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FINDING THE MISSISSIPPI UCC SALES CONTRACT AMID THE RFQ, QUOTES, PHONE CALLS, EMAILS, PURCHASE ORDER AND ACKNOWLEDGEMENT FORMS

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* Robert P. Wise is the President of Sharpe & Wise, PLLC. Email rwise@sharpewise.com or call 601-968-5561. Other articles of interest can be viewed at http://www.mslawyer.com/rwise. J.D. Washington & Lee University (1979). Many thanks to H. Richard Davis, Esq., for his able assistance while a law clerk at Sharpe & Wise, PLLC in finalizing this article for publication. This article is dedicated to the memory of the attorney who set me right on these points of law, William B. Lovett, Jr. (1962–2011) (J.D., *magna cum laude*, Mississippi College School of Law 2001 and former Editor-in-Chief, *Mississippi College Law Review*). Bill was a law clerk to the U.S. District Judge William H. Barbour and later a colleague at Wise Carter Child & Caraway, PA. The finest of lawyers and a prince of a fellow. May light perpetual shine upon him.

I. INTRODUCTION

Bad experience, not good experience, is often the more effective teacher. I know that was the case for me as an attorney handling my first real foray into litigation over the competing forms of a manufacturer and its buyer. My client, the manufacturer, was justifiably proud of its well engineered product that it had sold across the world, and its in-house counsel was equally eager that I should produce a result exonerating the terms included in their detailed quotation over conflicting terms in the buyer's purchase order. Surely, we thought, the terms of the manufacturer, as the provider of an essential product that would not have existed but for the manufacturer's ingenuity, should prevail over those of this one buyer who simply sent in an order with his own terms. Dead wrong: my motions for partial summary judgment were denied.

Warning: the world of conflicting forms and terms can become a subtle maze of mirrors in which an attorney is likely to become lost without a firm grasp of UCC Article 2's notions of what is a real offer, what is a final acceptance, and of what resolutions the battle of the forms provisions provide (if they indeed apply at all given all the facts), especially if one attempts to navigate with a bias (and no, it is no excuse to the attorney that one's client was ever so anxious to hear an exculpatory answer).

II. FIRST, WHAT CONTROLS?: ARTICLE 2 OR GENERAL CONTRACT LAW?

Although Article 2 of Mississippi's UCC governing sales of goods[1] clearly does not apply to contracts for the provision of services only, the

1. MISS. CODE ANN. §§ 75-2-101 to -725 (2010).

issue can arise whether the UCC applies to contracts where the provision of both goods and services are involved.[2] The UCC by its terms applies to sales of goods involving "things . . . which are movable at the time of identification to the contract."[3] But an issue can arise as to the UCC's application when a contract involves the supply of goods and services together, as one would often find, for example, in a construction contract.

The Supreme Court of Mississippi gave some examples of mixed transactions of goods and services in *J.O. Hooker & Sons, Inc.* In one case, a contract for installation of carpets in a large apartment complex was held to be primarily a contract for sale, rather than installation, and thus was subject to Article 2.[4] However, a subcontract for cement construction work was held to be primarily a services contract, although also involving a sale of goods.[5]

So, how can one distinguish between primarily sales or services contracts on a reliable basis? In *J.O. Hooker & Sons, Inc.*, an issue arose as to whether a subcontractor's agreement to renovate public housing, which involved tearing out cabinets and installing new ones, involved the cost of disposing of the cabinets as well. The court held that determining whether Article 2 applies "should depend upon the nature of the contract and also upon whether the *dispute* in question primarily concerns the goods furnished or the services rendered under the contract."[6] Thus, asking what the primary nature of the contract is (sales or services) is not enough alone to determine whether Article 2 applies; it is the nature of the dispute itself that should ultimately determine whether the sales laws govern the controversy. The court in *Hooker* stated that if the quality of the cabinets sold had been at issue, Article 2 could have applied, but because the dispute was a standard contract question involving the services aspects of the transaction, Article 2 would have no application.[7]

The Supreme Court of Mississippi revisited the *Hooker* criteria for application of the UCC in *Upchurch Plumbing, Inc. v. Greenwood Utilities Commission.*[8] In *Upchurch Plumbing*, a dispute arose over the upgrade of a control system for a GE combustion turbine.[9] Software for the control system contained a programming defect.[10] The court, applying the *Hooker* mixed transactions test, found that the UCC did not apply to the dispute

2. *See* J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 400 (Miss. 1996).

3. MISS. CODE ANN. § 75-2-105.

4. *J.O. Hooker & Sons, Inc.*, 683 So. 2d at 400 (citing Snyder v. Herbert Greenbaum & Assocs., Inc., 380 A.2d 618 (Md. Ct. Spec. App. 1977)).

5. *Id.* (citing Freeman v. Shannon Constr. Inc., 560 S.W.2d 732 (Tex. Civ. App. 1977).

6. *Id.* (emphasis in original).

7. *Id.*

8. 964 So. 2d 1100 (Miss. 2007).

9. *Id.* at 1102.

10. *Id.*

because, taking the contract as a whole, sixty-percent of the contract related to services for the specialized, defective design of software and testing, which are services, while only forty-percent of the contract dealt with the hardware.[11]

III. STATUTE OF FRAUDS REQUIREMENTS UNDER THE UNIFORM COMMERCIAL CODE

Left to their own devices without the intervention of lawyers and courts, many merchants would go about the business of selling and buying using the phone alone. However, there is a strict UCC Article 2 statute of frauds requirement for the sale of goods that requires merchants to document their transactions in writing for sales transactions of $500 or more.[12] The statute of frauds for sales of goods for $500 or more imposes the following requirements for the transaction to be enforceable in the courts:

> 1) the writing must be "sufficient to indicate that a contract for sale has been made between the parties,"
> 2) the writing must be "signed by the party against whom enforcement is sought," and
> 3) the writing must specify a quantity.[13]

Notice that the writing requirement does not require inclusion of a price term because the parties may have contracted on the basis of a published price list, or because the gap can be filled by the trier of fact finding what a reasonable price would be.[14]

Although generally the statute requires that the writing be "signed by the party against whom enforcement is sought" or his agent or broker, a merchant can obtain a contract enforceable against the party with whom he is dealing, albeit unsigned, by sending a written confirmation of the contract to the other merchant. The contract is confirmed provided that the other merchant does not reply with an objection to the terms within ten days of receipt of the confirmation.[15] Thus, the merchant who fails to answer a written confirmation of a contract within ten days of receipt cannot later claim a violation of the statute of frauds as a defense to the contract (although the merchant can always dispute that, in fact, a prior oral contract was made at all, or its contents).[16] The UCC therefore provides an important incentive for buyers and sellers to send out written confirmations of their transactions promptly following oral discussions, which in turn is an

11. *Id.* at 1111 (holding that the dispute "clearly concern[ed] the testing of the system, which is a service").

12. MISS. CODE ANN. § 75-2-201(1) (2010).

13. Migerobe, Inc. v. Certina USA, Inc., 924 F.2d 1330, 1333 (5th Cir. 1991) (applying Mississippi law).

14. *See* MISS. CODE ANN. § 75-2-201 cmt 1.

15. MISS. CODE ANN. § 75-2-201(2).

16. *See* MISS. CODE ANN § 75-2-201 cmt 3.

important reason for the many written forms exchanged between merchants.[17]

Moreover, "[t]he statute of frauds can be met though the integration of several documents, each of which alone might not be sufficient to meet these three requirements."[18] In *Migerobe*, for example, the court was presented with the issue of whether there was a contract for the sale of watches enforceable against the seller. The court held that the contract was enforceable against the seller based on the integration of two signed internal memoranda and an unsigned order form that the seller had not actually exchanged with the buyer during the course of the transaction, but which appear from the opinion to have been found in discovery in the seller's files.[19] The court stated that "[t]he signed writing need not refer explicitly to the unsigned writing; a Mississippi court would consider them to be integrated if the signed writing 'makes[s] at least an implied reference to the other writing.' "[20] The seller's documents, signed and unsigned, viewed together, were sufficient for the court to find that the statute of frauds was satisfied, and demonstrated both that the seller had authorized its salesman to offer its merchandise at a discounted price, and that the buyer had accepted the offer.[21]

Further, "[a] contract that does not meet the three requirements [of § 75-2-201] but is valid in other respects is enforceable, 'if the party against whom enforcement is sought admits in his pleading, testimony or otherwise that a contract for sale is made.' "[22] Also, the writing requirement of the statute of frauds ceases to apply if the buyer has received and accepted the goods (as "acceptance" is defined at § 75-2-606), or if the buyer has made payment for them.

