” in these cases, but it is probably an unnecessary analysis. In cases involving merchants, courts interpret the Code concept of unconscionability as conclusively presuming that the parties have read and understood printed forms. So-called exceptions to this analysis typically involve parties who are merchants in name only. Courts penetrate the superficial characterization and, in effect, treat the party as a consumer despite the commercial setting of the agreement. Generally, such cases involve parties who would neither read nor understand the printed terms of a document presented to them by the large corporation with superior bargaining power.<sup>206</sup> The assumption that merchants read and understand the printed terms is typically false.<sup>207</sup> The need for stability, certainty, and predictability in

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<sup>206</sup> See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (E.D. Mich. 1976).

<sup>207</sup> The author has conducted seminars involving over 5,000 purchasing agents and has never discovered one who read or understood printed terms. Moreover, not one read or un-

merchant-to-merchant transactions, however, prevents the use of the *unexpected* term type of unconscionability by a merchant.<sup>208</sup> As to the *no-choice* variety, if the argument is raised at all, the weaker party usually has no evidence or insufficient evidence that he attempted to negotiate with respect to the printed term that subsequently forms the basis of litigation.<sup>209</sup> If unconscionability is still in its formative stages, the doctrine is pre-embryonic with respect to merchant-to-merchant transactions. In this regard, section 208 of the *Restatement Second* provides no assistance. If courts eventually consider unconscionability of the "unexpected" type in merchant cases, subsection 211(2) may be a significant problem. For the reasons suggested in the analysis, equality of treatment regardless of superior knowledge is antithetical to current judicial thinking in these cases. Thus, not only does the *Restatement Second* fail to provide any illumination—it is, again, counterproductive.

#### IV

#### AN INTEGRATED ANALYSIS

It is at least doubtful that a separate section on standardized printed forms is necessary or desirable. The current section suffers from its caption, "Standardized Agreements"; the problems that it attempts to confront concern the operative effect of certain printed clauses. It is misleading to use the term "agreement," because the section is concerned with the evidence of agreement rather than agreement itself. The confusion is deepened by attaching the qualifying term "integrated" to the section. The section is premised on the realistic assumption that printed forms are not read or understood; thus, it is difficult to conceive of an intention by the parties to regard such a writing as final

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derstood the terms on his own purchase order form. Even people who are paid to read and understand documents sometimes fail to do so. Justice Douglas reports a World War II story:

But even the great were bogged down in paperwork. Memoranda were produced in greater numbers than bullets. They flooded the departments. On one of my regular lunch dates with Forrestal, I said, "Why don't you write a two-page memo and put in between the two sheets a half-dozen pages of the same size containing excerpts from the *Odyssey* or *Iliad*?"

The next time I saw him, Forrestal was laughing when he told me that he had done it and "the whole thing came back initialed by everyone, including George Marshall."

W. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 277 (1980).

<sup>208</sup> The seminal case in this area is *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970). See also *W.L. May Co. v. Philco-Ford Corp.*, 273 Or. 701, 543 P.2d 283 (1975); *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 344 N.E.2d 391, 381 N.Y.S.2d 459 (1976).

<sup>209</sup> See generally cases cited in note 208 *supra*; see also *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1977), *aff'd mem.*, 588 F.2d 838 (7th Cir. 1978). In *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974), the court found no evidence to indicate that the buyer had attempted to negotiate the particular contract provision that it alleged was unconscionable. However, this case was reversed and remanded without opinion, 527 F.2d 853 (D.C. Cir. 1975).

or complete. More important, it is probably impossible to assemble a new section that provides comprehensive and effective guidance with respect to the standard-form phenomena as they appear throughout the *Restatement Second*.

