

Contracting Is Easy – Drafting Is Hard¹

By Vincent A. Wellman and Deirdre Golden

Introduction

In the fall of 2006, the authors collaborated to teach a Contract Drafting Seminar at Wayne State University Law School. We believe that this was the first such course to be offered at any law school in Michigan, and one of a small number to be found in the country. Although drafting courses are not yet common, we expect they are part of a trend in legal education to include more “skills” courses to help law students prepare for the challenges they will face as young lawyers.² Law schools are learning that law practice has changed. Our graduates are not likely to enjoy a long apprenticeship, where they can learn by watching their elders; instead, beginning lawyers will be assigned important tasks as soon as they are hired. Among these tasks will be drafting various agreements—if not full-fledged contracts, then perhaps engagement letters or discovery agreements.

We asked our students to perform many such drafting tasks; some were simple and others more complex. We are proud of how well they performed and how much they learned, and their success has motivated us to continue the seminar. One aim of this article is to document and praise these pioneers. We also aim to make some points about how to teach this kind of skill. To accomplish both these ambitions, we will sketch a confusing area of the law—in this case, the law of the battle of forms under Article 2 of the UCC—where we required the students to grapple with a complex problem, and where sophistication and insight is required to perform well. We then use this drafting challenge to illustrate some important lessons both for the craft of drafting and for the task of teaching that craft.

The Problem of Conflicting Terms in a Battle of Forms

In General

Two of our assignments required contracts for the sale of goods: first, on behalf of a prospective buyer and then on behalf of a seller. In each case, the students were asked to draft contracts that, as much as possible, would se-

cure the terms desired by their hypothetical clients. One lesson they learned was that, in the kind of situation commonly described as a “battle of forms,” it is nearly impossible to achieve this through drafting alone. For the most part, our students learned this lesson in the same hard way that it is learned by practitioners: by trying to achieve the impossible and then coming to realize that it cannot be done.

To varying extents, the students were already familiar with agreements for sale of goods. They had studied the text, and foibles, of several such agreements in their first year contracts course.³ Beyond that basic introduction, some had jobs in businesses where such contracts were common, and others had struggled in their clerkships with such documents. Thus, they were accustomed to the basic idea of a contract that expressed the core terms of the deal (quantity, price, delivery, etc.) and also asserted a sometimes bewildering array of “Standard Terms and Conditions” that were thought important by the client or more senior lawyers.

For obvious reasons, sellers will often want to limit consequential damages and buyers will usually seek to avoid any such limitation, and the UCC drafting assignments asked the students to deal with this issue. Section 2-719 of the Code⁴ allows the parties to limit consequential damages, or even foreclose them altogether, and includes a suggestion of the kind of language that, if included in their agreement, could accomplish that limitation.⁵ But, as drafters everywhere recognize, it is one thing to know how to draft the appropriate limitation *once* the parties have indeed agreed to accept such a term, and quite another to negotiate so that the parties actually agree to include any such limitation.

UCC 2-207 Basics

Section 2-207⁶ of the UCC has been cursed by generations of law students who have struggled to grasp its intricacies, but the section is important to their education because it has produced, in a limited arena, an important change in the rules of contract formation.

The section gives legal effect to a process by which, through an exchange of forms, the parties can struggle over the terms of their deal without actually negotiating those terms. Instead, an offeree can change some of the terms by sending its own form with terms that vary from those proposed by the offeror. Sometimes this process results in the offeree's preferred terms, and sometimes it can result in terms that are neither the offeror's nor the offeree's.

For example, the offeree's acceptance form might include an "additional" term to allow the buyer thirty-days credit before payment is due, where the seller's offer is silent on that question. Comment 3 to UCC 2-207 opines that, between merchants, this additional term would effect only a minor alteration in the deal and should be included in the final understanding of the agreement, even though the seller might have paid no attention to the term's inclusion in the buyer's form and might have given no indication of agreeing to its inclusion.

The section yields a different result if the offeree seeks to limit consequential damages. Suppose that the buyer has sent an order that qualifies as an offer, and the seller replies with an order acknowledgment that qualifies as a "definite and seasonable expression of acceptance." Suppose further that the acknowledgment adds a damages limitation, but the order was silent on the question. As a result, the seller's limitation on consequential damages would be another 'additional' term. Comment 4 to UCC 2-207 indicates that, in the view of the Code's drafters, such a limitation would "materially alter" the terms of the offer and would, therefore, not be included unless the offeror actually indicates assent to the proposed additional term. The case law concurs with this principle.⁷