Finally, manufacturers should be aware that the writing requirement of the statute of frauds does not apply to the sale of goods that are to be specifically manufactured for the buyer, that are not suitable for sale to others in the ordinary course of business, and for which the seller has made a substantial beginning of manufacture or obtained commitments obtained for their procurement.[23]

IV. THE PURCHASING PROCESS: RFQ'S, QUOTES, PHONE CALLS, EMAILS, PURCHASE ORDER AND ACKNOWLEDGEMENT FORMS

Ideally, parties to a sales contract will sit down around a conference table to hammer out every detail of their transaction, commit their agreement to one final, written document containing all the terms, and duly acknowledge the agreement by execution by the all parties. However, the

17. *See generally infra* Part IV.
18. *Migerobe, Inc.*, 924 F.2d at 1333.
19. *Id.* at 1333–34.
20. *Id.* (quoting Ludke Elec. Co. v. Vicksburg Towing Co., 127 So. 2d 851, 854 (Miss. 1961)).
21. *Id.* at 1335.
22. Fairly v. Turan-Foley Imps., Inc., 65 F.3d 475, 480 (5th Cir. 1995) (quoting MISS. CODE ANN. § 75-2-201(3)(b)).
23. *See* MISS. CODE ANN. § 75-2-201(3)(a) (2010).

real world of sales is a different place in which parties, on their own, exchange form documents, telephone calls and emails, and subsequently find themselves seeking the guidance of their attorneys and the courts or arbitrators to find the scope of their contract after something has gone wrong.

The real world purchasing process depends on an informal exchange of forms because, unlike the search for a single contractor to build a unique building, the provision of goods is in an environment of quickly-repeated sales transactions for the same or similar items, often involving suppliers at some distance from the purchaser. A purchaser, for example, may begin the process by faxing or e-mailing out multiple Requests for Quotation (RFQs) to possible suppliers. Or a manufacturer may start the process by sending out numerous Quotations to potential buyers. In either case, only a portion of the RFQs or Quotations broadcast to potential parties to a transaction will end up leading to a completed sale.

A purchaser's RFQ or a manufacturer's Quotation may be quite detailed, with attachment or reference to specifications and other design and product-type testing criteria, as well as industry performance standards that must be met. However, the RFQ and Quotation may also leave out important terms, such as quantity, determination of product options, and final pricing or delivery terms.

So, once the buyer has received the seller's Quotation, the buyer may seek to set forth in greater detail the transaction by issuing a Purchase Order, specifying the buyer's expectations for the seller's performance in terms of production options chosen, specifications, industry standards that must be met, quantities, delivery dates, and final price.

Once the manufacturer or seller receives the buyer's Purchase Order, the seller may attempt to add terms to the transaction. For example, the seller may attempt to add terms for the inclusion of attorney's fees for collection in the event of non-payment, or an arbitration provision in the event of a dispute. The seller can add terms by sending out an acknowledgement form thanking the buyer for his Purchase Order, but stating, by the way, that the terms on the back of the acknowledgement form are included in the transaction's terms. Similarly, the seller also may attempt to add terms by adding provisions on the back of invoices, such as a finance charge for late payment.

In between the exchange of forms, of course, there are likely to have been telephone calls and memoranda confirming the terms discussed on the phone. All the communications in the purchasing process, of course, written and verbal, may lead to much confusion if the deal later falls apart or if there is a refusal of payment. Just what was the contract the parties made? The UCC seeks to supply an answer.

V. FINDING THE OFFER: IS THE SELLER'S QUOTATION AN OFFER OR JUST AN INVITATION TO DEAL?

The starting point for finding the scope of a sales contract amid the exchange of forms and phone calls is to ask: which communication constitutes the offer, and which comprises the acceptance? As each first-year law student would recognize, a valid contract must have an offer and an acceptance.[24] Therefore, one must first identify the offer and acceptance before, say, looking at the possible incorporation of additional terms by an acceptance or confirmation under the UCC's "Battle of the Forms" provision of § 75-2-207.[25] Indeed, as will be seen later:

> For a "battle of the forms" to arise and trigger the provisions of § 2-207, there must be conflicting forms to begin with, each of which satisfies the common-law or statutory requirements for an offer. If the first form is not an offer, there can be no battle.[26]

Thus, the first "battle" that a merchant may face, perhaps the most important one, is not the classic battle of the forms applying UCC § 75-2-207 involving acceptances and confirmations, but a battle over which document constitutes the offer that can be accepted to form a contract.

Identifying the legal "offer" may not be as easy as one would think. True, it is easy to see that a buyer's RFQ likely would not be the offer because it is not a contractual commitment by the buyer. A RFQ is merely the buyer's invitation to a seller to start the negotiation process by providing a statement of prices at which the seller is willing to sell. The more problematic question is whether the seller's quotation is the offer.

Although one might think intuitively that a quotation would be a seller's offer because it sets forth prices at which he is willing to sell, courts in many instances have found that the quotation in fact is not a contractual offer at all. Instead, many courts have found that the seller's quotation, like the buyer's initial RFQ, is just a means of proposing further negotiations that, in turn, will lead to the parties arriving at more complete terms that will become the contract. "Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract."[27] Where a quotation leaves a number of terms open for negotiation, it is not an offer, but an invitation to negotiate further.[28] "Instead, a buyer's purchase agreement submitted in response to a price quotation is usually deemed the offer."[29]

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24. *See* Anderton v. Bus. Aircraft, Inc., 650 So. 2d 473, 476 (Miss. 1995).
25. MISS. CODE ANN. § 75-2-207(2010).
26. Litton Microwave Cooking Prods., Inc. v. Leviton Mfg., Inc., 15 F.3d 790, 794 (8th Cir. 1995).
27. White Consol. Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1190 (8th Cir. 1999).
28. *Id.* (citing *Litton*, 15 F.3d at 794–95).
29. Dyno Constr. Co. v. McWane, Inc., 198 F.3d 567, 572 (6th Cir. 1999).

However, the Eighth Circuit, in *White Consolidated Industries v. McGill Manufacturing Co., Inc.*, found that the quotation in that case was the offer because it not only covered the essential terms, but indicated that the quote was made for immediate acceptance by the buyer.[30] "Because McGill manifested a 'clear, definite and explicit' offer of sale, the price quotation qualifies as a valid offer."[31] Similarly, the Sixth Circuit has noted that "a price quotation may suffice for an offer if it is sufficiently detailed and it 'reasonably appear[s] from the price quotation that assent to that quotation is all that is needed to ripen the offer into a contract.' "[32] So in some cases the seller's quotation may be found to have been the offer.

Yet, make no mistake that the tendency of the courts appears to be to find that a seller's quotation is not a final offer capable of being accepted as a final contract in the absence of clear language in the quotation stating in no uncertain terms that it is, in fact, an offer for immediate and final acceptance by the buyer that will create a binding contract. The Eighth Circuit in *Litton* emphasized the limited nature of most sellers' quotations:

> We ruled that the mining company's refusal to sell the equipment did not rise to the level of a breach of contract. We reasoned that "[t]he mere description of merchandise, coupled with the purchase terms, is not, in itself, sufficient to constitute a legally valid offer." Without a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it," there was no contract to breach.[33]

Once again, the difference between whether a quotation is a definite offer or a mere invitation to deal further will likely turn on whether the quotation is sufficiently detailed, explicitly states that it is for immediate acceptance, and states that acceptance will create a contract. After all, the seller may have shotgunned unsigned quotations in a mailing to many potential buyers, not intending to be bound by the quotations without further direct negotiations that would address the buyer's specific needs, including details as to the schedule, place and means of deliveries, as well as any other special requirements of the buyer. Most often one would expect the buyer to reply to the seller's quotation by setting forth the final detailed terms specific to the individual buyer's needs in a purchase order.

In *Litton*, for example, the court noted a number of open terms that the seller's quotation did not address that precluded its consideration as an offer:

30. *White*, 165 F.3d at 1190.

31. *Id.*

32. *Dyno Constr.*, 198 F.3d at 572.

33. *Litton*, 15 F.3d at 794–95 (internal citations omitted).

