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## U.C.C. Section 2-207: When Does an Additional Term Materially Alter a Contract?

Timothy Davis

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## U.C.C. Section 2-207: When Does an Additional Term Materially Alter a Contract?

### **Cover Page Footnote**

Executive Associate Dean for Academic Affairs and John W. & Ruth H. Turnage Professor of Law, Wake Forest University School of Law. Professor Davis appreciates the research assistance of the following Wake Forest law students, Robert Angle, Alan Bowie and Matthew Cloutier. Professor Davis acknowledges the helpful comments of Christina L. Kunz, Professor Emerita, Mitchell Hamline School of Law. He also appreciates the research support provided by Dean Suzanne Reynolds of Wake Forest School of Law.

# U.C.C. SECTION 2-207: WHEN DOES AN ADDITIONAL TERM MATERIALLY ALTER A CONTRACT?

*Timothy Davis*<sup>+</sup>

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Uniform Commercial Code (“U.C.C.”) Section 2-207 (section 2-207) affords commercial law professors an opportunity to engage law students in statutory interpretation.<sup>1</sup> The section introduces students to the complexities and ambiguities that often reside in statutes notwithstanding drafters’ best efforts to achieve clarity. The study of section 2-207 also acquaints students with how courts interpret the language of a U.C.C. provision that has been characterized as a “quagmire,”<sup>2</sup> “incomprehensible,”<sup>3</sup> and a “statutory disaster whose every word invites problems in construction,”<sup>4</sup> and criticized for the waste resulting from the litigation the section has spawned.<sup>5</sup> An introduction of section 2-207 in law school also provides emergent commercial law attorneys with familiarity that may be beneficial when they enter practice and tackle legal disputes or structure sales transactions that implicate the section.

Indeed the idea for this Article originated in my teaching of section 2-207 in a Contracts class. Students and I discussed *Paul Gottlieb & Co. v. Alps South Corp.*,<sup>6</sup> which addresses when a disclaimer of consequential damages clause on the reverse side of a seller’s standardized form constitutes an additional term that materially alters the parties’ agreement.<sup>7</sup> The *Gottlieb* court stated that the buyer, the party seeking to exclude the additional term from the contract, failed to carry its burden to establish that the clause would materially alter the contract if included, given that the buyer proffered no evidence of either surprise or hardship.<sup>8</sup>

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1. Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2679 (2000) (stating that section 2-207’s incomprehensible nature makes it an excellent, yet challenging tool to teach about “intricacies of statutory construction”).

2. See Corneill A. Stephens, *Escape from the Battle of the Forms: Keep it Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233, 234 (2007).

3. See Keating, *supra* note 1, at 2679.

4. Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1224 (1982).

5. *Id.* at 1248.

6. 985 So. 2d 1 (Fla. Dist. Ct. App. 2007).

7. See *id.* at 4, 6.

8. *Id.* at 7–8.

However, a student questioned the court's holding. The student had assumed that, given the importance of an aggrieved buyer's recovery of consequential damages, a disclaimer of such damages would constitute a *per se* material alteration of the contract obviating the necessity of the court engaging in a facts-based analysis. Other students shared this view and extended their reasoning to disclaimer of warranty provisions that frequently appear in a seller's acceptance or confirmation document. Certain students also expressed surprise that courts would engage in fact-based analyses in determining the materiality of any additional term that strips buyers of important rights implied into the party's contract by U.C.C. Article 2's default rules. The students' comments regarding these and other clauses resulted in a lively discussion of incorrect assumptions as to when an additional term materially alters a contract and the approaches courts take when making this determination.

In an effort to provide some clarity on when an additional term constitutes a material alteration, this Article examines ninety-four cases decided between January 1, 2005 and July 1, 2015.<sup>9</sup> The survey reveals that the nature and extent of a court's inquiry as to whether a provision materially alters an agreement turns on several factors including: (1) the subject matter of the additional term; (2) the test adopted for determining materiality; (3) the conduct of the parties, particularly course of dealings; (4) whether the repetitive sending of forms gives rise to a course of dealing; and (5) the language of Official Comments three, four, and five to section 2-207.

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9. The primary source for finding cases was Westlaw. Section 2-207 of the Uniform Commercial Code Case Digest was also reviewed for cases discussing whether an additional term materially altered the contract. Cases that discussed additional terms but did not engage in a section 2-207(2) analysis to determine whether an additional term should become a part of the contract were not included in the ninety-four cases examined. Also, cases involving different rather than additional terms were not included. Cases are grouped according to the nature of the additional term that is at issue. In instances where a court examined more than one additional term (e.g., disclaimer of warranty and a limitation of remedy provisions), the cases are discussed in the section of the article that examines each provision. These cases were only counted once, however, for purposes of the total of ninety-four cases reviewed. Cases that were reviewed but are not discussed in detail relate to indemnification, choice of law, non-assignment, statute of limitations, and integration clauses. *See, e.g.*, Carr v. Weinig, No. 5:01-CV-1514(HGM/GJD), 2006 WL 2355867, at \*5 (N.D.N.Y. Aug. 14, 2006) (discussing materiality of indemnification clause); Borden Chem., Inc. v. Jahn Foundry Corp., 834 N.E.2d 1227, 1230 (Mass. App. Ct. 2005) (discussing materiality of indemnification clause); C9 Ventures v. SVC-West, L.P., 202 Cal. App. 4th 1483, 1487 (Cal. Ct. App. 2012) (discussing materiality of indemnification clause); Greer v. T.F. Thompson & Sons, Inc., No. CV-10-0799-PHX-SMM, 2011 WL 175889, at \*3 (D. Ariz. Jan. 19, 2011) (discussing choice of law provision); Trans-Tec Asia v. M/V Harmony Container, 435 F. Supp. 2d 1015, 1017 (C.D. Cal. 2005), *aff'd in part, rev'd in part*, 518 F.3d 1120 (9th Cir. 2008) (discussing choice of law provision); ISRA Vision, AG v. Burton Indus., Inc., 654 F. Supp. 2d 638, 647 (E.D. Mich. 2009) (addressing a non-assignment clause); Packgen v. Berry Plastics Corp., 973 F. Supp. 2d 48, 50 (D. Me. 2013) (addressing statute of limitations issue); Plastech Engineered Prods. v. Grand Haven Plastics, Inc., No. 252532, 2005 WL 736519, at \*4 (Mich. Ct. App. March 31, 2005) (addressing integration clause).

Section I(A) of the Article provides an overview of section 2-207, beginning with a discussion of the types of transactions in which battle-of-forms issues invoke section 2-207. Section I(B) then examines contract formation under section 2-207, focusing on the common law's "mirror image" and "last shot" rules that section 2-207 displaces.<sup>10</sup> Section I(C) initially discusses sections 2-207(2)(a) and (c), which govern the means by which an offeror can preclude the incorporation into a contract of additional terms contained in an offeree's acceptance or confirmation.<sup>11</sup> Section I(C) also establishes the predicate for a discussion of section 2-207(2)(b) and the material alteration concept included therein.