A better course would have been to include a comprehensive treatment of standard-form problems in all sections in which they arise. Certainly the section concerned with non-matching acceptances<sup>210</sup> should expressly consider the standard-form problem. Similarly, the unconscionability section<sup>211</sup> should deal with the problem comprehensively. In that section, a clear delineation between the "unexpected" and "no-choice" types of unconscionability would have been particularly useful in relation to the proper judicial reaction to standard forms. Because current interpretations of section 2-207 of the Code suggest modifications of the normal operation of counter-offers, there is a compelling need to deal with that problem in the counter-offer section.<sup>212</sup> Perhaps even more important is the need to deal directly with the printed-form problem in relation to equivocal acceptances<sup>213</sup> and those acceptances that merely add requested terms or those purported acceptances that are conditioned upon assent to additional terms.<sup>214</sup> Relevant sections on interpretation<sup>215</sup> should include clear guidance with respect to the printed form, either in the battle of the forms context or where the form is the single document purporting to evidence the agreement between the parties. The generic section dealing with the effect of misunderstanding<sup>216</sup> should also include express guidance concerning the operative effect on printed forms. Cross-references and distinctive applications of these sections should be included in the Comments to each of these sections. Finally, this pervasive effort should begin in the definitional sections, particularly the section defining "term"<sup>217</sup> as used throughout the *Restatement Second*. Although this Article may be said to demonstrate these relationships from the *Restatement Second* itself, the demonstration is possible in spite of the final draft rather than because of it.

If a principle underlies the plethora of problems involving the standardized printed form, that principle is currently found scattered throughout the *Restatement Second*. As suggested earlier, the most important statement in section 211 on standardized agreements is the statement in the Comment that a party should not be bound "to unknown

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210 RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

211 *Id.* § 208.

212 *Id.* § 39.

213 *Id.* § 57.

214 *Id.* § 61.

215 *Id.* §§ 200-203.

216 *Id.* § 20.

217 *Id.* § 5.

terms which are beyond the range of reasonable expectation."<sup>218</sup> If only one printed form serves as the evidence of the actual or purported assent of the parties, the principle may be elaborated as follows: The parties are bound by those terms in a printed form that they reasonably expect that form to contain, regardless of what the form contains.<sup>219</sup> They are bound by terms not contained in the form if such terms are reasonably expected; they are not bound by terms contained in the form if such terms are not reasonably expected. If the transaction involves an exchange of forms, the threshold question, often overlooked in current judicial explorations of section 2-207, should be emphasized by the *Restatement Second*: Was the response to the offer a definite and reasonable expression of acceptance or was it a counter-offer? One workable test exists to decide this question, and it is available in the *Restatement Second*. Sections 57 and 61 state the test in a fashion which is indistinguishable from the test suggested in section 211 as outlined in the Comment to that section. Under section 57, the test is whether the offeror reasonably understood the reply as an acceptance. Under section 61, the test is whether the reply is fairly interpreted as an acceptance.<sup>220</sup> These tests must be superimposed on section 59 if that section is to work. Section 59 determines if a reply that purports to be an acceptance is indeed an acceptance by whether or not it is conditional on the offeror's assent to different or additional terms. If the reply is conditional, it is a counter-offer; if not, it is an acceptance. Yet, whether a reply is conditional is itself a question of interpretation; the tests that must be used in that interpretation process are the tests under sections 57 and 61: Would the offeror reasonably understand or fairly interpret it as an acceptance, or would the offeror understand it as conditional on the offeror's assent to the additional or different terms in the reply?

Had this test been applied in current section 2-207 cases, the results may not have changed but the analysis would have provided a sound basis and high precedential value for further development. Moreover, the current confusion surrounding the operation of counter-offers would

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<sup>218</sup> *Id.* § 211, Comment f.

<sup>219</sup> JUDGE CONFORD [N.J.]: I think I generally remember what you said, but I'm not sure whether the formulation by Mr. Willard would cover both the situations of the signing party or the assenting party assuming that a provision was in as well as an assumption that the assenting party assumed that a provision was out. In other words, would it cover both? I think it should cover both.

PROFESSOR BRAUCHER: I think I need Mr. Willard's help on this. I think we mean to cover both, but I think the language does not quite cover both.

MR. WILLARD: I think that's correct, Mr. Reporter, and if a form of words can be found to say it both ways, that seems to me to be appropriate.

47 ALI PROCEEDINGS 526 (1970).

<sup>220</sup> Again, RESTATEMENT OF CONTRACTS § 201 (1932) provides guidance for fairly interpreting the acceptance.