> There is, of course, little question that both the price letters and catalogs were clear, definite, and explicit, but it is difficult to maintain that they left "nothing open for negotiation." When and where might the parts listed be delivered? Was Litton obligated to purchase all the parts listed in the quantities listed, or might they be able to purchase just what was necessary to fill their needs by picking and choosing from the parts listed? Could Litton feel justified, based on the quotation letters alone, in finding Leviton [seller] in breach of contract if Leviton were to be unable to fill any purchase order submitted?[34]

Similarly, the Sixth Circuit in *Dyno*, found that a seller's quotation was not an offer where the word "Estimate" was printed at the top of the document, and the fax sheet transmitted with it stated, "Please call."[35]

> These words are indicative of an invitation to engage in future negotiations rather than an offer to enter into a contract. Although both price lists set forth descriptions of materials, prices, and quantities, nothing was stated about the place of delivery, time of performance, or terms of payment.[36]

It is true that § 75-2-204(3) provides that not all terms must be agreed upon for there to be a definite contract, stating: "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."[37]

However, the court in *Litton*, while acknowledging that all terms need not have been provided to create a contract, emphasized that it still would not find a quotation was an offer inviting a contract by mere acceptance where terms were left open. The court stated: "Without definite and affirmative answers to the foregoing questions, however, and perhaps to some others, Leviton's price letters and catalogs amount to no more than 'the mere description of merchandise, coupled with the purchase terms . . . .' "[38]

It is important to understand, as well, that a seller's quotation may be sufficiently detailed to appear to be an offer, including, for example, a detailed schedule for deliveries to the buyer, and specific payment terms (e.g. payment due 30 days from invoice). Yet the quotation could still fail legally to be considered an offer. How? The quotation will become spoiled as an offer, however detailed it may be, if the quotation (or the cover letter

34. *Id.* at 795.
35. 198 F.3d at 573–74.
36. *Id.* at 574.
37. MISS. CODE ANN. § 75-2-204(3) (2010).
38. *Litton*, 15 F.3d at 795.

accompanying it, for that matter) anticipates the receipt of additional terms from the buyer for the seller's review and acceptance. In *Mantaline Corporation v. PPG Industries, Inc.*, the court found that a quotation was not an offer because of the following language:

> This proposal is for immediate acceptance only and is subject to change at any time before orders are accepted by us. This proposal *and our acceptance of your orders, signed by a representative of our Company*, together with your order, constitutes the entire contract between us.[39]

The court found that despite the language that "[t]his proposal is for immediate acceptance only" the rest of the language reserving to the seller final acceptance of a purchase order conditioned on the seller's signature was "forward-looking language" that rendered the quotation nothing more than an "invitation to deal."[40] Thus, a seller's quotation will not be construed as an offer if it contains any language looking ahead to receipt of additional terms from the buyer for the seller's review and negotiation. As the court stated in *Mataline*, to be a firm offer, a price quotation must be "so made as to justify another person in understanding that his assent to that bargain is invited and *will conclude it*."[41] The court then went on to find that the buyer's detailed purchase order was the offer, and that the seller had accepted all the terms of the purchase order as the controlling contract by shipment of the goods.[42]

Ultimately, whether a price quotation is deemed to be just an invitation to deal further (the usual case) or an offer that the buyer could have accepted to form a contract:

> . . . depends primarily upon the intention of the person communicating the quotation as demonstrated by all of the surrounding facts and circumstances. Thus, to constitute an offer, a price quotation must be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract.[43]

In some cases the courts have found quotations to be offers.[44] However, one should note that in those cases not only were the seller's quotations sufficiently detailed and tailored to the buyer's delivery schedule to

39. No. 97-4473, 2000 WL 799337, at *1 (6th Cir. June 8, 2000) (unpublished table decision) (applying Ohio law) (emphasis added).

40. *Id.* at *1, *3.

41. *Id.* (emphasis added).

42. *Id.*

43. *Dyno Constr.*, 198 F.3d at 572.

44. *See, e.g.* Reaction Molding Techs., Inc. v. Gen. Elec. Co., 585 F. Supp. 1097 (E.D. Pa. 1984) (concerning quotation containing detailed payment and delivery terms); *see also* Loranger Plastics Corp. v. Incoe Corp., 670 F. Supp. 145 (W.D. Pa. 1987) (stating quotation was "subject to acceptance without modification within 30 days" from issuance."); Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1121 (5th Cir. 1985) (finding offer where seller's executed letter proposals which promised to

be offers, but they did not contain the "forward-looking" language, looking ahead to the receipt of additional terms from the buyer that spoiled the quotation as an offer as in *Mantaline*. Again, for the quotation to be an offer, the offer cannot contain language that would make it appear to be just part of an ongoing negotiation process that would not conclude merely by the buyer's acceptance of the quotation.

In *Hohenberg Brothers Co. v. Killebrew*, a Fifth Circuit case out of Mississippi, the court found that a farmer's one page "purchase and sales agreement" form covering the sale of his expected cotton crop at a stated price, although not addressed to any particular buyer, was specifically performable against the farmer who later attempted to disavow it.[45] In that case, the farmer, through his agent, executed his own one page agreement and shopped it to a willing buyer, who, in addition to sending the farmer its standard-form, three page purchase form, also executed and signed the farmer's one page agreement. Presumably, the price of cotton went higher than the farmer's original agreement had called for, giving the buyer a windfall, and the farmer tried to get out of the agreement.[46] The court concluded that the farmer should "not be heard to complain of enforcement of the precise agreement to which he signified his unconditional commitment by the execution of the one-page purchase and sale agreement."[47] In *Killebrew*, the fact that the one page agreement was not only denominated as a purchase and sales agreement (not just a quote), undoubtedly contributed to the court's finding that the one page agreement had been proposed as an offer the farmer became stuck with. Further, the agreement had been proposed with all blanks filled in except the buyer's name, which the buyer then supplied upon its execution of the document, signifying the buyer's acceptance of the terms.[48] It is just such a result that leads many sellers to stick to the more limited language of a quotation that will give them a chance to review the buyer's order as an offer, together with any intervening changes in market costs that may require further negotiation, rather than as an acceptance once it comes in.

Nonetheless, if a manufacturer or other seller wishes to increase the likelihood that its quotation form will be deemed later by a reviewing court to have expressed the terms of a firm offer for immediate acceptance by the buyer, it should do the following:

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sell at listed prices, and the buyer's purchase orders or responsive phone calls were acceptances); Mead Corp. v. McNally-Pittsburg Mfg. Corp., 654 F.2d 1197, 1203 (6th Cir. 1981) (finding proposal was an offer where it offered prices and delivery schedules, and its terms were incorporated into buyer's purchase order which was the acceptance).

45. 505 F.2d 643, 646 (5th Cir. 1974) (holding "where a party receives a writing containing essential terms identical to those expressed in a previously executed contract proposal, that party has a duty to speak out if he does not intend to be bound by the terms he proposed. Failing in this duty, his silence constitutes an estoppel").

46. *Id.* at 644.

47. *Id.* at 646.

48. *Id.*

- State explicitly in the quotation that the quotation is an offer subject to acceptance without modification by the buyer within a limited period of time (e.g. 30 days) from issuance, and that the buyer's acceptance will result in the immediate creation of a final, binding contract between the parties.
- If the seller really means for a quotation to be an offer, then the seller should include on the quotation form a place for its signature (e.g. "authorized by____") and have a place for the buyer to acknowledge its acceptance by signature.
- Avoid using the word "estimate" in connection with the quotation.
- Avoid any "forward-looking" language in either the quotation, (and just as importantly!) in the cover letter, or in the fax sheet or e-mail accompanying the quotation, that would anticipate the later receipt or review for approval by the seller of additional terms and conditions from the buyer in the form of a purchase order, phone calls, or other communications.
- Include in the quotation fully negotiated, detailed terms for prices, materials, quantities, place of delivery, times of delivery, means of delivery, payment due dates, and any specifications, design or testing criteria, or industry standards that would be expected in the industry to be recited and met for the equipment or product involved.
- Scrutinize and take exception to any terms later received from the buyer that do not conform to the terms of the quotation, referencing back to the terms of the quotation as the applicable terms of an offer that was provided for the buyer's acceptance.

Given the apparent inclination of courts to leave the buyer in control of the offer through purchase order forms, a manufacturer in any case cannot afford to rely simply on its quotation, while ignoring conflicting or objectionable terms in a buyer's purchase order. It is the obligation of the manufacturer's contract personnel to review the buyer's purchase order to object to terms that would impose burdens the seller has no intention assuming or that would conflict with standards and requirements in the quotation. Further, a manufacturer may find that it would be better off not attempting to make its quotation into an offer (which might or might not be construed as an offer in any case). Instead, the manufacturer must rely on a thorough review of the buyer's purchase order, and on the taking of exception in writing to any objectionable terms. Manufacturers take note: carefully scrutinize a buyer's purchase offer to scrub out any objectionable terms in the purchase order by striking through them and returning the purchase order to the buyer fully noting the objections right on the purchase order (although keeping a good copy). Otherwise, the manufacturer will find itself likely stuck with the buyer's purchase order terms even though the buyer's terms contradict the seller's original quotation terms.