Part II begins with a discussion of the surprise or hardship test employed by courts to determine if an additional term materially alters the contract. It is followed by an attempt to define surprise and hardship. The Article then discusses issues that emerge from the application of the surprise or hardship test, including whether hardship is an independent test for determining materiality, the role of course of dealing in determining materiality, and whether the repeated sending of forms containing an additional term operates as a course of dealing in regard to § 2-207(2)(b). Part II also summarizes the findings from the survey of ninety-six cases decided over the last decade in which courts have addressed when an additional term materially alters parties' contract.<sup>12</sup> The survey exposes the inaccuracy of certain assumptions as to when an additional term will be included or excluded from parties' agreements. For example, arbitration and disclaimer of warranty clauses do not constitute *per se* material alterations.<sup>13</sup>

Additional observations drawn from the survey include the: (1) adoption by the majority of courts of the unreasonable surprise or hardship test to determine materiality, notwithstanding arguments that hardship is a consequence of surprise;<sup>14</sup> (2) imposition of the burden of proving materiality on the party seeking to exclude the additional term;<sup>15</sup> (3) increased adoption and application of a facts-based case-by-case approach, with limited exceptions, in assessing materiality;<sup>16</sup> (4) frequent application of course of dealings to negate surprise;<sup>17</sup> and (5) a split among the jurisdictions on whether the repetitive sending of a form containing the additional term gives rise to a course of dealing.<sup>18</sup>

Part III analyzes six clauses that frequently appear as additional terms in acceptance and confirmation documents, which include: (1) arbitration;<sup>19</sup> (2)

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10. *See infra* Section I.B.
  11. *See infra* Section I.C.
  12. *See infra* Part II.
  13. *See infra* text accompanying notes 200–03.
  14. *See infra* Section II.A.
  15. *See infra* text accompanying notes 106–10.
  16. *See infra* text accompanying notes 163–66.
  17. *See infra* text accompanying notes 115–18.
  18. *See infra* text accompanying notes 154–61.
  19. *See infra* Section III.A.

disclaimer of warranties;<sup>20</sup> (3) limitation of remedies, including consequential damages;<sup>21</sup> (4) forum selection;<sup>22</sup> (5) attorney's fees;<sup>23</sup> and (6) pre-judgment interest upon a buyer's default.<sup>24</sup> The survey concludes that, except for forum selection and pre-judgment interest clauses, courts have gravitated toward rejecting a *per se* approach in favor of a case-by-case approach in which the facts of a particular case are assessed in determining unreasonable surprise or hardship.<sup>25</sup> It also reveals that most courts wisely refrain from strictly adhering to the guidance set forth in comments 4 and 5 of section 2-207, which pertain to when a clause is likely or unlikely to materially alter.<sup>26</sup>

## I. OVERVIEW OF SECTION 2-207

### A. *The Applicability of Section 2-207*

Section 2-207 was drafted for a world of contracting that relies largely on contract formation arising from an exchange between parties of standardized form documents rather than parties sitting down and hammering out the terms of their contract and signing a single document.<sup>27</sup> This is due in part to the reality that contracting for goods often occurs quickly and involves repeated sales and purchases of similar goods between parties who are at a distance.<sup>28</sup> Section 2-207 was promulgated, in part, to attempt to deal with these realities.<sup>29</sup>

Contractual behavior that invokes section 2-207 might resemble the following. A buyer sends to a supplier an email containing a request for proposals. The supplier responds by emailing a price quote, which typically will not constitute an offer.<sup>30</sup> Under this scenario, an offer would arise when the buyer emails or otherwise communicates a purchase order in response to the supplier's price quote. The buyer's purchase order will likely consist of a form

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20. *See infra* Section III.B.

21. *See infra* Section III.C.

22. *See infra* Section III.E.

23. *See infra* Section III.D.2.

24. *See infra* Section III.D.1.

25. *See infra* Part IV.

26. *See id.*

27. *See* Robert P. Wise, *Finding the Mississippi UCC Sales Contract Amid the RFQ, Quotes, Phone Calls, Emails, Purchase Order and Acknowledgment Forms*, 30 MISS. C. L. REV. 491, 496 (2012) (noting that modern contract formation "depends on an informal exchange of forms").

28. *See id.*

29. *See* Keating, *supra* note 1, at 2682.

30. *Nordyne, Inc. v. Int'l Controls & Measurements Corp.*, 262 F.3d 843, 846 (8th Cir. 2001) (finding that a price quote will only constitute an offer when it's made sufficiently clear that its acceptance will form a contract); James G. Raphelson & Jane D. Quasarano, *Dueling, Dickering, and Delivering: UCC Battle of the Forms in Manufacturing Contracts*, 93 MICH. B.J., no. 10, Oct. 2014, at 29 (noting that absent specific circumstances, such as a price quote that contains specific quantities and an indication that it's for the buyer's immediate acceptance, price quotes are typically construed as an invitation for an offer rather than an offer); Wise, *supra* note 27, at 497.

document that contains “dickered” terms, which are the “essential terms over which” the parties expressly negotiate,<sup>31</sup> such as the identification of the product, quantity, price, and delivery terms.<sup>32</sup> The purchase order would also likely contain preprinted standard terms, “boilerplate” provisions,<sup>33</sup> relating to a range of matters, such as warranties and remedies.<sup>34</sup>

In response to the buyer’s purchase order, the seller might send an acknowledgement, invoice, or another standardized form document that contains dickered terms that match those contained in the buyer’s purchase order.<sup>35</sup> The seller will likely attempt, however, to add terms to the transaction. To accomplish this, the seller’s acknowledgment form or invoice will include boilerplate provisions relating to a range of matters, such as attorney’s fees in the event of the buyer’s nonpayment, mandatory arbitration, and disclaimers of implied warranties and consequential damages.<sup>36</sup> As discussed *infra*, under section 2-207, the exchange of forms constitutes a contract between the parties.<sup>37</sup>

Of course, section 2-207 governs transactions that do not track the contracting behavior described above. In addition to the above scenario, a seller might begin the process by communicating numerous quotations to potential buyers.<sup>38</sup> Section 2-207 is also relevant where the supplier sends the first form (e.g., an acknowledgement), which creates an offer that the buyer accepts by sending a purchase order. Similarly, section 2-207 will apply where parties reach an oral agreement that is followed by one or both of the parties sending confirmations.<sup>39</sup> Although the courts are split, some courts hold that section 2-207 applies where a seller responds to a buyer’s purchase order by shipping the goods with an

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31. See Stephens, *supra* note 2, at 236.

32. See Wise, *supra* note 27, at 496 (stating that once the buyer receives the seller’s price quote, the buyer will issue a more detailed purchase order by adding terms relating to product options, price, delivery dates, or industry standards in an attempt to specify the buyer’s expectations regarding the seller’s performance).

33. See Stephens, *supra* note 2, at 236.

34. See *id.*

35. Wise, *supra* note 27, at 496. Buyers typically send the form document, which is a purchase order, and sellers can respond with an acknowledgment or invoice. *Id.* Courts have provided examples of what is and is not a dickered term. See, e.g., *General Electric Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1098–99 (6th Cir. 1994); *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 323–24 (N.M. 1993).

