

1979

Johnson Tire Service Inc. v. Thorn, Inc. : Brief of Appellant

Utah Supreme Court

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Layne T. Rushforth; Jackman & Associates; Attorney for Appellant;

Steven E. Stewart; Attorney for Respondent;

Recommended Citation

Brief of Appellant, *Johnson Tire Service v. Thorn, Inc.*, No. 16625 (Utah Supreme Court, 1979).

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOHNSON TIRE SERVICE, INC.,	:	
A Utah Corporation,	:	
	:	
Plaintiff and Appellant,	:	
	:	
v.	:	No. 16,625
	:	
THORN, INC., A Utah Corporation,	:	
	:	
Defendant and Appellee.	:	

APPELLANT'S BRIEF

Appeal from the Judgment of the Fourth
Judicial District Court for Utah County
Hon. David Sam, Judge

LAYNE T. RUSHFORTH
Attorney for the Plaintiff
Suite 10, Broderick & Howell Bldg
930 South State Street
Orem, Utah 84057

STEVEN H. STEWART
Stewart, Young, Paxton & Russell
Attorneys for the Defendant
Suite 450, The Chancellor Bldg.
220 South 200 East
Salt Lake City, Utah 84111

FILED

SEP 17 1979

Clk. Supreme Court Utah

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NATURE OF THE CASE

This is an action by the plaintiff-seller to collect the purchase price of large-equipment tires, interest thereon, and attorneys' fees from the defendant-buyer who failed to make timely payment thereof on its open account with the plaintiff.

DISPOSITION IN THE LOWER COURT

The Fourth Judicial District Court in and for Utah County, the Honorable David Sam presiding, granted partial summary judgment to the plaintiff wherein the Court awarded the principal purchase price and interest thereon to the plaintiff. The Court also granted partial summary judgment to the defendant wherein the Court denied the plaintiff's claim for attorneys' fees.

RELIEF SOUGHT IN THE PLAINTIFF'S APPEAL

The plaintiff seeks reversal of summary judgment granted the defendant denying the plaintiff's claim for attorneys' fees, judgment for cost in the Court below and on appeal, and, if necessary, remand for the determination of the proper amount of such fees and costs.

THE FACTS OF THE CASE

1. The plaintiff, Johnson Tire Service, Inc., is a merchant which sells tires and related products. The defendant, Thorn, Inc., is a ready-mix concrete merchant which renders products and services relating to the construction industry. Since the late 1960s, the plaintiff has sold tires, as well as related products and services, to the defendant on an open

account.

2. During the time in which the parties have been doing business with one another, the defendant customarily ordered the goods on an authorized purchase order which frequently did not contain any terms except a description of the goods. Johnson Tire, the plaintiff, acknowledged and accepted the buyer's offer to purchase by sending an invoice which, if signed by an employee of the defendant, was followed by delivery of the tires ordered.

3. In approximately 1973, the plaintiff modified its invoices to reflect the exact terms and conditions of the sales agreement. Since that time all invoices sent to the defendant and other purchasers contained the following legend:

TITLE REMAINS WITH SELLER UNTIL PAID. BUYER PROMISES TO PAY ACCOUNT AT SPRINGVILLE, UTAH. FINANCE CHARGE AT ANNUAL PERCENTAGE RATE OF 18 PERCENT CHARGED ON ANY AMOUNT UNPAID AFTER 30 DAYS FROM DATE HEREOF. BUYER AGREES TO PAY COSTS OF COLLECTION, INCLUDING REASONABLE ATTORNEY FEES, WITH OR WITHOUT SUIT.

4. At the beginning of 1978, the defendant's account with the plaintiff showed an unpaid balance of \$567.70. As additional purchases were made during the year, the unpaid balance gradually increased.

5. In May of 1978, with an unpaid balance of \$1,406.34 in its account with the plaintiff, the defendant ordered four heavy-duty Michelin equipment tires (customarily used on front-end loaders) at a cost of \$6,020.79, including taxes.

6. The plaintiff sent regular monthly statements to the defendant, but received only partial payments.

7. Representatives of the plaintiff met with a representative of the defendant, Jerry Thorn, in August, 1978 and requested that the ac-

count be paid in full. Mr. Thorn promised to have the account fully paid by October, 1978.

8. During the August, 1978 meeting, Mr. Thorn objected to the rate of interest or service charge added to its account, but no agreement was made to change that rate.