Nor, given the inclination of courts to find that the seller's quote was a mere estimate or invitation to deal or negotiate further, rather than a contract document, should a manufacturer or other seller think that it can rely solely on the quote as the memorandum of the deal. If the buyer does not follow up with a purchase order, and if the manufacturer for its part does not follow up with a written confirmation of the terms of the deal after the buyer's verbal acceptance of its quote (and, in the absence of some document of the buyer, like an e-mail, acknowledging the deal at the contract price in addition to a verbal assent to the quote) the seller may find it cannot enforce the contract price it originally quoted. The quote alone is not enough: as noted earlier, there is a statute of frauds for the sale of goods over $500 under the UCC that requires a written acknowledgement of the deal by the buyer if the seller is attempting to enforce the transaction at an agreed-upon price against the buyer.[49]

Following receipt of a purchase order, also, the manufacturer can still attempt to add terms to the contract that one would ordinarily expect (such as the addition of interest terms applicable to overdue accounts and reasonable attorneys fees and costs of collection) by sending an acknowledgement form to the buyer, thanking him for the purchase order, but noting the additional, usual penalties for late payment included in the acknowledgement form.[50]

VI. IF THE BUYER'S PURCHASE ORDER IS THE OFFER, IS THE SELLER'S SHIPMENT AN ACCEPTANCE OF ITS TERMS?

Sellers should beware that the mere act of shipping conforming goods may be construed as acceptance of all of the terms of the buyer's purchase order. As we have seen in *Mantaline*, the court found that the seller's quotation was a mere invitation to deal, not an offer, because it contained forward-looking language anticipating receipt of the buyer's purchase order.[51] The court then found that the buyer's purchase order did qualify as an offer to the seller under traditional contract analysis, and that, by its terms it invited acceptance by the seller's prompt shipment of conforming goods.[52] Further, the court in *Mantaline* noted that § 2-206 of the UCC also provides that a seller's acceptance of a contract can be demonstrated by the seller's shipment.[53] In Mississippi, the relevant statute provides:

> (1) Unless otherwise unambiguously indicated by the language or circumstances

49. *See* MISS. CODE ANN. § 75-2-201 (2010).

50. *See infra* Part XIII.

51. Mantaline Corp. v. PPG Indus., No. 97-4473, 2000 WL 799337, at *3 (6th Cir. June 8, 2000).

52. *Id.*

53. *Id.* (citing OHIO REV. CODE ANN. § 1302.09 (West 2000) (OHIO REV. CODE ANN. § 1302.09 is the equivalent of UCC § 2-206.).

> (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
> (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance by either a prompt promise to ship or by the prompt or current shipping of conforming or nonconforming goods.[54]

In *Mantaline*, the court reasoned that the seller's shipment was an acceptance of the terms of the buyer's purchase order, including the buyer's arbitration and indemnification provisions.[55]

VII. If the Seller's Quotation Is the Offer, Is It Irrevocable?

If the seller's price quotation is sufficiently definite to create an offer to the buyer, the seller's list prices may be irrevocable and binding on the seller for up to three months under the right circumstances.[56] The code section entitled "Firm Offers," § 75-2-205, states:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three (3) months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.[57]

In *Mid-South Packers, Inc. v. Shoney's Inc.*, a meat supplier, Mid-South Packers, submitted a letter "Proposal" to the Shoney's restaurant chain listing prices at which it would be willing to sell meat to the restaurants.[58] The letter, by its terms, was vague in that it "contained neither quantity nor durational terms[,]" and provided that Shoney's would be informed forty-five days prior to any change in prices.[59] Shoney's never explicitly assented or rejected the terms of the seller's proposal, but within a few months it began purchasing meat from Mid-South.[60] Shoney's sent a series of purchase orders to Mid-South.[61] Just four months after sending out the price quotation, Mid-South Packers, without warning, announced that it was increasing its prices by ten cents per pound due to a computational error in the original "proposal."[62] After discussions, Mid-South

54. Miss. Code Ann. § 75-2-206 (2010).
55. *Mantaline*, 2000 WL 799337 at *3.
56. Miss. Code Ann. § 75-2-205 (2010).
57. *Id.*
58. 761 F.2d 1117, 1119 (5th Cir. 1985).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

agreed to only increase the price by seven cents per pound.[63] Shoney's neither agreed to nor rejected the new prices; nothing was ever formalized in a written contract.[64]

Shoney's continued to send purchase orders to Mid-South Packers for some months thereafter but then shorted a payment to Mid-South by the amounts it had been charged above the prices originally quoted by Mid-South in its initial letter "Proposal."[65] In determining the legal status of the original sales "Proposal" letter, the Fifth Circuit found that Shoney's breached its agreement with Mid-South when it sent the short payment and that it had no right to offset the seller's higher prices.[66] Analyzing the transaction under § 75-2-205, the court found that Mid-South's original sales quotation was, at most, a "firm offer" that remained irrevocable despite a lack of consideration for three months at most, as provided by the statute.[67] The court also held that "each purchase order stood on its own as a contract between Shoney's and Mid-South" that Shoney's accepted each time it issued a purchase order or verbal telephone order.[68]

However, a merchant's offer becomes irrevocable for up to three months only if there is language in the offer indicating it is to be held open.[69] In *Ivey's Plumbing Electric v. Petrochem Maintenance*, the court stated:

> It is settled by explicit provision of Uniform Commercial Code that a merchant's quotation, or estimate, or other offer, to be irrevocable for a reasonable length of time, must [*b*]y its terms give assurance that it will be held open. MISS.CODE ANN. § 75-2-205 (1972). Otherwise, a mere offer lacking such assurance is subject to revocation by the seller at any time prior to the buyer's acceptance.[70]

The court also noted that the buyer's reliance on prices alone will not make the seller's quotation into an irrevocable firm offer.[71]

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63. *Id.*
64. *Id.*
65. *Id.* at 1119–20.
66. *Id.* at 1122.
67. *Id.* at 1121.
68. *Id.*
69. *See* MISS. CODE ANN. § 75-2-205 (2010) ("An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three (3) months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.").
70. 463 F. Supp. 543, 551 (N.D. Miss. 1978) (emphasis added).
71. *Id.* at 551 n.4.

VIII. The Role of the Court in Determining the Scope of a Sales Contract Under the UCC

Is it the role of the judge to be the interpreter of the parties' contract? Normally, "[d]etermination of a contract's terms is a question of law."[72] In the case of sales contracts the UCC's encompassing body of law governs all conceivable aspects of a sales transaction and supplies any gaps for omitted terms, leaving little room for ambiguity. Therefore, it is especially likely that a court will find that scope of a sales contract should be a question of law under the UCC for the court rather than for a jury to decide. The Sixth Circuit, for example, has noted the special role of the UCC as a guide to a court's determination of a contract's scope:

> Absent the Code, questions of contract formation and intent remain factual issues to be resolved by the fact-finder after careful review of the evidence. However, the Code provides rules of law, and Section 2-207 establishes important legal principles to be employed to resolve complex contract disputes arising from the exchange of business forms. Section 2-207 was intended to provide some degree of certainty in this otherwise ambiguous area of contract law. In our view, it is unreasonable and contrary to the policy behind the Code merely to turn the issue over to the uninformed speculation of the jury left to apply its own particular sense of equity.[73]

Further, in the usual case it is undisputed as to what forms have been exchanged. Oral communications may cause more problems, though.[74] Even so, the statute of frauds requires that contracts for the sale of goods over $500 be evidenced by a memorandum in writing.[75] Therefore, even if a sale of goods contract begins with oral communications, a merchant should know that within a reasonable time a written confirmation of the oral agreement's terms will have to be presented to the other party in order for the contract to be enforceable.[76] The strict statute of frauds requirement for sales contracts makes it more likely that the communications leading up to the formation of the contract will be undisputed, and therefore,

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72. United States ex rel. Control Sys., Inc. v. Arundel Corp., 814 F.2d 193, 197 (5th Cir. 1987); *see also* Fairly v. Turan-Foley Imps., Inc., 65 F.3d 475, 480 (5th Cir. 1995) ("Questions of the validity, enforceability, and construction of contracts—whether the parties have satisfied the law's formal requirements—are committed to the court as distinguished from the trier of facts.") (citing Leach v. Tingle, 586 So. 2d 799, 801 (Miss. 1991)).