36. Wise, *supra* note 27, at 496.

37. See *infra* text accompanying notes 58–59.

38. See Wise, *supra* note 27, at 498.

39. U.C.C. § 2-207(1) (AM. LAW INST. & UNIF. LAW COMM’N 2002). Section 2-207(1) reads in its entirety as follows:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

*Id.*; see also *Cent. Bag Co. v. W. Scott & Co.*, 647 S.W.2d 828, 830 (Mo. Ct. App. 1983); *Sw. Eng’g Co. v. Martin Tractor Co.*, 473 P.2d 18, 26 (Kan. 1970).



acknowledgment form or invoice that either accompanies the shipment of goods or is sent shortly after the goods are shipped.<sup>40</sup> In addition, section 2-207 applies where one party makes an oral offer to which the recipient responds by forwarding a standardized form that constitutes an acceptance.<sup>41</sup> Moreover, instead of the parties exchanging their documents by email with forms attached, one or both of the parties may include in their emails links to sites containing their respective terms and conditions.<sup>42</sup> Finally, contract formation may occur by virtue of an electronic data interchange (“EDI”).<sup>43</sup> Notwithstanding the precise way in which documents are communicated between the parties, section 2-207’s rules governing contract formation may be pertinent. Equally relevant are the section’s rules that determine the terms governing the parties’ contract.<sup>44</sup>

### B. Section 2-207 and Contract Formation

#### 1. The Common Law’s “Mirror Image” and “Last Shot” Rules

Section 2-207 was promulgated with the intention of changing the common law approach to both the formation and terms of a contract entered into through the use of standardized forms.<sup>45</sup> In regard to contract formation, section 2-207 altered what was characterized as the common law’s “mirror image rule.”<sup>46</sup> Under this rule, unless the terms of the offer and the purported acceptance matched (i.e., the terms of the offer were the “mirror image” of the purported acceptance), no contract was formed.<sup>47</sup> To illustrate, assume that a buyer sent a purchase order and the seller responded with an acknowledgment. The dickered terms of the seller’s acknowledgment matched the dickered terms of the buyer’s offer but the seller’s boilerplate terms included a disclaimer of warranties, a matter not addressed in the buyer’s offer. Under the common law mirror image rule, the seller’s acknowledgement gave rise to a counteroffer.<sup>48</sup> In this scenario and the scenario detailed below, section 2-207 alters the common law approach

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40. *Rocheux Int’l of N.J., Inc. v. U.S. Merchants Fin. Grp., Inc.*, 741 F. Supp. 2d 651, 678 (D.N.J. 2010) (acknowledging cases in which transactions were consummated in this fashion and the split among the jurisdictions on this issue).

41. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1163–66 (6th Cir. 1972); *Apex LLC v. Sharing World, Inc.*, 206 Cal. App. 4th 999, 1011 (Cal. Ct. App. 2012).

42. *See, e.g., Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, 872 F. Supp. 2d 1191, 1196 (D. Colo. 2012) (illustrating a scenario where a document contained links to terms and conditions on a website).

43. *See generally* Stephens, *supra* note 2, at 235 (noting the standard form documents now appear in both electronic and paper media).

44. U.C.C. § 2-207(2), (3) (AM. LAW INST. & UNIF. LAW COMM’N 2002).

45. Keating, *supra* note 1, at 2682–83 (stating section 2-207 deals with whether and when contract formation occurred, as well as which party’s non-immediate terms control).

46. *Id.* at 2684.

47. Stephens, *supra* note 2, at 237.

48. *See, e.g., Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619, 620 (N.Y. 1915).

by making the seller's acknowledgement an acceptance rather than a counteroffer.<sup>49</sup>

Section 2-207 also sought to alter a common consequence of the mirror image rule—the “last shot rule.”<sup>50</sup> Consider the above illustration. Assume that the seller sent their acknowledgment and then shipped the goods, which the buyer received, accepted, and paid for. Under the common law, a contract was formed pursuant to the buyer's conduct in having accepted the goods and, in turn, the seller's counteroffer.<sup>51</sup> Having accepted the seller's counteroffer through their acceptance of the goods, the buyer was bound by the terms set forth in the seller's acknowledgment form notwithstanding a lack of awareness of the boilerplate terms.<sup>52</sup> Under the common law's last shot rule, the party who sent the last form, often the seller, dictates the terms governing the transaction.<sup>53</sup>

## 2. Displacing the “Mirror Image” and “Last Shot” Rules

The changes wrought by section 2-207 were intended to address concerns that the common law's mirror image and last shot rules permitted a party to renege on what both parties believed constituted their contract<sup>54</sup> and the unfairness of permitting the party who sent the last form to control the terms of the contract given the absence of an agreement in fact on those terms.<sup>55</sup> Therefore section 2-207 was intended to address the last shot rule's tendency to ignore the actual bargain into which the parties had entered.<sup>56</sup> Section 2-207 was promulgated

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49. *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416, 420–21 (Mo. Ct. App. 1989).

50. *See Stephens, supra* note 2, at 237–38.

51. *Id.*

52. *Id.* at 238.

53. Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making the Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893, 902 (1991) (noting that under the common law rule, the offeree became the master of the commercial contract created pursuant to an exchange of forms).

54. Keating, *supra* note 1, at 2684 (“Because a purported acceptance such as the seller's is treated as a counteroffer that is then accepted by the buyer's performance, the seller's terms will govern by virtue of its having fired the ‘last shot.’”).

55. Keating, *supra* note 1, at 2684. Professor Keating also argues that the common law approach to the battle of the forms

turns contract law on its head. This is a deal in which the parties recklessly, if not, knowingly, consummate a sale of goods without having settled on all of the terms. And while one could argue that every contract is incomplete at some level, what distinguishes the battle of the forms case is that these contracts are most often incomplete at very fundamental levels.

*Id.* at 2679; *see also* Stephens, *supra* note 2, at 239 (arguing that the last shot rule encourages parties to engage in gamesmanship and bounds parties to unread terms that both parties had often ignored, thereby forcing an agreement on them to which neither had agreed).

56. Brown, *supra* note 53, at 899 (noting that section 2-207 fosters the U.C.C.'s broad policy of effectuating the intent of parties and removing technical rules that inhibit that policy); Stephens, *supra* note 2, at 240.

with the intent of fostering the bargain in fact between the parties and to conform to commercial realities.<sup>57</sup>

Section 2-207(1) displaces the common law's mirror image rule by allowing an offeree's responsive document to constitute an acceptance, even though the boilerplate terms therein are not identical to the terms of the offer.<sup>58</sup> Returning to our scenario, under section 2-207, rather than giving rise to a counteroffer, the seller's acknowledgment would constitute an acceptance.<sup>59</sup> If a buyer's offer is silent as to certain matters, additional terms, such as arbitration and disclaimer of warranties provisions appearing in the seller's acknowledgment, will not defeat contract formation.<sup>60</sup> The same would not be true if the offer contains dickered terms not addressed in the acceptance. An acceptance by stating "yes" is assent to all of the offer's terms, even if not repeated in the acceptance.<sup>61</sup> Therefore, additional terms only implicate section 2-207 when they appear in the acceptance or confirmation. Moreover, the seller's acknowledgment constitutes an acceptance of the buyer's purchase order even if the boilerplate terms of the parties' respective documents differ.<sup>62</sup> Consequently, if a buyer's purchase order contains a provision not allowing for arbitration and the seller's acknowledgment contains boilerplate language allowing for arbitration, a contract would be formed notwithstanding the presence of conflicting (i.e., different) boilerplate terms.<sup>63</sup>