9. During the course of dealings between the parties, the plaintiff has consistently applied the defendant's payments first against accrued service charges ("interest") and then against principal. Unpaid service charges have been added to principal for the computation of subsequent service charges.

10. The defendant's open account with the plaintiff, as of the time of the plaintiff's motion for summary judgment (February 10, 1979), reflected an unpaid balance of \$567.70 for 1977, purchases of \$7,240.44, service charges ("interest") of \$950.21, and total payments or credits of \$1,590.26, leaving an unpaid balance of \$7,168.09. The last payment prior to that time was received on December 22, 1978.

11. In January of 1979, the plaintiff referred the defendant's account to its attorney for collection for a contingent fee of 25% of all amounts collected if suit were required. The defendant failed to respond to demands by the plaintiff and by plaintiff's attorney, and suit was commenced in the Fourth Judicial District Court in Utah County.

12. At all times pertinent herein, the defendant, by and through its agents, were aware of the content of the plaintiff's invoices. The provisions on the bottom of the plaintiff's invoices were discussed with Jerry Thorn in his office at Thorn, Inc. Mr. Thorn, who represented himself as having powers to negotiate in behalf of the defendant and who is

an attorney, was well aware that such terms were part of the bargain with the plaintiff. Objection to those terms was not made within a reasonable time.

13. On all forms used by the plaintiff, the provisions regarding the service charge were not in "fine print", but rather in extra bold lettering showing the annual percentage rate. The bold lettering would attract a merchant's attention to the provisions for the interest charges and the costs of collection, including reasonable attorneys' fees.

14. The terms of credit in the plaintiff's invoices were standard and are typically used by other merchants in this state, including the defendant.

15. The plaintiff's partial summary judgment for principal and interest was satisfied and all garnishments therefor were released upon receipt of payment from the defendant in the amount of \$7,799.10 on July 30, 1979. [Substantiated by the District Court file.]

16. On the principal sale of \$6,020.79, the plaintiff was to have made some \$250 profit. While it recovered the principal, the plaintiff had attorneys' fees of some \$1,950 which, although reasonable, put the non-breaching plaintiff-seller in the position of being forced to sell goods at a loss because of the defendant-buyer's delinquency in making payment. [Not in the record, but added to focus the plaintiff's arguments.]

SUBSTANTIATION FROM RECORD: Unless otherwise indicated, the facts herein cited are substantiated principally from the plaintiffs Statement of Facts in support of Plaintiff's Motion for Summary Judgment and supplemented by the Affidavit submitted therewith and the plaintiff's

Reply Statement which were adopted by the court in its findings of fact.

STATEMENT OF POINTS

POINT ONE: BINDING ADDITIONAL TERMS. Since both the plaintiff and the defendant are merchants, the provision in the plaintiffs invoices regarding attorneys' fees established a contractual obligation on the defendant to pay the plaintiff's attorneys' fees under the provisions of § 70A-2-207 of the Utah Uniform Commercial Code (cited "Utah UCC").

POINT TWO: INCIDENTAL DAMAGES. The District Court erred in failing to award its attorneys' fees as "incidental damages" [to the plaintiff - seller] resulting from the defendant - buyer's breach under the provisions of § 70A-2-710 of the Utah UCC.

POINT THREE: COURSE OF DEALING. The lower Court should have ruled that the parties course of dealings established a contractual obligation on the defendant to pay the plaintiffs' attorneys' fees under the provisions of §§ 70A-2-208 and 70A-2-202 of the Utah UCC.

POINT FOUR: COMMON LAW. The lower court improperly ruled that the defendant was not bound to pay the plaintiff's attorneys' fees on common principles and improperly relied on inappropriate precedent in its decision.

ARGUMENT

POINT ONE: BINDING ADDITIONAL TERMS.

A. General Rule. For the creation of a binding sales contract, Chapter 2 of the Utah Uniform Commercial Code [§§ 70A-2-101 et seq., hereinafter cited as "Utah UCC"] does not require that the acceptance of an offer be limited to the exact terms of the offer. Section 70A-2-207 of the Utah UCC provides:

70A-2-207. 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 act.

The contract involved in this case is for the sale and purchase of goods from one merchant to another, and Chapter 2 of the Utah UCC and those of its provisions specifically applicable to merchants clearly apply.