73. Mead Corp. v. McNally-Pittsburg Mfg. Corp., 654 F.2d 1197, 1206 (6th Cir. 1981) (internal citations omitted).

74. *See, e.g.*, R.C. Constr. Co., Inc. v. Nat'l Office Sys., Inc., 622 So. 2d 1253, 1255 (Miss. 1993) ("The existence of an oral contract is a fact issue.").

75. Miss. Code Ann. § 75-2-201(1) (2010).

76. *See* § 75-2-201(2) (sending a written confirmation by merchant within reasonable time satisfies UCC statute of frauds if not objected to by the other party within ten days of the receipt of the confirmation).

the contract's scope will be a question of law for the court to consider as a summary judgment issue under Rule 56 of either the federal or state rules of civil procedure.

IX. PURPOSE OF MISSISSIPPI UCC § 75-2-207

As previously discussed, the issue of finding a legally-binding offer amid the contemporaneous exchange of forms that is the norm in modern commercial life can be a difficult thing to determine, even for experienced commercial litigators. However, the complexity is only heightened when the terms of acceptance in these transactions differ from those of the offer. When this happens, in a transaction for the sale of goods, we have the "battle of the forms" situation, the bane of many a student of the UCC. The "battle of the forms" provision appears at § 2-207 of the UCC, which is entitled "Additional Terms in Acceptance or Confirmation."[77]

The UCC's 2-207 provision presents a departure from the old common law "mirror image" rule, under which a court would find that there was no contract at all unless the acceptance mirrored the offer precisely.[78] The authors of the Code found that in the real world of sales transactions, for example, the seller might attempt to both accept the buyer's purchase order by sending out an acknowledgement form thanking the buyer for the order while simultaneously insisting that terms on the back of the acknowledgement form apply even though they are different from or additional to the terms of the purchase order.[79]

However, the Code expresses a reluctance to find that the seller's acknowledgement form can easily turn what would have been an acceptance into a "take it or leave it" counteroffer. A counteroffer, if not accepted, would destroy the contract even though the parties are likely to have begun performance by the time a problem arises.[80] Rather, the Code sets forth criteria in its Battle of the Forms provision, under which additional or different terms may or may not become part of the contract, depending on the facts, while maintaining the viability of the contract.[81] The ultimate purpose of the Battle of the Forms provision, though, is not simply to maintain the integrity of the parties' agreement where the acceptance may not exactly mirror the offer, but, more importantly, to help answer what the terms and scope of the contract are.[82]

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77. MISS. CODE ANN. § 75-2-207 (2010).

78. *See generally*, Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1231–37 (1982).

79. *See* Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F.2d 1333, 1335 (7th Cir. 1991) (noting that "the 'mirror image' rule" was "widely believed to take insufficient account of the incorrigible fallibility of human beings engaged in commercial as in other dealings").

80. *See* § 2-207(1) ("A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance *even though it states terms additional to or different from those offered or agreed upon*, unless acceptance is expressly made conditional on assent to the additional or different terms") (emphasis added).

81. *Id.*

82. *See* MISS. CODE ANN. § 75-2-207 cmt. 1 (stating that the statute is dealing with two common situations in commercial life: "The one is the written confirmation, where an agreement has been

X. REVIEW OF THE TEXT OF MISSISSIPPI UCC § 75-2-207

The Code section addresses three areas: (1) an acceptance versus a counteroffer; (2) the terms of a contract where one agreeing to a contract attempts to add terms in the acceptance or confirmation (the "battle of the forms" provision); and (3) the terms of a contract if it is formed in the end only by conduct recognizing the existence of the contract by shipment and acceptance of goods.[83] The full text of § 75-2-207 reads:

> Additional Terms in Acceptance or Confirmation
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.[84]

Thus subsection 2-207(2) automatically includes additional terms in the contract found in an acceptance or confirmation if it is one between "merchants" and criteria are met of § 75-2-207. Who is a merchant? The Code defines a "merchant" as one who deals "in goods of the kind."[85]

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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 . . . .").

83. § 75-2-207.

84. *Id.*

85. MISS. CODE ANN. § 75-2-104 (2010).

XI. Can the Seller Take Control by Insisting that Its Acceptance of the Buyer's Order Is Expressly Conditional on Adherence to the Terms of an Acknowledgement?

A. Finding an Acceptance Is Favored Over Finding a Counteroffer: § 75-2-207(1)

Assuming, as the courts indicate is often the case, the buyer's purchase order is the offer, can the seller take control of the deal by issuing an acknowledgement form that states that the seller's acceptance is expressly conditional on the buyer's adherence to terms that are different from or additional to the terms found in the buyer's earlier purchase order? In other words, can the seller readily turn his acceptance form into a counteroffer?

As we have seen, the policy of the drafters of the UCC is to preserve the parties' expression of their contract in the exchange of forms by turning a common law counteroffer where possible into contract acceptance.[86] The policy of the UCC, at least as expressed by a number of courts, appears to favor allowing the buyer through a purchase order to retain control over the basic terms of an offer to purchase goods. However, under the Battle of the Forms provision of 2-207(2), the seller, who is in the business of satisfying buyers' needs, at least can propose additional or different terms as part of an acceptance, but the new terms will become part of the contract only if they would not unduly surprise the buyer who may not read the acknowledgement form, and if they would not materially alter the essential terms of the offer of the buyer's purchase order.[87]

The likelihood that a seller's acknowledgement form will be found to be an acceptance, even if it attempts to state different or additional terms to the contract, rather than a counteroffer that does away with consideration of the buyer's form, is apparent from a reading of the statute:

> 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.[88]

The courts are reluctant to find, in the words of § 75-2-207(1), that "an acceptance is expressly made conditional on assent to the additional or different terms." As White and Summers state in their authoritative commentary on the Uniform Commercial Code:

> But under the cases so far, this language is *not* easily invoked. The offeree must state a counteroffer very

86. *See* Miss. Code Ann. § 75-2-201(1) (2010).
87. Miss. Code Ann. § 75-2-207 (2010).
88. § 75-2-207(1).

> clearly. . . . Courts routinely characterize even deviant documents as acceptances and not as counteroffers as a way of preventing surprise to the original offeror who may not have read the claimed counterofferor's form—an "anti-last-shot" policy.[89]

For example, in *Ralph Shrader, Inc. v. Diamond International Corp.*, the court found that the terms in an acceptance would not create a counteroffer unless there were a clearly expressed unwillingness to continue with the contract without the additional or different terms.[90] Similarly, in *Daitcom, Inc. v. Pennwalt Corp.*, the court held that an acceptance stating only that it was expressly limited to its terms was not expressly conditional because it did not state an unwillingness to form a contract without the additional terms.[91]

B. A Buyer's Acceptance of Goods Is Not an Agreement to a Counteroffer: § 75-2-207(3)

Even if the seller manages to make its acknowledgement form into a counteroffer that is expressly conditional on the buyer's acceptance of new or different terms, the courts appear reluctant to find that the buyer can unwittingly accept the counteroffer merely by accepting the seller's shipment of the goods, without having expressly accepted the counteroffer. Thus, White and Summers states: "Most courts under the Code hold that such an 'acceptance' merely by conduct does not constitute 'assent' within the meaning of § 75-2-207(1) . . . ."[92] Instead, the UCC indicates that although a contract is created by the conduct of the parties in shipping and accepting goods, the seller's attempts to impose new or different terms by a genuine, but unaccepted counteroffer will not follow from the buyer's mere acceptance of the goods. The third subsection of the statute reads as follows:

> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties

89. JAMES J. WHITE & ROBERT R. SUMMERS, UNIFORM COMMERCIAL CODE: SALES, §§ 1–3 at 16 (4th ed. 1995) (emphasis original); *see also* Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643, 646 (5th Cir. 1974) ("Section 2-207(1) . . . rejects the common law mirror image rule and converts what under the common law would have been a counteroffer into an acceptance or confirmation even though the acceptance or confirmation includes terms additional to or different from those offered or agreed upon.").

90. 833 F.2d 1210, 1214 (6th Cir. 1987).

91. 741 F.2d 1569, 1577 (10th Cir. 1984); *see also* United States *ex rel.* Control Sys. v. Arundel Corp., 814 F.2d 193, 198 (5th Cir. 1987) (construing acknowledgement form narrowly so as to not conflict with buyer's order form).