Section 2-207 does not, however, abrogate the parties' ability to create a counteroffer.<sup>64</sup> Under section 2-207, nonmatching dickered terms alone are not enough to prevent a "definite and seasonable expression of acceptance" unless at least one of the parties' dickered terms diverges significantly<sup>65</sup> and, therefore,

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57. Brown, *supra* note 53, at 895–96 (arguing that section 2-207 removes common law barriers to assessing parties' objective manifestations of assent); Colin P. Marks, *The Limits of Limiting Liability in the Battle of the Forms: UCC Section 2-207 and the "Material Alteration" Inquiry*, 33 PEPP. L. REV. 501, 510 (2006) (arguing that the primary purpose of section 2-207(1) is to prevent minor discrepancies in an offer and acceptance from giving rise to a counteroffer that could provide a basis for a party to renege on a contract).

58. Keating, *supra* note 1, at 2684 (stating that section 2-207(1) effectively finished the common law mirror image rule); Stephens, *supra* note 2, at 242.

59. Brown Mach., Inc. v. Hercules, Inc., 770 S.W.2d 416, 420 (Mo. Ct. App. 1989).

60. *Id.* at 420–21; Hitchiner Mfg. Co. v. Modern Indus., Inc., No. 09-cv-242-PB, 2009 WL 3643471, at \*3–4 (D.N.H. Oct. 29, 2009).

61. See Brown, 770 S.W.2d at 420–21.

62. U.C.C. § 2-207(1) (AM. LAW INST. & UNIF. LAW COMM'N 2002); see also RBC Aircraft Prods., Inc. v. Precise Machining & Mfg., LLC, 26 F. Supp. 3d 156, 176 (D. Conn. 2014) *aff'd in part, vacated in part*, No. 14-2911, 2015 WL 6875006 (2d Cir. Nov. 10, 2015); Brown, 770 S.W.2d at 420.

63. See Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1175 (7th Cir. 1994); ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc., 322 P.3d 114, 128 (Alaska 2014).

64. See U.C.C. § 2-207 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

65. *Id.*

will not result in contract formation.<sup>66</sup> Thus, if a buyer and seller's standardized forms contain conflicting price terms, the seller's response to the buyer's offer is a counteroffer because there is no reasonable expression of assent.<sup>67</sup> In other words, generally courts have found that no contract is formed pursuant to the exchange of forms if the dickered terms of the offer and purported acceptance do not match in ways that matter to the parties.<sup>68</sup>

Subsection 2-207(1) provides the parties another means by which to create a counteroffer and negate contract formation pursuant to an exchange of forms.<sup>69</sup> The subsection states that notwithstanding additional or different terms in the offeree's document, a contract will be formed "*unless acceptance is expressly made conditional* on assent to the additional or different terms."<sup>70</sup> In order for language to give rise to a conditional acceptance, it must clearly indicate the offeree's unwillingness to proceed with the deal unless the offeror assents to the additional or different terms in the offeree's form.<sup>71</sup> Generally, courts find that language in the offeree's form that mirrors the language of the conditional acceptance provision of section 2-207(1) operates as a counteroffer rather than an acceptance.<sup>72</sup> To avoid formalistic determinations that would be inconsistent with the U.C.C.'s goal of construing its provisions liberally,<sup>73</sup> however, language can operate as a conditional acceptance even if it does not perfectly track the conditional acceptance provision, so long as it places the offeror on unambiguous notice that the offeree's acceptance documents and terms therein create a counteroffer rather than an acceptance.<sup>74</sup>

To reiterate, conditional acceptance language creates a counteroffer.<sup>75</sup> Assume a buyer emails a purchase order to a seller. The seller responds by emailing its acknowledgement to the buyer. The seller's document states that

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66. U.S. Indus., Inc. v. Semco Mfg., Inc., 562 F.2d 1061, 1067 (8th Cir. 1977); Howard Constr., Co. v. Jeff-Cole Quarries, Inc., 669 S.W.2d 221, 229 (Mo. Ct. App. 1983).

67. Gage Prods. Co. v. Henkel Corp., 393 F.3d 629, 637-38 (6th Cir. 2004); Laforce, Inc. v. Pioneer Gen. Contractors, Inc., No. 299848, 2011 WL 4467762, at \*5-6 (Mich. Ct. App. Sept. 27, 2011); U.C.C. § 2-207(2)(b) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

68. Gen. Elec. Co. v. G. Siempelkamp GmbH & Co., 29 F.3d 1095, 1099 (6th Cir. 1994); Laforce, 2011 WL 4467762, at \*5; Keating, *supra* note 1, at 2685 (noting that a divergence in the dickered terms of the offer and purported acceptance creates a counteroffer rather than an acceptance); Raphaelson & Quasarano, *supra* note 30, at 30.

69. U.C.C. § 2-207(1) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

70. *Id.* (emphasis added).

71. See, e.g., Walter Toebe Constr. Co. v. Kard Welding, Inc., No. 05-73605, 2008 WL 220620, at \*2 (E.D. Mich. Jan. 25, 2008).

72. See, e.g., PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C., 225 F.3d 974, 979 (8th Cir. 2000); Scientific Components Corp. v. ISIS Surface Mounting, Inc., 539 F. Supp. 2d 653, 657-58 (E.D.N.Y. 2008).

73. White Consol. Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1191 (8th Cir. 1999).

74. Vicor Corp. v. Concurrent Computer Corp., No. 051437A, 2006 WL 1047522, at \*4 (Mass. Supp. Mar. 6, 2006) (quoting JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 53 (1st Cir. 1999)).

75. Walter Toebe, 2008 WL 220620, at \*2.

the seller's acceptance of the terms of the buyer's purchase order are expressly conditioned on the buyer's assent to the terms and conditions contained in the seller's acknowledgment. The seller's sending of an acknowledgment containing such language constitutes a counteroffer.<sup>76</sup> A contract arises pursuant to the parties' exchange of forms only if the buyer expressly assents to the terms set forth in the seller's acknowledgment (counteroffer).<sup>77</sup> Therefore, the buyer's mere payment for the goods would not constitute assent by the buyer to the terms and conditions contained in the seller's acknowledgment. The seller's shipment and the buyer's acceptance of and payment for the goods will, however, give rise to a contract pursuant to conduct which is governed by section 2-207(3).<sup>78</sup> Thus section 2-207(3) is invoked when the parties' documents fail to give rise to a contract usually because a conditional acceptance is not expressly agreed to by the initial offeror, but the parties nevertheless engage in conduct evidencing a contract.<sup>79</sup> In such an instance, the terms of the resulting contract consist of the terms in which the parties' forms are in agreement and U.C.C. Article 2 gap filler terms.<sup>80</sup>

### *C. Governing Terms Under Section 2-207: Displacing the Last Shot Rule*

As it relates to which party's terms should govern, section 2-207 was premised on the assumption that parties do not read the standardized pre-printed terms contained in the other party's standardized form.<sup>81</sup> Although research has

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76. Brown, *supra* note 53, at 921 ("The proviso's role is to ensure that no acceptance will be found where there are other facts unambiguously negating the inference that the form has been used as an acceptance. An effective manifestation of the offeree's intent not to accept negates the form's usual meaning as a 'definite and seasonable expression of acceptance' and renders the offeree's response a counter offer"); Keating, *supra* note 1, at 2685 (noting that the offeree's use of conditional acceptance language demonstrates the offeree's intent not to be bound unless the offeror specifically assents to the additional or different terms in the offeree's document).

77. PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C., 225 F.3d 974, 979–80 (8th Cir. 2000); Curwood Inc. v. Prodo-Pak Corp., No. 07-C-544, 2008 WL 644884, at \*3 (E.D. Wis. Mar. 7, 2008).

78. Stemcor USA, Inc. v. Trident Steel Corp., 471 F. Supp. 2d 362, 367 (S.D.N.Y. 2006) (stating that a contract can be formed under section 2-207(3) pursuant to conduct where the parties' forms fail to consummate a contract); U.C.C. § 2-207(3) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

79. Scientific Components Corp. v. ISIS Surface Mounting, Inc., 539 F. Supp. 2d 653, 658 (E.D.N.Y. 2008) (holding that a contract can be formed under section 2-207(3) notwithstanding the failure of a contract to arise pursuant to an exchange of forms because of conditional acceptance language contained in offeree's form); U.C.C. § 2-207(3) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

80. Textile Unlimited, Inc. v. ABMH & Co., 240 F.3d 781, 788 (9th Cir. 2001); Premix-Marbletite Mfg. Corp. v. SKW Chemicals, Inc., 145 F. Supp. 2d 1348, 1355 (S.D. Fla. 2001); U.C.C. § 2-207(3) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

81. See Stephens, *supra* note 2, at 236 (explaining that parties are generally ignorant of the boilerplate language contained in the other party's standardized document).

questioned this assumption,<sup>82</sup> judicial decisions appear to continue to accept its accuracy.<sup>83</sup>

As discussed above, section 2-207 was intended to alter the “last shot” rule under which the terms of the last party to send a document controlled the terms of a resulting agreement.<sup>84</sup> Under section 2-207, the seller’s sending of its acknowledgment form accepts the buyer’s offer, but the buyer’s acceptance of the goods does not constitute assent to the additional boilerplate terms contained in the seller’s acknowledgment.<sup>85</sup> Of course, a party’s express assent to an additional term, such as the offeror signing the offeree’s form, would bind the offeror to the additional terms because the additional term is an offer to modify the already formed contract, and the offeror is assenting to the offer to modify.<sup>86</sup>

### 1. *The Offeror’s Power to Object Under Sections 2-207(2)(a) and (c)*

Section 2-207(2) allows an offeror to take affirmative steps to exclude additional boilerplate terms included in the offeree’s acceptance or confirmation. Subsection (2) provides:

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.<sup>87</sup>

Thus, subsections 2-207(2)(a) and (c) grant the offeror the limited power to set the terms of the agreement.<sup>88</sup> Under 2-207(2)(a), an offeror can make an advance objection to any additional terms contained in the offeree’s acceptance or confirmation.<sup>89</sup> Subsection 2-207(2)(c) authorizes an offeror to object to

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82. See Keating, *supra* note 1, at 2703–04.

83. See *id.* at 2682–83.

84. See *id.* at 2684.

85. PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C., 225 F.3d 974, 980 (8th Cir. 2000); Stephen W. Ranere, *Charting A Course: How Courts Should Interpret Course of Dealing in a Battle-of-Forms Dispute*, 41 SUFFOLK U. L. REV. 671, 681 (2008).

86. C9 Ventures v. SVC-W., L.P., 202 Cal. App. 4th 1483, 1500 (Cal. App. Ct. 2012); Ranere, *supra* note 85, at 681.

87. U.C.C. § 2-207(2) (AM. LAW INST. & UNIF. LAW COMM’N 2002).

88. Marks, *supra* note 57, at 511 (stating that sections 2-207(2)(a) and (b) reserves to the offeror the power to set terms by objecting to additional terms “before or after the fact”).

89. Chainworks, Inc. v. Webco Indus., Inc., No. 1:05-CV-135, 2006 WL 461251, at \*7 (W.D. Mich. Feb. 24, 2006); Stemcor USA, Inc. v. Trident Steel Corp., 471 F. Supp. 2d 362, 369 (S.D.N.Y. 2006); U.C.C. § 2-207(2)(a) (AM. LAW INST. & UNIF. LAW COMM’N 2002); Marks, *supra* note 57, at 511.

additional terms after receiving the document containing an additional term.<sup>90</sup> The offeror's objection to additional terms within a reasonable time after having received the offeree's acceptance or other document prevents additional terms from becoming a part of the parties' agreement.<sup>91</sup> The same rule would apply where additional boilerplate terms are contained in a confirmation rather than an acceptance.<sup>92</sup>

## 2. Section 2-207(2)(b): Material Alterations of the Agreement

Section 2-207(2) gives the offeree limited latitude to add to the terms set forth in the offeror's document. As discussed above, this power is circumscribed where the offeror objects to the additional terms either before or after receiving the offeree's acceptance.<sup>93</sup> Subsection 2-207(2)(b) protects the offeror who fails to object as provided in sections 2-207(2)(a) & (c) by preventing the offeror from being "burdened with any substantial or material additions to the risk contemplated by the offer."<sup>94</sup> As articulated in comment four to section 2-207, the primary function of subsection (2)(b) is the "avoidance of oppression and unfair surprise."<sup>95</sup> If an additional term is one that materially alters the parties' contract, it will be excluded as a term of the parties' agreement.<sup>96</sup> To summarize, the offeree's power to set terms is circumscribed where an additional term in an offeree's acceptance document materially changes the bargain as proposed in the offer.<sup>97</sup>

The text of section 2-207(2)(b) fails to define when an additional term constitutes a material alteration.<sup>98</sup> Nonbinding guidance is found, however, in comment four of section 2-207.<sup>99</sup> Comment four defines material alteration as when the clause would "result in surprise or hardship if incorporated without express awareness by the other party. . . ."<sup>100</sup> Comment five speaks of

90. U.C.C. § 2-207(2)(c) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

91. *Gen. Steel Corp. v. Collins*, 196 S.W.3d 18, 22 (Ky. Ct. App. 2006); U.C.C. § 2-207(2)(c) (AM. LAW INST. & UNIF. LAW COMM'N 2002); Marks, *supra* note 57, at 511.

92. John E. Murray, *The Definitive "Battle of the Forms": Chaos Revisited*, 20 J.L. & COM. 1, 22 (2000).

93. *See supra* text accompanying notes 87–92.