The defendant's offer to purchase, memorialized in its purchase orders or otherwise, were acknowledged and accepted by the plaintiff's invoices which contained additional terms of credit relating to credit.

service charge ("interest") and costs of collection, including reasonable attorneys' fees. As between these merchants, the terms of credit "become part of the contract" under § 70A-2-207 of the Utah UCC since none of the statutory exceptions exists. There is no statutory requirement that the seller's form of acceptance be signed by the buyer or its authorized representative.

B. No Restricted Offer. The defendant's offer did not expressly limit the plaintiff's acceptance to the terms shown on its purchase order. In fact, the purchase price was not shown on the defendant's purchase orders, but was negotiated and agreed upon otherwise.

C. Material Alteration. Although the statute itself does not delineate what types of terms "materially alter" a contract within the meaning of § 70A-2-207(2)(b), the Official Comments* to § 2-207 of the UCC by the Commissioners on Uniform State Laws contain clear guidelines for its interpretation.

Official Comments 3 and 4 indicate that the test for material alteration is whether the additional provisions would "result in surprise or hardship if incorporated [into the agreement] without express awareness by the other party...." Hence, the lower Court erred in requiring a signature or other evidence of "express awareness."

Official Comment 5 to § 2-207 of the UCC states that "a clause providing for interest on overdue invoices or fixing the seller's

*See Appendix B for the full text.

standard credit terms where they are within the range of trade practice and do not limit any credit bargained for" involves no element of unreasonable surprise and is to be incorporated into the contract between merchants unless timely objection is made.

Subsection (2) of § 70A-2-207 was submitted to the Utah legislature with Official Comments which explained that terms of credit on an invoice would be binding on a merchant-buyer, and the legislature adopted it without modification.

Merchants in this state, including both the plaintiff and the defendant, typically require the payment of the costs of collecting a delinquent account, including reasonable attorneys' fees, as well as credit service charges, as a part of their standard terms of credit. Therefore, the additional terms of credit contained on the plaintiffs invoices are within the range of trade usage and do not cause any "surprise" or "undue hardship" to the defendant (which uses similar terms of credit on its invoices).

c) Timely Objection. The defendant failed to make objection within a reasonable time to the additional terms on the plaintiff's invoices as required by §70A-2-207 (2) (c). Such terms were on the plaintiff's invoices since 1973, and although the defendant had an open account before and after that time, it failed to object to those terms until August, 1978 (except perhaps on specific isolated transactions not related to this case).

d) Earlier Precedent. This Court did not discuss or apply the Utah UCC in either Spanish Fork Packing Company v. House of Fine Meats, Inc., 29 Utah 2d 312, 508 P.2d 1186 (1973) and B & R Supply

Company v. Bringham, 28 Utah 2d 442, 503 P.2d 1216 (1972). They are inappropriate as precedent in this case where the UCC clearly applies and was raised in the lower Court as the plaintiff's chief argument for its claim for attorneys' fees.

This is a case of first impression, apparently for other jurisdictions as well as for Utah. Those two cases, and similar cases in other jurisdictions, are clearly based on common law prior to the Uniform Commercial Code even though they were decided after its adoption. Of course, the Court could not decide in the previous cases an issue which was not raised by the parties.

e) Conclusion. The Court below ruled that the additional terms of credit on the plaintiff's invoices were not binding on the defendant without an authorized signature or other evidence of consent. The Utah UCC mandates that such terms are binding as between merchants. Since the offer was not restricted to its terms, since there is no material alteration of the agreement causing surprise or undue hardship to the defendant, and since the defendant failed to object until after five years of receiving the plaintiff's invoices, none of the exceptions to § 70A-2-207 of the Utah UCC applies.

The current statutory provisions of the Utah UCC were adopted by the legislature to supersede prior statutory and case law. The law does not require actual consent but incorporates into contracts "commercial understandings" and the expectations of modern merchants. [See Official Comment 2 to § 2-207 of the UCC.] The defendant is legally and contractually obligated to pay the plaintiff's attorneys' fees.

POINT TWO: INCIDENTAL DAMAGES

A. General Rule. The Official Comment* to § 2-710 of the UCC indicates that a buyer is liable to the seller for "all commercially reasonable expenditures made by the seller" as a result of the buyer's breach. The clear intent of the law is to make the non-breaching party whole, not to merely compensate for the principal purchase price.

B. Plaintiff's Argument. The plaintiff's expenditure of attorneys' fees is a "commercial reasonable" expense which resulted directly from the defendant's refusal to make payment in full on its account.