Both the analysis and the result change if we consider a "different" rather than an "additional" term. To understand this, suppose that the buyer had asked for a specific quote, in response to which the seller issued a well-articulated offer to sell, which includes a limitation on consequentials. Suppose further that the buyer replies with its order, which in this scenario will operate as an acceptance, and that the order asserts the buyer's entitlement to consequential damages caused by the seller's breach. In Michigan, as in many states, the problem of different terms is handled according to the "knockout" doctrine, which means that neither the seller's nor

buyer's proposed term is included in our final understanding of the parties' agreement.⁸ Instead, the conflicting terms cancel each other, and the question of consequential damages would be resolved according to the Code's damage provisions. As a result, in our example, no limitation on consequentials would become part of the contract.⁹

Beyond the Basics

More complicated situations will require more thought and skill, including a deeper understanding of UCC 2-207 and the knockout doctrine. But in teaching drafting, the most difficult problem relates to the drafter's attitude rather than to any subtlety of law.

As we described earlier, UCC 2-207 allows one party to change some terms and conditions in the agreement *without* the other party's assent or even acknowledgment: an additional term can be added to the final contract (provided that the additional term does not materially alter the contract), or one of the Code's default terms can be substituted under the knockout doctrine for terms sought by one or the other of the parties. This legal result can lead to a drafter's unfortunate expectation that, by manipulating its forms, it can expect to impose its terms on the deal without having to secure the other party's assent. As it turns out, however, this expectation is almost always misplaced.

What would happen, for example, if the buyer has submitted an offer (whether in the form of a Purchase Order (PO) or otherwise), and the seller hopes to use its reply (an order acknowledgment or something comparable) to impose its own terms and conditions? In particular, let us again consider a limitation on consequential damages. A seller could recognize that the knockout doctrine will cancel out its damages limitation term if the order acknowledgment is treated as an acceptance with a different term and, therefore, might try to take advantage of the last clause of UCC 2-207(1), sometimes called the "proviso" clause: "*unless acceptance is expressly made conditional on assent to the additional or different terms.*"¹⁰ This clause provides for an exception to the rest of the subsection's procedures. One way to understand the potential impact of this clause on a drafter's thinking would be this: a seller might read this clause to indicate that, if its order acknowledgement stated clearly that its acceptance was "conditional" on the buyer's assent to the seller's different terms, it could impose those terms without regard to anything the buyer has said or may come

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to say. Put differently, it appears as if the seller could use its form to dominate the terms of the deal, and, in particular, foreclose any undesirable terms proposed by the buyer in its offer.

But here, as in so many contexts relating to UCC 2-207, appearances can be deceiving. The proviso clause does not convert the seller's order acknowledgment into an acceptance whose terms dominate the contract. Instead, including such a clause turns the seller's purported acceptance into a *counter-offer*. To be sure, if the buyer gives assent to the seller's proposal, then the seller's damages limitation term will become operative, but this is so for the usual reason—namely, the buyer has accepted the seller's offer. However, our analysis, and the caselaw, both indicate some important alternatives to this scenario, the most likely of which is usually not in the seller's interest. In particular, suppose that the buyer's reply insists that the buyer may recover consequential. (After all, a buyer is just as likely as a seller to have a predrafted form for its use and is as likely as a seller to revert to its own form rather than to actually engage the other party in serious and thoughtful negotiations.) In such a case, the buyer's reply would likely be construed as a "definite and seasonable expression of acceptance" of the seller's counteroffer with a *different* term. As applied to this scenario, the knockout doctrine would again mean that the conflicting terms cancel each other, and the Code's default term regarding damages would be incorporated instead. In sum, the buyer's preferences could prevail if (but only if) the buyer's preferences are the same as the Code's default term, and the seller's preferences would *not* prevail.

A determined seller might attempt one further stratagem. That is, the seller might add yet more language to its order acknowledgment to say something like, "Seller will accept no contract on terms that are different from those contained in this form; any attempt to add or change the terms of this Order is inoperative and precludes the formation of a binding contract." The seller might well expect that if its counteroffer includes this strong assertion, or something like it, the seller can prevent any further iterations of the *attack-counterattack* character of the battle of the forms as outlined in UCC 2-207(1) and (2). Up to a point, the seller's thinking is sound. After all, if the seller's language is sufficiently clear and strong, it can establish

that any reply by the buyer that attempts to vary the terms should not be deemed an acceptance at all and hence not a "definite and seasonable expression of acceptance," which is the predicate for UCC 2-207(1). And, if the buyer's reply is not an acceptance under UCC 2-207(1), then the other provisions of UCC 2-207 should not operate to recognize additional or different terms.