92. WHITE & SUMMERS, *supra* note 89, at 16.

> agree, together with any supplementary terms incorporated under any other provisions of this code.[93]

Thus, the new, materially different terms of the seller's unaccepted counteroffer would fall by the wayside under § 75-2-207(3) because those terms did not agree with the terms of the buyer's offer in the purchase order.

All this means that it may be difficult for a seller to come up with a preprinted acceptance/acknowledgement form that the seller can count on in each case to take control of the terms of the contract away from the buyer who has submitted a purchase order as an offer for acceptance. As noted earlier, the seller's best defense to unacceptable terms in a buyer's purchase order is to be sure that its person in charge of reviewing contracts for the seller goes over the fine print of the purchase order very carefully, marks out objectionable provisions, and sends them back to the buyer with a request for changes to the buyer's form (while keeping a good copy of the marked-up form for his records). The seller should withhold any acceptance of the buyer's purchase order until the changes are made by the buyer to its form.

C. A Seller Should Treat the Buyer's Order Acknowledgement Form with Caution

A buyer may present to the seller as part of its purchase order an order acknowledgement form to sign and send back. The seller's acknowledgment in the buyer's form typically not only provides for acknowledgement of the receipt of the purchase order, but also acceptance of all the terms of the purchase order. Thus, the seller who objects to terms in a purchase order must be careful not to sign and return the preprinted order acknowledgement form that may accompany the buyer's purchase order's terms. If the seller, for example, does not read the buyer's purchase order later but comes to the conclusion that the purchase order form represents a material alteration of an earlier oral agreement between the parties, giving him an argument under the battle of the forms provisions of § 75-2-207(2), the seller waives that argument by signing the buyer's acknowledgement form stating the seller has expressly agreed to and accepted the materially-altering terms within the purchase order.[94]

Therefore, a seller must be careful to review and object to terms of a buyer's purchase order and to not waive such objections by signing and returning the buyer's acknowledgement form without comment. Indeed, many sellers, rather than using the buyer's acknowledgement form, will send instead the seller's own acknowledgement form that insists on the application of new or different terms from those of the buyer's purchase order form. Those additional terms of the seller may come into the contract under the right circumstances sanctioned by § 75-2-207.

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93. MISS. CODE ANN. § 75-2-207(3) (Rev. 2002).

94. *See* WHITE & SUMMERS, *supra* note 89, §§ 1–3 at 19 n.19.

XII. Addition of Terms to an Acceptance or Confirmation: § 75-2-207(2)

A. *The Addition of Terms Between Merchants Can Be Automatic*

One who wishes to accept or confirm an offer for a contract cannot always "have his cake and eat it too" by attempting to recognize the contract in an acceptance or confirmation while simultaneously coming close to making a counteroffer by insisting that additional or different terms included with his form must be complied with. Rather, unless the offeree has made a genuine counteroffer (stating clearly he is not willing to form a contract without an express acceptance of his new terms) the terms the offeree attempts to add in acceptance or confirmation may or may not become part of the contract depending on the application of legal criteria set forth in the battle of the forms provision. The battle of the forms provision directs that "[t]he additional terms are to be construed as proposals for addition to the contract."[95] By operation of law, "such terms become part of the contract unless" three exceptions apply: "(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 within a reasonable time after notice of them is received."[96]

B. *Merchants Defined*

A "merchant" is one who deals in "goods of the kind," and "[b]etween merchants" means parties "chargeable with the knowledge or skill of merchants."[97] Thus, an acceptance or confirmation "between merchants" may automatically add terms to a contract unless the exceptions apply, but not if the contract is between a merchant and a retail consumer.[98]

C. *Confirmations*

The battle of the forms provision covers the addition of terms included in confirmations of oral agreements as well as acceptances. A confirmation is a form of acceptance. The Fifth Circuit has explained the role of confirmations to evidence terms that were earlier agreed to in oral conversations:

> The written confirmation is recognized primarily as a writing necessary to satisfy the statute of frauds when the agreement reached is at least partially unenforceable for lack of a writing; this appears to be the primary basis for permitting a written confirmation to act as an acceptance under § 75-2-207(1). We think this rationale properly applies to contracts that are partly oral, *i.e.*, the offer is oral and the acceptance

95. Miss. Code Ann. § 75-2-207(2) (2010).
96. *Id.*
97. Miss. Code Ann. § 75-2-104 (2010).
98. § 75-2-207(2).

> written, so long as the written acceptance does not purport to contain the entire agreement.[99]

Thus, a memorandum sent by a merchant to satisfy the statute of frauds following oral discussions as permitted by § 75-2-201(2) would be a confirmation to which a merchant might also attempt to add new or additional terms that would become part of the contract if not objected to and if they meet the criteria for addition set forth in the battle of the forms provision. Further, in *Shoney's*, the court found that invoices sent by the seller constituted confirmations subject to analysis under the battle of the forms provision where the buyer's purchase orders "did not purport to contain all of the terms of the agreement" and where the seller's invoices constituted the only writings rendering the contract enforceable against the seller under the UCC statute of frauds.[100]

XIII. Exclusion of Materially Altering Terms

The primary exception to terms that can be added automatically by an acceptance or confirmation exchanged between merchants are terms that would "materially alter" the agreement.[101] The drafters of the Code explained that an added clause would "materially alter" the contract when it would "result in *surprise or hardship* if incorporated without express awareness by the other party."[102] Examples of material alterations can include the following: clauses negating a standard's warranties of merchantability and fitness; clauses requiring that complaints be made in a materially shorter time than reasonable or customary in the industry; contract cancellation clauses for untimely payment of invoices; indemnification clauses; limitations of liability clauses; and arbitration clauses.[103] A strong indication that a term is a material alteration is if it is contrary to industry practice or trade usage for the provision of goods involved.[104] Another gauge of materiality is whether the proposed addition to the contract is "sufficiently material to require express conversation between the parties over its inclusion or exclusion in the contract."[105]

There are two Mississippi cases that touch on the issue of material alteration, both dealing with terms added to the seller's invoices. In *Mid-South Packers, Inc. v. Shoney's, Inc.*, the court found terms included in the seller's invoices requiring the buyer to pay interest on late payments and reasonable collection costs, including attorney's fees "became 'part of the contract' " under the battle of the forms provision of § 75-2-207(2). The buyer had not contended that the exceptions to the battle of the forms

99. Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1123 (5th Cir. 1985) (internal citation omitted).

100. *Id.* at 1123–24.

101. § 75-2-207(2)(b).

102. § 75-2-207 cmt. 4 (emphasis added).

103. *See id.*; *see also* White & Summers, *supra* note 89, §§1–3 at 18 n.36.

104. White & Summers *supra* note 89, at 15 n.24.

105. Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 425 (Wis. 1973).

provision applied to those terms.[106] In *American Cable Corp. v. Trilogy Communications, Inc.*, the court noted that an invoice could add terms to a contract, and that a seller's invoices for goods sent in response to, and in confirmation of, an oral order could add a clause stating that the law of Mississippi and the venue of Mississippi courts would apply to the parties in the event of a dispute.[107] As the court noted, the buyer sent no objection to the terms added by the seller's invoices.[108] The court's discussion of § 75-2-207(2) did not find that the choice-of-law and venue provisions were material alterations to the oral contract previously made for the goods to be manufactured in Mississippi for later shipment to the buyer.[109]

Indeed, courts have found that the following terms added to a seller's acceptances or confirmations are not material alterations because they should not come as a surprise to the buyer in the ordinary course of business: interest, finance charges, costs and attorney's fees for collection;[110] choice of law provisions;[111] requirement that complaints be made in a reasonably timely fashion;[112] force majure clauses;[113] and clauses limiting rejection for defects which fall within customary trade tolerances but providing for an adjustment or other limited remedy.[114]

The reason for automatically excluding materially altering terms under the battle of the forms provision from an acceptance or confirmation is to preserve the essential terms of a firm offer or prior oral agreement. As one court has stated:

> Section 2207 [Michigan's UCC § 2-207] proceeds on the assumption that businessmen frequently reach firm oral understandings not instantly reduced to writing and signed; that it is commonplace for one or both to confirm such understandings in writing; that not infrequently the writings differ but the parties, nevertheless, commence performance, impelled to do so by the exigencies of the business world. The policy of section 2207 is that the parties should be able to enforce their agreement, whatever it is, despite discrepancies between the oral agreement and the confirmation (or between an offer and acceptance) if enforcement can be granted without requiring either party to be bound to a material term to which he has not agreed. . . . Under section

106. Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1124 (5th Cir. 1985).

107. 754 So. 2d 545, 551 (Miss. Ct. App. 2000) (citing *Mid-South Packers*, 761 F.2d at 1123).