If attorneys' fees are not awarded as valid incidental damages, merchants (such as the plaintiff) will often be forced by delinquent buyers (such as the defendant) to sell at a loss because collection expenses can easily consume and exceed the profit and even the price on the goods sold.

Although awarding attorneys' fees as incidental damages is inconsistent with the pre-UCC application of contract law, the Utah legislature's clear intent under § 70A-2-710 was to make a non-breaching seller whole and to make a breaching buyer fully responsible for all expenses reasonably incurred because of its breach.

*See Appendix B for the full text.

POINT THREE: COURSE OF DEALINGS

A. General Rule. As provided in §§ 70A-2-202. (a) and 70A-2-208 of the Utah UCC, the acquiescence of a party may be equivalent to assent under Utah contract law. Because the defendant failed to object for several years to the crediting of its payments first to current interest and then to unpaid principal (including past interest charges), the District Court awarded the plaintiff interest, before and after judgment, at the rate shown on the plaintiff's invoices and monthly statement.

"Course of dealings" is analogous to estoppel, and differs only in that one party relies on the silent acquiescence of the other, rather than on explicit representations. For many years, the plaintiff in this case sold goods and extended credit to the defendant in reliance on the defendant's acquiescence to the standard terms of credit contained in the plaintiff's invoices.

The Utah UCC was adopted to relax the requirements for a fair and enforceable contract. The UCC does not require a signed contract with each purchase. Even at common law, printed conditions on sales slips were regarded as part of the contract where those conditions were expressly made a part thereof or they were so set forth and were so related to the writing and the subject matter of the agreement as to manifest to the other party an intent that they were to be obligatory on him. 77 C.J.S., Sales, § 71.

B. Application to This Case. The defendant accepted goods and credit for years knowing of the plaintiff's terms therefor.

[See §§ 1 and 2 of the plaintiff's Reply Statement of Points and Authorities dated April 5, 1979.] The defendant's failure to object to those terms of credit constitutes acquiescence to those terms.

The lower Court awarded interest to the plaintiff because of the defendant's acquiescence in the plaintiff's billing practice, including the computation of interest. It is unfair to allow the defendant to now claim that it never acquiesced to pay cost of collection, including reasonable attorneys' fees where the other terms of credit had been honored. To hold otherwise would allow long-term merchant buyers to disregard credit terms at will.

In short, several years of dealings one with another made both parties aware of unwritten but valid expectations which are enforceable under §§ 70A-2-202(b) and 70A-2-208 of the Utah UCC.

POINT FOUR: COMMON LAW

A. Prior Cases--Factual Distinctions. The defendant and the District Court relied upon the rulings of this Court in two prior cases, Spanish Fork Packing Company v. House of Fine Meats, Inc., 29 Utah 2d 312, 508 P.2d 1186 (1973) and B & R Supply Company v. Bringham, 28 Utah 2d 442, 503 P.2d 1216 (1972).

In the B & R Supply case the Court ruled that where the buyer's attention was never called to the seller's terms of credit printed in "small inconspicuous print" on the seller's invoices, no contract was created for the payment of attorneys' fees. In the Spanish Fork Packing case the Court ruled that where the buyer had never read the terms of credit on a seller's invoices, there was no "meeting of the minds" and no enforceable contract for attorneys' fees.

In the present case, however, the defendant-buyer was made aware of the terms of credit contained on the plaintiff-seller's invoices and never denied knowledge thereof. In the plaintiff's Reply Statement of Points and Authorities, the plaintiff clearly alleged that Jerry Thorn, an agent for the defendant and an attorney, discussed with representatives of the plaintiff the provisions at the bottom of the sales slip and that Mr. Thorn was made aware that attorneys' fees were part of the contract between the parties. Such allegations were never controverted and were adopted by the District Court in its Findings of Fact [q.v.].

B. Inapposite Precedent. The law applied in the B & R Supply and Spanish Fork Packing cases is inconsistent with the common law and undermines the purpose of contract law.

The dissenting justice in the Spanish Fork Packing case, Justice Henriod, described that case as being one:

. . . where actually there is no meeting of the minds, but where there is a manifestation of mutual assent which appears to create consensual liability by virtue of a sort of estoppel that says one is bound if ostensibly he represents something without affirmatively denying liability therefor,--that he will respond *ex contractu*, if one relies on his representations, either by express authority or by implication. Spanish Fork Packing, 508 P.2d at 1188 (dissent).