94. Murray, *supra* note 92, at 8–9.

95. *Id.* at 9; U.C.C. § 2-207 cmt. 4 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

96. U.C.C. § 2-207 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

97. Brown, *supra* note 53, at 928.

98. *See* U.C.C. § 2-207 (2) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

99. U.C.C. § 2-207 cmt. 4 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

100. *Id.* Comment four reads in its entirety as follows:

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 leeway; a clause reserving to the seller

“unreasonable surprise.”<sup>101</sup> Comment four provides examples of additional terms that “would normally ‘materially alter’ the contract,” including disclaimers of U.C.C. Article 2’s implied warranties of merchantability and fitness for particular purpose.<sup>102</sup> Comment five identifies additional terms that “involve no element of unreasonable surprise,” including clauses providing for the payment of interest on overdue accounts and reasonable limits on remedies in the event of breach.<sup>103</sup>

A critical question that emerges from the materiality standard and the illustrations in comments four and five is the extent to which courts have adopted the standards in the comments.<sup>104</sup> As one commentator noted:

The difficulty of using examples to define material alteration is its tendency to lead to per se rules. Ignored by section 2-207 is the fact that what is or is not a material alteration is dependent upon a number of factors and variables, including the value of the transaction, the quantity involved in the transaction, the relationship of the parties to each other, the custom and usage of trade, and the course of dealing and course of performance between the parties. Only by considering all of the above factors can a court make a determination whether a term is truly a material alteration.<sup>105</sup>

This Article will now focus on how courts have interpreted and applied section 2-207(2)(b)’s material alteration standard and the variables that influence their decision-making.

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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.

*Id.*

101. U.C.C. § 2-207 cmt. 5 (AM. LAW INST. & UNIF. LAW COMM’N 2002).

102. *Id.* at cmt. 4.

103. *Id.* at cmt. 5. Comment five reads in its entirety as follows:

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. . . .

*Id.*

104. See Stephens, *supra* note 2, at 248. Unless the U.C.C. comments are enacted by a state legislature, they are mere commentary and secondary authority. See generally Baird & Weisberg, *supra* note 4, at 1227–28. Thus, the only way a comment attains primary authority is when a court uses the comment. See generally Ranere, *supra* note 85, at 680.

105. Stephens, *supra* note 2, at 248.



## II. MATERIAL ALTERATION: OVERVIEW OF FINDINGS

The author reviewed ninety-four judicial opinions released between January 1, 2005 and July 1, 2015. Included are decisions from federal district and appellate courts, as well as state trial and appellate courts. These cases provide insight into how courts decide when it is appropriate to incorporate, as an additional term, one or more of the following clauses into the parties' agreement: (1) arbitration; (2) warranty disclaimer; (3) limited remedies, including disclaimers of consequential damages; (4) pre-judgment interest; (5) attorney's fees; and, (6) forum selection.

### A. *The Surprise or Hardship Test*

Several generalizations can be gleaned from the cases reviewed. Courts impose the burden of establishing a material alteration on the non-assenting party who is objecting to the inclusion of the additional term.<sup>106</sup> To satisfy its burden, most jurisdictions require the non-assenting party to prove that incorporating an additional term into the parties' agreement will result in surprise or hardship to the non-assenting party. In *Dumont Telephone Co. v. Power & Telephone Supply, Co.*,<sup>107</sup> the court stated, "A clause will be held to 'materially alter' a contract when it would 'result in surprise or hardship if incorporated without the express awareness of the other party.'"<sup>108</sup> A surprise or hardship test was also adopted in *Leica Geosys., Inc. v. L.W.S. Leasing, Inc.*<sup>109</sup> The court relied on comment four to section 2-207 in stating that additional terms materially alter an agreement when they "result in surprise or hardship if incorporated without express awareness by the other party."<sup>110</sup>

#### 1. *Unreasonable Surprise*

As a guide for determining the presence of unreasonable surprise, many courts articulate a general standard derived from the language of comments four and five to section 2-207. The court in *Carr v. Michael Weinig, AG*<sup>111</sup> expressed this standard: "To carry the burden of showing surprise, a party must establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term."<sup>112</sup> Courts also characterize unreasonable surprise as comprising "both the subjective element of what a party

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106. See, e.g., *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 221 (2d Cir. 2000).

107. 962 F. Supp. 2d 1064 (N.D. Iowa).

108. *Id.* at 1078 (assessing whether an arbitration provision constitutes a material alteration of the parties' contract).

109. 872 F. Supp. 2d 1191 (D. Colo. 2012).

110. *Id.* at 1200 (assessing whether including limitation of remedies, disclaimer of warranty, and choice of law provisions in the parties' contract would materially alter the agreement).

111. 2006 WL 2355867 (N.D.N.Y. Aug. 14, 2006).

112. *Id.* at \*5.

actually knew and the objective element of what a party should have known.”<sup>113</sup> Based on this view, courts rule that a non-assenting party’s “profession of surprise is insufficient to establish surprise unless the non-assenting party can also ‘establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term.’”<sup>114</sup> Having articulated a general standard, courts then examine the factual circumstances surrounding the disputed transaction, particularly course of dealing and trade usage (the relevance of which are discussed below), to determine if the inclusion of the additional term into the contract will amount to unreasonable surprise.<sup>115</sup>

Some courts identify a list of factors that would guide their analysis in assessing unreasonable surprise. In *ISRA Vision AG v. Burton Industries, Inc.*,<sup>116</sup> the court adopted the surprise or hardship test of materiality.<sup>117</sup> Discussing unfair surprise, the court identified the following factors as salient in determining whether a non-assenting party was unreasonably surprised: (1) course of dealing; (2) trade usage; (3) the number of form documents exchanged; (4) the conspicuousness of the additional term; and (5) whether the party objecting to the inclusion of the additional term includes the term in its standardized forms.<sup>118</sup>

## 2. Hardship

### a. Defining Hardship

When addressing hardship, courts have generally defined it as substantial economic hardship. In *ISRA Vision*, the court stated hardship exists where “the clause at issue would impose substantial economic hardship on the nonassenting party.”<sup>119</sup> A clause that “creates or allocates an open-ended or prolonged liability” is often provided as an example of substantial economic hardship.<sup>120</sup> Discussing the materiality of an indemnification provision as an additional term, a court stated: “A shift in legal liability which has the effect of relieving one party of the potential for economic hardship and placing this burden upon another party is an important term in any contract.”<sup>121</sup>

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113. Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 224 (2d Cir. 2000).

114. Glencore, Ltd. v. Degussa Engineered Carbons L.P., 848 F. Supp. 2d 410, 430 (S.D.N.Y. 2012) (quoting Aceros Prefabricados, S.A. v. Tradearbed, Inc., 282 F.3d 92, 100 (2d Cir. 2002)).

115. See *id.* at 430.

116. 654 F. Supp. 2d 638 (E.D. Mich. 2009).

117. *Id.* at 648.

118. *Id.*

119. *Id.*

120. Carr v. Michael Weinig, AG, No. 5:01-CV-1514(HGM/GJD), 2006 WL 2355867, at \*5 (N.D.N.Y. Aug. 14, 2006) (quoting Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 226 (2d Cir. 2000); accord Oceanconnect.com, Inc. v. Chemoil Corp., No. H-07-1053, 2008 WL 194360, at \*5 (S.D. Tex., Jan. 23, 2008).