108. *Id.*

109. *Id.*

110. *See e.g.*, *Mid-South Packers, Inc.*, 761 F.2d at 1124 (holding seller's confirmatory invoices adding interest, costs and attorney's fees becoming part of contract); *accord* Am. Cable Corp., 754 So. 2d at 551; MISS. CODE ANN. § 75-2-207 cmt. 5.

111. WHITE & SUMMERS, *supra* note 89, at 15 n.27.

112. § 75-2-207 cmt. 5.

113. *Id.*

114. *Id.*

> 2207, a party, except a merchant in the case of an immaterial term, may ignore additional terms, and proceed with performance of the agreement actually negotiated by the parties without fear that such performance will be interpreted by court or jury as acceptance of the other party's additional terms.[115]

Further, "[t]he drafters of the Code intended to preserve an agreement, as it was originally conceived by the parties, in the face of additional material terms included in the standard forms exchanged by merchants in the normal course of dealings."[116] Hence, the drafters included the automatic exclusion in the battle of the forms provision of material alterations that would result in "surprise or hardship" if added to the terms of the offer or to a previously reached oral agreement by a written acceptance or confirmation.[117]

After all, it is the policy of the UCC that businessmen should not be caught by the addition of materially altering terms in an acceptance or confirmation that no one will read until something goes wrong:

> The drafters of the Code . . . intended to change the common law in an attempt to conform contract law to modern day business transactions. *They believed that businessmen rarely read the terms on the back of standardized forms* and that the common law, therefore, unduly rewarded the party who sent the last form prior to the shipping of the goods. *The Code disfavors any attempt by one party to unilaterally impose conditions that would create hardship on another party.* Thus, before a counteroffer is accepted, the counterofferee must expressly assent to the new terms.[118]

XIV. THE BATTLE BETWEEN CONFLICTING CONFIRMATION FORMS

What if, following an oral agreement between buyer and seller that covers the essential terms of a contract, both parties send written confirmations that happen to conflict? White and Summers offers the following analysis:

> When a confirmation states a term different from the original oral or other informal agreement, the different term falls out. The benchmark for determining additionalness or differentness is the prior agreement, not the other confirmation form. Thus, if a supplier of metal and a purchaser

115. Am. Parts Co., Inc. v. Am. Arbitration Ass'n., 154 N.W.2d 5, 12, 15 (Mich. Ct. App. 1968).

116. Leonard Pevar Co. v. Evans Prods. Co., 524 F. Supp. 546, 550 (D. Del. 1981) (citation omitted).

117. *See* MISS. CODE ANN. § 75-2-207 cmt. 4.

118. *Leonard Pevar Co.*, 524 F. Supp at 551 (emphasis added).

> orally agree to the sale of a set quantity of brass at a firm price of $1.17 per pound, that will be the contract price notwithstanding a different price in one of the two confirming forms. . . . If the seller responds with a confirmation of a term not in the informal agreement and the buyer's confirmation states a conflicting term, the two knock each other out. Comment 6, however, provides that if Article 2's gap fillers then supply a term, it is binding.[119]

Thus, just as material alterations fall out of written acceptances and confirmations automatically by operation of law under § 75-2-207, so too do conflicting terms fall out of competing confirmations of an oral contract. That is, if the two confirmations do not agree on what was said, the differences fall out; it is the original oral agreement that governs.

What if one party attempts to make the terms of his confirmation of an oral agreement stick in place of the other party's confirmation by making his confirmation "expressly conditional" on the other party's agreement to new or different terms? White and Summers offers a steady line of cases, stating that a confirmation of an oral agreement cannot be made "expressly conditional" on additional or different terms because, "[a] party should not be able to escape an oral contract through a confirmation."[120] In other words, one cannot turn a confirmation of an oral contract into a genuine counteroffer that, if not accepted, would end the contract.

An illustration of a case in which one party sent in a confirmation that contained a material alteration that the court rejected is *Flight Systems, Inc. v. Elgood-Mayo Corp.*[121] Flight Systems, Inc. made an oral agreement to manufacture and install electric control panels in a locomotive for Elgood-Mayo Corp.[122] Elgood-Mayo in turn later issued a confirmation of the oral contract in the form of a purchase order for the panels.[123] Elgood-Mayo's customer, Perini Corporation, refused to accept the locomotive because of defects to motors unrelated to the panels supplied by Flight Systems.[124] Elgood-Mayo notified Flight Systems that it would not pay for the panels, relying on a clause of the purchase order stating that, "[p]ayment to Flight Systems for this order is based on successful testing and acceptance by Perini Corp."[125] Thus, Elgood-Mayo, in its purchase order, had added a third-party testing and acceptance requirement to Flight System's work, although

119. WHITE & SUMMERS, *supra* note 89, at 22.

120. *Id.* at 21 n.45 (quoting Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 342, 408 N.E.2d 1041 (1980)).

121. 660 P.2d 909, 911 (Colo. App. 1982).

122. *Id.* at 910.

123. *Id.* at 911.

124. *Id.*

125. *Id.*

the parties had reached an oral agreement for the terms of the work earlier.[126] However, the trial court entered judgment for the seller, Flight Systems, and the Court of Appeals affirmed.[127]

The court in *Flight Systems* provided the following analysis under UCC § 2-207(2)(b) and its Comments 3 and 4:

> By the court's ruling, it implicitly found that the purchase order was not the contract; it was a confirmation of the oral contract. . . . Since this provision would have been a material alteration and was not expressly agreed to by Flight Systems, it did not become a part of the contract, and Flight Systems was not bound by it.[128]

In *Flight Systems*, therefore, the buyer, Elgood-Mayo, was relying on a clause of its confirming purchase order that would have required the "successful testing and acceptance" by an independent, third-party, the ultimate customer for the locomotive, Perini.[129] The court, though, was quite clear that additional terms in the purchase order for third-party testing represented a material alteration from the original oral contract that did not become part of the parties' contract by operation of law under UCC § 2-207(2)(b).[130]

As *Flight Systems, Inc.* indicates, the presence of an earlier-concluded oral agreement can turn a document like a purchase order into a confirmation for comparison with the oral agreement, and exclusion of any materially altering additional terms. Although one of the parties may have regarded its document as a primary offer or acceptance, such documents may instead be confirmation documents if they follow an oral agreement earlier concluded. However, if the purported confirmation form contains forward-looking language anticipating the receipt of additional terms from the other party, the document may not be a confirmation, despite prior negotiations, but just more evidence of ongoing negotiations not yet concluded. The analysis of offer and acceptance forms in this sense can become subtle indeed.

XV. BEWARE!: THE BATTLE OF THE FORMS PROVISION MAY NOT APPLY

In *Mantaline Corp. v. PPG Industries, Inc.*, the district court found that a quotation to sell window gaskets for construction of a building in Denver, Colorado, was not an offer because it contained forward-looking language anticipating that the buyer might provide a purchase order, and because it required that any such purchase order's terms be accepted by and signed

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 910.
130. *Id.* at 911.

off on by the seller.[131] The buyer did send a purchase order to the seller for the gaskets that contained additional terms, including an arbitration provision in the event of a dispute and an indemnification provision.[132] The seller did not expressly accept or sign the purchase order as it had indicated it would do in its earlier quotation, but simply responded by shipping the gaskets without objecting to any terms of the purchase order.[133] The district court concluded that the parties had reached their agreement by the seller's conduct in shipping the gaskets, and that the arbitration and indemnification clauses of the purchase order were excluded from the resulting contract by the operation of UCC § 2-207(3), which states:

> Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [this Act].[134]

Thus, the district court concluded that because the quotation and the purchase order were not in agreement as to the arbitration and indemnification clauses, those terms fell out of the agreement.[135]

However, the Sixth Circuit on review reversed the district court in *Mantaline*, holding that the battle of the forms provisions of § 2-207(2) and (3) had no application to the set of facts.[136] The court stated that UCC § 2-207(2) had no application because the buyer's purchase order, which was indeed the offer, contained language making its acceptance expressly conditional on acceptance of its terms; under § 2-207(2) additional terms do not come in if "[t]he offer expressly limits acceptance to the terms of the offer."[137] Further, the court stated that § 2-207(3) did not apply because it "is relevant only where subsection [1] applies—that is, where the 'expression of acceptance . . . states terms additional or different from those offered.' "[138] The court found that the seller "gave no 'expression of acceptance' " that stated terms different from those offered by the buyer's purchase order because the seller's acceptance simply consisted of its shipment of goods in response to the purchase order; the seller had said nothing in response to the offer of the purchase order except to ship.[139] The court noted that under UCC § 2-206(1)(b)[140] an order may be accepted by