The justice went on to say:

It is somewhat ridiculous to conclude that the purchaser-defendant's officials did not read the so-called "fine print" at the very head of the invoice,--some of which was not as "fine" as asserted. It is also amazing to this writer that disclaiming liability for the attorney's fee provision because nobody in authority bothered to read it or question its obvious implications over a two-year period falls squarely within the authorities cited in *Slim Olson v. Winegar*, 122 Utah 80, 246 P.2d 608 (1952)] based on acquiescence in the terms of an agreement by silence. 508 P.2d at 1188 and 1189 (dissent).

The Spanish Fork Packing and B & R Supply cases are inconsistent with common-law contract principles, trade usage, and the intent of the Utah Uniform Commercial Code. If those cases are upheld and a similar decision is reached in this case, the following legal advice will be more frequently given (and followed) in Utah:

[T]he way to avoid attorney's fees or any other provision in fine print, simply is to ignore it, permit your employees to sign delivery invoices on which are terms, that if undesirable, could be rejected, say you authorized them to sign for the delivery only but not for anything appearing on the invoices, such as weight, price, quality and the like, and you will not be responsible for any of those items, and you then can put the seller to proof dehors the invoice itself, and renege on even the delivery of goods itself by saying, for example, that your employee was not authorized to establish proof of delivery because that was reserved to the President of the corporation, who knew and saw nothing about the invoice, what was on it, or what his employee's signature looked like. 508 P.2d at 1189 (dissent).

In other words, those cases place an unconscionable burden on a sel-

ler and give the buyer the benefit of a bargain without obliging him to honor it.

CONCLUSION

A. Binding Additional Terms: The lower Court improperly disregarded § 70A-2-207 of the Utah UCC both as to interest and attorneys' fees. Since the record indicates that there was no material alteration of the parties' agreement and that the defendant failed to object to the additional terms within a reasonable time, the terms of credit in the plaintiff's invoices are a binding part of the sales agreement between the parties.

B. Incidental Damages: The provisions of § 70A-2-710 require that the plaintiff be made whole, and therefore the plaintiff should be reimbursed for all costs incurred because of the defendant's breach of its promise to pay on time, including reasonable attorneys' fees.

C. Course of Dealing: The parties' dealings with each other established mutual expectations which the defendant should be obligated to follow and "estopped" from denying under the provisions of §§ 70A-2-208 and 70A-2-202 of the Utah UCC.

D. Common Law: The lower court improperly relied on the Spanish Fork Packing and B & R Supply cases where the facts in the present case distinguish it from those previous cases, and where the law applied in those cases is inconsistent with fairness, trade usage, and the common-law principle of estoppel.

APPENDICES

APPENDIX "A"	Specific Statutory Provisions
APPENDIX "B"	Official Comment to the UCC by the National Conference of Commissioners on Uniform State Laws

APPENDIX "A"

70A-2-202. Final written expression—Parol or extrinsic evidence.—Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (section 70A-1-205) or by course of performance (section 70A-2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

70A-2-207. 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 act.

70A-2-208. Course of performance or practical construction.—(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (section 70A-1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

70A-2-710. Seller's incidental damages.—Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

Official Comment to §2-202

Prior Uniform Statutory Provision: None.

Purposes:

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive

statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Official Comment to UCC § 2-207

Prior Uniform Statutory Provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of Changes:

1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction. [Comment 1 was amended in 1966.]

2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms. [Comment 2 was amended in 1966.]

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under

Official Comment to UCC § 2-207 (cont'd)

that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement. [Comment 6 was amended in 1966.]

7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule. [Comment 7 was added in 1966.]

Official Comment to UCC § 2-208

Prior Uniform Statutory Provision: No such general provision but concept of this section recognized by terms such as "course of dealing", "the circumstances of the case," "the conduct of the parties," etc., in Uniform Sales Act.

Purposes:

1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this Article.

2. Under this section a course of performance is always relevant to determine the mean-

ing of the agreement. Express mention of course of performance elsewhere in this Article carries no contrary implication when there is a failure to refer to it in other sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see Section 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights on a single occasion (see Sections 2-605 and 2-607).

Official Comment to UCC § 2-710

Prior Uniform Statutory Provision: See Sections 64 and 70, Uniform Sales Act.

Purposes: To authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all commercially reasonable expenditures made by the seller.