121. Borden Chem., Inc. v. Jahn Foundry Corp., 834 N.E.2d 1227, 1232 (Mass. App. Ct. 2005).

*b. Independent Basis for Establishing Materiality?*

A question arising from the surprise or hardship language of comment four to section 2-207 is whether hardship is a basis independent of surprise for demonstrating that an additional term constitutes a material alteration. In comment four of section 2-207, the drafters state that a term is a material alteration when it results in surprise or hardship, if incorporated without express awareness by the other party.<sup>122</sup> In comment five, however, the drafters list several clauses, which will not be considered material alterations because they involve no element of unreasonable surprise.<sup>123</sup> Comment five does not address hardship.<sup>124</sup> This apparent inconsistency between the two comments, coupled with the drafters' decision not to define surprise or hardship, has resulted in differing judicial interpretations of the relationship between hardship, surprise, and material alteration. In this regard, Professor Murray stated:

While "hardship" has often been viewed as substantial economic hardship and treated as independent from "surprise," there is a growing recognition that such an analysis may be flawed. Simply because a contract requires performance that may be characterized as a hardship, it may still be an operative term of the contract if it is an "expected" term, i.e., it is not objectively surprising. "Hardship is a consequence [of material alteration], not a criterion."<sup>125</sup>

Similarly, in *Union Carbide Corp. v Oscar Mayer Foods Corp.*,<sup>126</sup> Judge Posner explained that the traditional phrasing of the test—whether the term results in surprise or hardship<sup>127</sup>—is based on a misreading of comment four to U.C.C. section 2-207.<sup>128</sup> Quoting from the text of comment four, he observed that the comment seeks to provide examples of "clauses which would normally materially alter the contract *and so result in surprise or hardship* if incorporated without express awareness by the other party."<sup>129</sup> Judge Posner asserted that "hardship is a consequence, not a criterion" while surprise may be either.<sup>130</sup> This perspective finds support in the general principle that a party may not be exempted from an agreement to perform contractual duties simply because performance of those duties has become a hardship.<sup>131</sup>

As alluded to above, jurisdictions differ in their approaches to the issue of whether hardship provides an independent ground on which a non-assenting

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122. U.C.C. § 2-207, cmt. 4 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

123. *Id.* at cmt. 5.

124. *See id.*

125. Murray, *supra* note 92, at 9–10.

126. 947 F.2d 1333 (7th Cir. 1991).

127. *Id.* at 1336.

128. *Id.*

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

130. *Id.*

131. *Id.*

party can demonstrate materiality.<sup>132</sup> In the cases surveyed, many courts simply refrained from addressing this issue and, after articulating the surprise or hardship test, made the materiality determination by examining surprise alone<sup>133</sup> or in conjunction with hardship.<sup>134</sup>

A split exists, however, among the jurisdictions that specifically considered the role of hardship in applying the test. Some courts have adopted the Seventh Circuit approach in holding that hardship is merely a consequence of surprise and not a separate basis for examining the materiality of an additional term.<sup>135</sup> Other courts have declined the invitation of the Seventh Circuit and some commentators; these courts held that hardship is an independent test of materiality. For example in *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*,<sup>136</sup> the court found “that enforcement of the damages limitation provision would result in both hardship and surprise [to the non-assenting party].”<sup>137</sup> Explaining its decision not to adopt the reasoning of *Union Carbide*, the court stated that while an interpretation of comments four and five excluding hardship may seem reasonable, it fails to provide an answer as to why the drafters included hardship at all.<sup>138</sup> Further, the Eighth Circuit noted that the comments do not carry the force of law.<sup>139</sup>

In several cases, courts expressed sympathy for the notion that hardship is merely a consequence of surprise, but nevertheless determined materiality by considering surprise and, alternatively, hardship.<sup>140</sup> Finally, a notable number of courts addressed only surprise without discussing hardship.<sup>141</sup> In such

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132. See *infra* text accompanying notes 133–41.

133. See, e.g., *Cargill, Inc. v. Biodiesel of Las Vegas, Inc.*, No. 2:09-cv-02134-JCM-RJI, 2010 WL 4121850, at \*4–5 (D. Nev. Sept. 8, 2010) (articulating a surprise or hardship test, but focusing on the surprise element in finding no material alteration).

134. See, e.g., *Dumont Tel. Co. v. Power & Tel. Supply Co.*, 962 F. Supp. 2d 1064, 1079–80 (N.D. Iowa 2013).

135. See, e.g., *Paul Gottlieb & Co. v. Alps South Corp.*, 985 So. 2d 1 (Fla. Dist. Ct. App. 2007).

136. 401 F.3d 901 (8th Cir. 2005).

137. *Id.* at 912.

138. *Id.* at 911 n.6.

139. *Id.*

140. See, e.g., *Rocheux Int’l of N. J., Inc. v. U.S. Merchants Fin. Grp., Inc.*, 741 F. Supp. 2d 651, 684 (D.N.J. 2010) (acknowledging the sound reasoning of cases questioning whether hardship is an independent factor while focusing on whether an interest clause would impose substantial economic hardship on the non-assenting party); *Oceanconnect.com, Inc. v. Chemoil Corp.*, No. H-07-1053, 2008 WL 194360, at \*5 (S.D. Tex. Jan. 23, 2008); *Carr v. Michael Weinig, AG*, No. 5:01-CV-1514(HGM/GJD), 2006 WL 2355867, at \*5 (N.D.N.Y., Aug. 14, 2006) (noting that the Second Circuit has expressed doubt as to whether hardship is an independent basis for finding a material alteration, but explicitly declined to resolve the issue).

141. In cases assessing the materiality of interest and arbitration clauses, courts typically only addressed the surprise element of the test and were silent on hardship. See, e.g., *Cargill, Inc. v. Biodiesel of Las Vegas, Inc.*, No. 2:09-cv-02134-JCM-RJI, 2010 WL 4121850, at \*5 (D. Nev. Sept. 8, 2010) (articulating the surprise or hardship test, but focusing on the surprise element in finding no material alteration).

instances, the Seventh Circuit's admonition against considering hardship as a criterion may have been indirectly achieved.

*B. Factors that Affect the Meaning of "Surprise" or "Hardship"*

*1. Course of Dealing*

*a. The Significance of Course of Dealing*

The presence of a course of dealing and, to a lesser extent, a trade usage, are among the more important factual circumstances that influence whether inclusion of an additional term materially alters an agreement.<sup>142</sup> Commenting on the role that trade usage and course of dealing play in determining whether an additional term materially alters the agreement, one commentator stated the issue is "the offeror's reasonable intention manifested by the preprinted form in the context of the particularities of the transaction and such circumstances as course of dealing or trade usage."<sup>143</sup> The cases reviewed proved that the commentator was prescient.