131. No. 97-4473, 2000 WL 799337, at *2 (6th Cir. June 8, 2000) (unpublished table).
132. *Id.*
133. *Id.*
134. *Id.* (quoting OHIO REV. CODE ANN. § 1302.10(c) (West 2011) [Ohio's UCC § 2-207(3)]).
135. *Id.*
136. *Id.* at *1.
137. *Id.* at *3.
138. *Id.*
139. *Id.*
140. OHIO REV. CODE ANN. § 1302.09 (West 2011).

the prompt shipment of goods.[141] There was no reason to go back to the seller's quotation to compare it with the purchase order because the quotation, with its forward-looking language had been just an invitation to deal further, not an offer.[142] Moreover, the seller's act of shipment was not a statement of acceptance that contained additional or different terms that would need to be compared with the terms of the offer in the buyer's purchase order under the battle of the forms provisions.[143] As the court stated, the seller's "price quotation form did not satisfy the requirements for an offer. Thus, there was no 'battle' here that could trigger the provisions of section [2-207]."[144] Further:

> In sum, the forward-looking language in Mantaline's invitation to deal (the price quotation form) fell by the wayside when the contract was formed. Because PPG's purchase order constituted the sole 'offer', and Mantaline's shipment of conforming goods constituted *an unqualified 'acceptance' of the offer*, the resulting contract included the terms of PPG's purchase order providing for indemnification and arbitration of disputes.[145]

Thus, although indemnification and arbitration clauses would be materially altering terms that would fall out of the agreement under a battle of the forms analysis,[146] that analysis under UCC § 2-207 was never reached because the seller's mere "unqualified" acceptance by shipment involved no competing acknowledgment form by the seller.

The court appears to imply that if the seller's earlier quotation in *Mantaline* had been a firm, final offer, with no "forward-looking" language that anticipated continued negotiations and the receipt of additional terms from the buyer—and then had been faced with the purchaser's purchase order as a counter-offer that stated in its terms that there would be no "effective" contract except as provided under the terms of the order—then yes, there would have been no contract except as created by the parties' conduct in the shipment and acceptance of goods. In that case, it would have been appropriate, indeed, under § 2-207(3) to compare the terms of the offer and counteroffer to see where they agreed, accepting only the agreed terms as the ultimate terms of the contract under the analysis of subsection (3). But, alas, for the seller it was to be because the quotation was not a true, firm and final "offer" that could be compared with the purchase order as a counteroffer. Thus, the court wrote:

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141. *Mantaline*, 2000 WL 799337 at *3.

142. *Id.*

143. *Id.* at *4.

144. *Id.*

145. *Id* at *4 (emphasis added).

146. *See supra* Part XIII.

> For a 'battle of the forms' to arise and trigger the provisions of § 2-207, there must be conflicting forms to begin with, each of which satisfies the common-law or statutory requirements for an offer. If the first form is not an offer, there can be no battle.[147]

Clearly, a manufacturer or other seller should be aware that it is difficult to qualify a quotation as an offer and treat the buyer's purchase order with caution accordingly. A manufacturer should always carefully review a buyer's purchase order for any term that should be objected to, and return the form with the objections noted on the form. The seller should also insist on a signed acknowledgement of a change from the buyer on any terms that the seller feels it must either have or have eliminated.

There is another example of a case in which the battle of the forms provisions would not apply. If both the parties have executed a *written* contract and the buyer, in effect, attempts to amend it unilaterally by issuing a purchase order with new terms a few days later, the battle of the forms provision of UCC § 2-207 has no application. In that instance the purchase order would not be a confirmation of an oral contract, but an attempt to modify a written contract that had already been formed previously.[148] The battle of the forms provision, concerning a contract acceptance or confirmation applies "only to the formation of the contract."[149]

XVI. Conclusion: Manufacturers and Other Sellers Take Caution

Manufacturers and other sellers need to be aware that if the quotation contains any forward-looking language anticipating further receipt of terms from the buyer in a purchase order or insists on the seller's review and acceptance of any anticipated terms from the buyer, the courts will likely find that the quotation is not an offer, no matter how detailed. If the quotation is not a true offer, and the seller then receives the purchase order and ships goods in response to it without objecting to the purchase order's terms, the seller will likely find that it has accepted all of the terms of the order. In this sense, if Article 2 contains a bias, it appears to favor buyers because in so many circumstances the seller's quotation will not qualify as the offer (as opposed to a mere invitation to deal), and more often than not the Code allows the buyer to take control of the transaction with a purchase order.

Also, as we have seen, the seller cannot depend on a form acknowledgement sent after receiving a purchase order to take back control because in most instances an acknowledgement will be held to be an

147. *Id.* (citing Litton Microwave Cooking Prods. V. Leviton Mfg. Co., 15 F.3d 790, 794 (8th Cir. 1994) (applying Minnesota law)).

148. *See* Migerobe, Inc. v. Certina USA, Inc., 924 F.2d 1330, 1335–36 (5th Cir. 1991) (citing Columbia Nitrogen Corp. v. Royester Co., 451 F.2d 3, 11–12 (4th Cir. 1971)).

149. *Id.* at 1336.

acceptance, not a counteroffer, and important conflicting terms included in the acknowledgement may fall out automatically as material alterations under the battle of the forms provision of UCC § 2-207(2). Even if the seller's acknowledgement form is deemed to be a counteroffer (because it clearly states (1) it is a counteroffer—not an acceptance—and (2) that there will be no contract except on the seller's terms), and the seller then ships without receiving an express assent to his terms from the buyer, then any different terms of the seller are likely to fall out under § 2-207(3). The seller, in many instances, cannot rely on a form acknowledgment, but must review the purchase order and explicitly reject any terms it cannot accept by marking the purchase order up and sending it back to the buyer with the seller's objections noted (keeping a clear copy of the mark-ups for the seller's file). The seller may also wish to examine its form quotation to make it into an explicit, final, signed offer inviting the buyer's acceptance by the execution and return of a simple, signed form acknowledgement. Finally, if the seller simply ships in response to a buyer's purchase order—even an order that contains materially altering terms from the seller's earlier quotation—then the seller will find that its shipment constituted an unqualified acceptance of the order's terms, and that the battle of the forms provisions do not come up at all.[150]

One might think reading White and Summers that the Code is neutral between buyers and sellers because of its emphasis on precluding the "last shot."[151] Ideally, it would be. However, the reality for sellers is that it is understood in many industries—and may arguably even be a "usage of the trade"—that large, sophisticated buyers can be expected to respond to a seller's quotation with a detailed form purchase order that will attempt to take control of the transaction, that will be expressly conditional on the acceptance of its terms, that explicitly rejects any contrary prior statement of terms, and that will have to be reviewed carefully by the seller for objectionable terms or omissions and responded to accordingly.

Again, though, a manufacturer or other seller may wish to take steps to minimize its risks by acting to make its quotation form, where possible, an explicit offer for immediate acceptance. Buyers, on the other hand, will want to be sure to respond to a quotation with a purchase order that states the order is the offer, that it is expressly conditional on its acceptance, that rejects any contrary terms previously proposed by the seller, and invites immediate acceptance.

Finally, whether seller or buyer, one must realize, as White and Summers points out, the following caveat:

> Under the present state of the law we believe that there is no language that the lawyer can put on a form that will always assure the client of forming a contract on the client's own terms. These efforts will be frustrated. . . . If one must

150. *See supra* Part XV (the discussion of Mantaline Corp. v. PPG Indus., Inc.).

151. *See* WHITE & SUMMERS, *supra* note 89, at 16.

> have a term, that party should bargain with the other party for the term. . . . If a *seller* must have the term to reduce its liability but cannot strike a bargain for it, the only answer may be to raise the price, buy insurance, or—as a last resort—have an extra martini every evening and do not capitalize the corporation too heavily.[152]

Notice that while White and Summers start off talking in neutral language in this segment between sellers and buyers, at the end the example they give is of a "*seller*" who better take that extra libation if it must have a term for which it cannot get the buyer's explicit agreement. That is because without the buyer's explicit cooperation, there may be little salvation for the seller in the battle of the forms provisions where the buyer has protected the terms it insists on with a purchase order. Again, if there is a bias in the battle of the forms provisions, it appears to favor the buyer armed with a purchase order. Manufacturers and other sellers need to be aware of the bias and treat the buyers' forms with caution accordingly.

152. WHITE & SUMMERS, *supra* note 89, at 24–25 (emphasis added).