have been avoided. Courts could use the underlying philosophy of section 20 as the basis for the application of this analysis. An offeror is entitled to a clear manifestation of acceptance as current section 57 and its predecessor mandate. A printed form containing non-matching terms is equivocal although it contains conditional language parroting or paraphrasing statutory or other formula language, because the offeror may reasonably understand the reply to be an acceptance. The offeree has created the printed-form reply and either knows or has reason to know that the offeror may reasonably understand the reply to be an acceptance. Pursuant to the principle of section 20, the reply should operate as an acceptance in accordance with the meaning attached by the offeror—the party who neither knows nor has reason to know the meaning attached by the offeree. The offeror is not “at fault,” but the offeree *is* “at fault” in submitting an ambiguous, equivocal reply that a reasonable party understands and fairly interprets as an acceptance. The offeree can make a counter-offer, but whether a court views the reply as a counter-offer depends upon whether the offeror reasonably understands or fairly interprets it as such rather than a reply that closes the deal. The underlying principle of section 20 is found in the single printed-form analysis in the same fashion. The party who submits the printed form knows that it will not be read or understood in all of its printed parts. He therefore knows or has reason to know—“reason to believe”—that a material, risk-shifting term will not reasonably be expected by the other party. The other party will not reasonably understand that form to contain such a term. Because the other party is not “at fault” in failing to read and understand each part of the printed form, a court should excise the unexpected clause from the operative effect of the factual bargain between the parties. The true understanding or agreement of the parties should be that which the parties have consciously considered, and that which they have not consciously adverted to, but reasonably expect their agreement to contain. It is fair to excise the unexpected term because the party “at fault” should not have the advantage of a term that would unfairly surprise and oppress the other party. Finally, a court should excise oppressive terms despite conscious consideration when it is apparent that the weaker party assented only because he had no reasonable choice. These terms should be excised because they are unconscionable—oppressive and unfair—not because there is an element of surprise; they are substantively unfair even though the weaker party was completely aware of their inclusion in the printed form.

#### CONCLUSION

It would have been possible for the *Restatement Second* to provide a complete structure for the development of effective and comprehensive

judicial analyses of all problems related to the use of printed forms. As a corollary, it would have been possible for the *Restatement Second* to provide a pristine analysis of unconscionability that would have been one of the great contributions to contracts analysis in this century. It would have been possible for the *Restatement Second* to expand the understanding of the underlying purposes of Article Two of the Uniform Commercial Code, which may be summarily described as the search for the factual bargain of the parties—i.e., “a more precise . . . identification of the actual or presumed assent of the parties.”<sup>221</sup> It is particularly frustrating to discover not only the seeds of an effective, integrated analysis in the *Restatement Second*, but also some additional initiatives that could have provided an uncommonly solid foundation for the acceptance of such a comprehensive analysis.

In attempting to discover why the promise failed so badly, one must reject out of hand certain superficial reasons. There was no dearth of talent or imagination on the part of the Reporter and his Advisers. There was no lack of support from the American Law Institute. There was at the same time, however, no ornate tapestry of the new philosophy of contract law simply waiting to be restated in classic form. The challenges that the new drafters confronted were overwhelming. The values of certainty and predictability had to be reduced in the unfolding interests of just results. The lines of distinction had to be more wavering and blurred. Generic principles of reasonableness, conscionability, good faith, and practicability had to be substituted for more concrete and specific rules that could play havoc with overriding values. The new demands on contract law had barely begun to unfold when the new *Restatement* process began. The necessary rejection of a monolithic and dogmatic approach was always considerate of the classic tradition, at least in terms of fundamental obeisance to it. The impossible reconciliation of myriad views created ambivalence in analytical clarity. A new Restatement of Contracts had been started and it would be finished, albeit more than a decade and a half later. All of these incredibly difficult tasks had to be accomplished within the process of the Institute, which superimposed still additional layers of compromise on the efforts of the Reporter and his Advisers. The presentation of the tentative drafts to the membership occurred in an ambience of emerging concepts of the new contract law with which the membership itself struggled in their workaday efforts as lawyers, judges, and teachers. We find some evidence of these emerging concepts as afterthoughts in the revised Reporter's Notes. Unfortunately, these afterthoughts may make certain sections and their Comments even less reliable and more inconsistent than they were in preliminary draft form.

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<sup>221</sup> See Murray, *supra* note 59, 51 OR. L. REV. at 269, quoted in R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL AND CONSUMER LAW 677 (1981).

One is tempted to say that the *Restatement Second* was premature. It was attempted before there was sufficient judicial and scholarly development of these sometimes diabolically difficult issues. There was insufficient time for reflection, and there were insufficient bases for reflection. One is tempted to suggest that *now* is the time for a new Restatement of Contracts. Then again, perhaps we should wait another decade or more.