The problem for the seller, however, is that there's more to UCC 2-207 than just subsections (1) and (2). Subsection (3), in particular, can thwart the seller's ambitions in unanticipated ways. Suppose now that the buyer does not make further reply to the seller's strong language; in many cases the buyer sends no reply at all. The seller might want to treat the buyer's silence as acquiescence to all the terms of its counteroffer and then ship the goods (likely accompanied by a bill of lading that repeats the same terms and conditions—usually on the reverse—including the damages limitation). Suppose finally that the buyer accepts the goods and sends payment. In this situation, the caselaw often indicates that no contract has been formed by the parties' writings: the order acknowledgment was a counteroffer that does not create a contract unless it is accepted by the buyer, but, under the Code and at common law, silence is not ordinarily treated as acceptance.

The subsequent conduct—the seller's shipment and the buyer's acceptance of, and payment for, the goods—will not likely be treated as wholesale acceptance of the seller's terms. It will more likely be treated under UCC 2-207(3) as "recognizing a contract by conduct".¹¹ In such a case, subsection (3) stipulates that the parties' contract will consist of those terms on which the parties' writings agree, together with the Code's default terms. As a result, the seller will again be thwarted.

There is a kind of paradoxical quality to this aspect of UCC 2-207. The more forcefully the seller states the point that it will not agree to a contract on any terms that differ from its own, the more likely it is that the seller will be deemed not to have accepted the buyer's offer and, instead, to have made a counteroffer. That means in turn that the seller's contract fate is dependent on the buyer's subsequent conduct. On the one hand, if the buyer replies in ways that look like an acceptance, the law still permits the buyer to propose different terms; and while UCC 2-207 does not mean that the buyer will necessarily gain its

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own preferences, the section does indicate that the seller can be prevented from securing its aims. On the other hand, if the buyer does not reply (or if the reply does not operate as an acceptance), then the seller's fate will depend on the subsequent conduct of both parties; and if any contract results from that conduct, with this scenario, UCC 2-207(3) usually means that the seller will again be thwarted. In sum, no amount of drafting, and no amount of cleverness in drafting, can ensure that the seller will get its terms.

Drafting Wisdom for Dealing with UCC 2-207 and How to Teach It

As we explained earlier, our seminar students had already struggled with UCC 2-207—in their studies and perhaps also in their work—but none of them had previously struggled with the drafting difficulties that are posed by the battle of forms. Some part of the seminar's class time, therefore, required a review of UCC 2-207 and its attendant case-law. However, the biggest lesson for the students was discovering that there are limits to what can be done by a drafter, no matter how crafty.

One of the authors has written elsewhere about the too common assumption of some lawyers that there are “magic” phrases to be used in contract drafting: words or clauses that can function like a wizard's wand to accomplish the drafter's ambitions without regard to what else is found in the contract or what else has transpired between the parties.¹² We thought that this was an important point to make in the seminar, and throughout the semester we reminded the students that there are few, if any, magic clauses in drafting. The lessons about UCC 2-207 were in the same genre as the anti-magic reminders: it is dangerous to assume that a drafter can impose his or her client's terms on a contract for sales of goods, no matter how forcefully, or comprehensively, the drafter tries to make the point.

There are three other lessons that came with the students' struggles to deal with conflicting forms. These lessons were the inspiration for this essay because they bear on both the craft of drafting and the teaching of that craft and could therefore be shared with a larger audience.

Lesson #1 – There are resources available; don't be afraid to use them.

It is axiomatic that no one drafts an agreement entirely from scratch. Beginning lawyers should learn to find examples, samples, or models that can help them get started. Books of sample or form contracts are available in most law libraries or online, and many law offices have an archive (some better organized than others) of past agreements that can guide the neophyte drafter. When we designed the seminar, we assumed that our students would be expected to proceed in this fashion in their jobs, and it therefore seemed silly to expect them to proceed in some different manner in the seminar. Most texts that address contract drafting make the same point, and even if the texts did not acknowledge this fact, law office economics would soon impress the point on beginning lawyers.

We decided to include this aspect of practice as part of the seminar's structure. Thus, an early assignment asked the students to draft a simple residential real estate purchase agreement. As part of the background for that task, we provided them with forms from different real estate boards and invited them to look for wisdom in the pages of these forms or, for that matter, in any other forms that they could find. For this and subsequent assignments, they submitted not only their draft of the assigned contract but also a short commentary on why they did what they did. We encouraged them to look for various ideas and solutions and then, in their commentaries, to chronicle and evaluate the samples and ideas that they reviewed. For each successive assignment, we expected the students to find and review different possible forms and to tell us what they found, and what they thought about those possible models. Our larger aim was to help the students develop both the search strategies to find various models and the kind of judgment they would need to sort the good ideas from the bad; in our classroom instruction and our comments on their drafts, we worked to hone their critical abilities.

Lesson #2 – No matter how many resources you use, there is no substitute for a solid knowledge of the law.

Internet resources have of late become particularly rich and diverse, and many of our students were more adept than we at going online to find both examples and inspira-

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tion for their work.¹³ The easy availability of the Internet underscores our second lesson. Online resources are rich, but they are also notoriously unreliable: as a result, using what you find on the Internet raises the risk that you will be led astray. We wanted the students to take advantage of those resources, but how could we help them sort the good from the bad?

Separating wheat from chaff is the same challenge, whether the crop is harvested from the Internet or a book in the library or the files of a senior partner. Whatever the drafting context, it is essential that the drafter understand the relevant law. In the case of UCC 2-207, two points are crucial. In Michigan, and many other states, the first of these points is the knockout doctrine. The logic of this doctrine leads to the conclusion that no offer, whether to sell or buy, can control the terms of the resulting contract. Regardless of the offer's terms, and regardless of how the offer is phrased, an acceptance that includes conflicting terms can knockout terms that the offeror had hoped to secure. As we explained above, this result is usually more favorable to a buyer, but it can undermine both the buyer's and the seller's efforts to control the legal consequences of their deals. Even the proviso clause cannot help much on this score: the language favored by that clause converts the reply into a counteroffer, and a counteroffer is still an offer.¹⁴ One sensible reaction to this fact is to rephrase a client's documents so that the client is in the position of *offeree* – to accept, or reject, the other party's offer. By placing the client in the position of the offeree, the drafter might hope to preserve the client's power to reject unacceptable terms. However, this expectation leads to trouble on the second crucial point of law. If this stratagem is available to the seller, it is also available to the buyer, and if both parties employ the stratagem, the end result is that neither party looks as if it is agreeing to the other's terms. Each party is saying, in effect, that it will not agree to the other's conflicting terms and will moreover reject any deal that is not on the terms it desires. In such a situation, the case-law applying UCC 2-207 shows a marked preference for treating the transaction as governed by UCC 2-207(3): no contract is formed by the writings, but, when the parties' conduct recognizes the existence of a contract, the conflicting provisions are, once again, cancelled.

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There are other examples of the same kind, where not knowing the relevant law can lead to crucial mistakes in drafting. In fact, two provisions of Article 2 anticipate problems of just this sort. In UCC 2-316(1), the Code limits a parties' power to exclude warranties and, in the commentary, issues a general warning against drafters who try to exclude "all warranties, express or implied."¹⁵ UCC 2-719(1)(b) can similarly undermine the efforts of the drafter who ignores the Code's provisions. UCC 2-719(1)(a) allows the parties to provide for remedies other than damages and may even limit the injured buyer to the repair or replacement of the nonconforming goods. However, subsection (1)(b) also specifies that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive..." The contract drafter who doesn't appreciate subsection (1)(b) could spend valuable time crafting a limitation on damages, only to discover that the law will treat that limitation as only one possible remedy among others, and that the full range of damages allowed under the Code are, in fact, still available.

Lesson #3 – No matter how many resources you use, there is no substitute for common sense.

If we could, we would confront drafters who expect that their preprinted forms will control all the terms of the contract. We would ask them, "Do you really expect that contract law will allow you to impose all of your terms on the deal, without regard to the agreement of the other party?" Framed this way, the question admits of only one plausible answer: "No, of course not. Our law of contracts requires that the parties agree on the terms of their deal." But recognizing this fundamental premise of contract law *should* lead the drafter to understand that UCC 2-207 gives an offeree only limited powers to change the terms of the deal and gives neither party the power to exercise complete control over the deal's terms and conditions. Greater familiarity with UCC 2-207 should confirm this fundamental premise rather than obscure it.

There are other examples, along the same lines, where common sense could avoid disappointment, and we emphasized several of them to the seminar. Inserting an arbitration clause into an employee manual, for example, will not ensure that the parties will need to arbitrate – no matter how well drafted the arbitration clause – if the beginning page of

the manual asserts that nothing in the manual creates any contractual obligation for either party.¹⁶ We wish, again, that we could confront the drafter of such a manual (and of some letters of intent) with the question, “Do you really expect to say that a writing has no legal effect and then, in the same breath, expect a court to enforce part of that writing?” Again, we expect that there can be only one answer to the question, and that recognizing the inconsistency will lead to a different and more satisfying approach by drafters of employee handbooks.

Common sense and the law of contract interpretation converge on the proposition that a contract has to be interpreted as a whole,¹⁷ and one cannot decide what a contract requires, or permits, without knowing the whole contract. One clause of an agreement may state that the seller is responsible for the performance of its goods, but another part of the same agreement might condition the seller’s performance on the buyer’s providing appropriate information about its manufacturing needs. If the goods fail to perform, then a simple-minded analysis might focus on only the first provision and conclude that the seller is liable for the goods’ failure, but knowledge of the condition precedent could change that initial conclusion: if the buyer did not provide appropriate data then failure of the goods was not in fact a breach of the contract.

This maxim of sound contract interpretation carries over to drafting: one cannot draft an adequate contract by just cobbling together a series of specific, isolated clauses. Consider, in this connection, those standard terms and conditions that assert that every transaction is governed by those standard terms. The drafter’s efforts will fail if, in another paragraph of the same standard terms, it requires that each new order be accomplished by use of a prescribed form that includes a merger and integration clause asserting that the order is a complete and independent transaction. A moment’s reflection should reveal the contradiction: if every new order is a complete and independent transaction, then the process of agreement that leads to some particular contract might or might not incorporate those standard terms. To put the point simply, shooting oneself in the foot is painful and embarrassing, and sound drafting accordingly requires that the drafter look at the whole instrument to avoid that result.

These are important lessons for every lawyer who works to provide forms for the sale of goods. For that matter, they are important lessons for every drafter. Teaching them is a challenge, although a rewarding one, when the students slowly grasp the insight that if they draft mindlessly, they will draft badly.

NOTES

1. The title of this essay invokes a famous joke in the entertainment industry, the punch line of which goes “Dying? Dying is easy. Comedy is hard.”

2. In summer of 2005, a conference on the teaching of contract drafting was held at Northwestern University’s law school. Such a conference is often the herald of growing trend in legal education.

3. When Wellman last taught UCC 2-207, it consumed a week’s class time and more than 20 pages of the casebook.

4. See MCL 440.2719.

5. In creating the seminar, we decided that we would need to mix certain elements of substantive contract law with the necessary points about drafting. In considering the issues relating to a limitation on consequential damages, we needed to remind the students about the extent to which 2-719 allows the parties to include such a limitation, and the extent to which that section also undermines the efforts of the heedless drafter. See especially 2-719(1)(a). We also needed to warn them about the extent to which some drafters confuse provisions addressing damages with provisions that address warranties.

6. See MCL 440.2207.

7. See, e.g., *Leonard Pevar Co v Evans Products Co*, 524 F Supp 546, 32 UCC Rep Serv 720 (D Del 1981); *Eagle Signal Controls v Midwestern Elec Inc*, 521 NE2d 967 (Ind Ct App 3d Dist 1998); *Winter Panel Corp v Reichhold Chemicals, Inc*, 823 F Supp 963, 21 UCC Rep Serv 2d 533 (D Mass 1993).

8. See, e.g., *Challenge Mach Co v Mattison Mach Works*, 138 Mich App 15, 359 NW2d 232 (1984).

9. From one perspective, this rule appears to enshrine the buyer’s preferences, but that appearance is artificial: the buyer gets its way *only if* its proposed term is the same as Article 2’s ‘default’ term. So, in contrast, if the buyer had wanted both consequential damages and attorney’s fees, the knockout doctrine would frustrate the buyer’s ambitions as well as the Seller’s.

10. MCL 440.2207(1).

11. See, e.g., *Goodyear Tire & Rubber Co v Dynamic Air, Inc*, 53 UCC Rep SErv 2d 778 (D Minn 2004).

12. See Vincent A Wellman, *The Unfortunate Quest for Magic in Contract Drafting*, 28 Wayne L Rev 1101 (2006) (hereafter “Quest for Magic”).

13. In this connection, we were delighted to learn of a Web site for small business owners that addressed the UCC 2-207 problem, and got it right. Unfortunately, the Web site has been discontinued.

14. One of the leading books on contract drafting misses this vital point. We were especially pleased that one the seminar students caught this error and pointed it out to the class.

15. See 2-316, Comment 1, which explains that subsection (1) denies “effect to such language when inconsistent with language of express warranty and permit[s] the exclusion of implied warranties only by conspicuous language or other circumstances which protects the buyer from surprise.”

16. See *Huertibise v Reliable Business Computers*, 452 Mich 405, 550 NW2d 243 (1996)(discussed in *Quest for Magic*, 28 Wayne L Rev at 1103-1106).

17. See, e.g., *Assoc Truck Lines, Inc v Baer*, 346 Mich 106, 77 NW2d 384 (1956).



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