The U.C.C. defines usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question."<sup>144</sup> Section 1-303(d) states that trade usage is relevant only when the parties are or should be aware of the industry custom in question.<sup>145</sup> This is consistent with the requirement in Subsection (c) that the usage of trade must have "regularity of observance."<sup>146</sup>

Course of dealing is "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."<sup>147</sup> Comment two of U.C.C. section 1-303 further explains that course of dealing is restricted to "a sequence of conduct between the parties previous to the agreement."<sup>148</sup> Courts have found that in order to establish a course of dealing, there must have been more than one prior transaction between the parties.<sup>149</sup>

The foregoing definitions have understandably prompted more than one commentator to persuasively argue that a term implied into an agreement by virtue of trade usage and prior course of dealing should not be subjected to a

142. See discussion accompanying *infra* notes 143–151.

143. Brown, *supra* note 53, at 934–35.

144. U.C.C. § 1-303(c) (AM. LAW INST. & UNIF. LAW COMM'N 2001).

145. U.C.C. § 1-303(d) (AM. LAW INST. & UNIF. LAW COMM'N 2001).

146. U.C.C. § 1-303(c) (AM. LAW INST. & UNIF. LAW COMM'N 2001).

147. U.C.C. § 1-303(b) (AM. LAW INST. & UNIF. LAW COMM'N 2001).

148. U.C.C. § 1-303 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2001).

149. See *Pyysa Panama, S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1251 (S.D. Fla. 2008), *aff'd*, 329 F. App'x 257 (11th Cir. 2009).

section 2-207(2)(b) additional term analysis.<sup>150</sup> According to one, “[a] term that simply makes explicit what would otherwise be imported into the contract through a course of dealing or usage in the trade is not a material alteration; in fact, it is no alteration at all.”<sup>151</sup> Notwithstanding the merit of this perspective, in the cases reviewed, courts did not discuss this issue, but instead considered the absence or presence of trade usage and/or a course of dealing in assessing whether there was unreasonable surprise or hardship under section 2-207(2)(b).

*b. What Constitutes a Course of Dealing?*

A party arguing for including an additional term within an agreement will often argue that the party’s repeated sending to the non-assenting party forms (e.g., a seller’s invoice) in previous transactions establishes a course of dealing that will negate unreasonable surprise, and consequently, materiality. The cases reviewed revealed that many courts assume, without discussion, that an offeree’s repetitive sending of a form can give rise to a course of dealing that can overcome the non-assenting party’s materiality argument.<sup>152</sup> These courts adopt this approach even in cases where there was no evidence that the recipient had read any of the forms containing the additional term.<sup>153</sup>

Among the courts that have addressed whether a course of dealing arises from a party’s repetitive sending of forms containing the disputed term, there is a notable split. Although some courts found that no course of dealing arose,<sup>154</sup> more courts found that a course of dealing arose from the repetitive sending of forms containing the additional terms.<sup>155</sup>

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150. See, e.g., John E. Murray, *The Judicial Vision of Contract—The “Constructed Circle of Assent and Printed Terms*, 26 ST. THOMAS L. REV. 386, 403 (2014) (stating that terms implied by virtue of prior course of dealing and trade usage are not subject to section 2-207(2)).

151. Brown, *supra* note 53, at 935; see also Murray, *supra* note 150, at 403.

152. See, e.g., *Cargill, Inc. v. Biodiesel of Las Vegas, Inc.*, No. 2:09-CV-02134-JCM, 2010 WL 4121850, at \*5 (D. Nev. Sept. 8, 2010); *Pycsa Panama, S.A.*, 625 F. Supp. 2d at 1251.

153. See Ranere, *supra* note 85, at 689 (recognizing one approach by a court where the recipient reading the form was irrelevant in determining whether a prior course of dealing existed, but the number of times the invoice or acknowledgment had been sent was relevant).

154. *Welsh v. TEX-MACH, Inc.*, NO. 08-CV-11401-DPW, 2009 WL 2922955, at \*10 (D. Mass. Aug. 28, 2009) (holding that the repeated sending of an invoice containing an indemnification clause did not constitute a course of dealing); *C9 Ventures v. SVC-W., L.P.*, 202 Cal. App. 4th 1483, 1488 (Cal. Ct. App. 2012).

155. *Hagrpotra for Trading & Distrib., Ltd. v. Oakley Fertilizer, Inc.*, No. 09 Civ. 9779(CM)(KNF), 2010 WL 2594286, at \*7–8 (S.D.N.Y. June 19, 2010), *aff’d*, 531 F. App’x 131 (2d Cir. 2013) (finding that confirmations containing arbitration provisions from at least twenty-two previous transactions between the parties created a course of dealing sufficient enough to overcome unreasonable surprise argument); *Bell, Inc. v. IFS Indus., Inc.*, 742 F. Supp. 2d 1049, 1053 (D.S.D. 2010) (holding that the repeated sending of a form containing a forum selection clause without objection by the buyer established a course of dealing); *Cargill*, 2010 WL 4121850, at \*5 (describing sales agreements containing an arbitration provision in dozens of previous transactions between the parties, which supported the inclusion of the provision in the contract); *CFMOTO Powersports Inc. v. NNR Global Logistics USA, Inc.*, No. 09-2202 (JRT/JJK), 2009 WL 4730330, at \*5 (D. Minn. 2009) (detailing how terms and conditions attached to 224 invoices established

Courts that either failed to address the issue or concluded that the repetitive sending of forms created a course of dealing arguably resurrected elements of the last shot rule that section 2-207 sought to displace. According to Professor Murray, “‘Course of dealing’ requires a previous sequence of conduct between the parties. The passive conduct of sending and receiving the same boilerplate should not be said to establish a course of dealing.”<sup>156</sup> Another commentator has written:

To recognize a course of dealing as a mere tally of exchanges between two contracting parties would undermine the central purpose of section 2-207 because it would perpetuate the problem of giving one of the parties the “last shot.” . . . Enforcing all terms—regardless of materiality—simply because the accepting party received them in a series of prior exchanges . . . This would violate the essential purpose of section 2-207 and arguably restore the “last-shot” nature of common law contract interpretation that the Code authors sought to eliminate. Accordingly, courts should determine the existence of a course of dealing on a term-by-term basis: only when there is evidence that the parties have acted by words or actions to acknowledge a specific term should a court allow their prior dealings to impact the term’s enforcement.<sup>157</sup>

Review of judicial decisions addressing course of dealing in the context of section 2-207(2)(b) reveals that courts have by and large ignored these concerns.<sup>158</sup>

## 2. *Case-by-Case Versus Per Se Approach*

Over the last decade, courts tended to state that determinations of material alteration were to be made on a case-by-case basis.<sup>159</sup> Adopting this fact-based approach, they then examined the factual circumstances, such as the presence of a course of dealing, to determine whether surprise was present.<sup>160</sup> The review of cases revealed, however, that courts departed from a case-by-case approach and engaged in something akin to a *per se* analysis in determining the materiality of forum selection<sup>161</sup> and pre-judgment interest clauses.<sup>162</sup> On the other hand,

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course of dealing); *Pycsa Panama, S.A.*, 625 F. Supp. 2d at 1251 (holding that by sending invoices on fourteen occasions, which were attached with terms and conditions that included a limited remedy provision, the seller defeated the buyer’s surprise argument); *R.O.W. Window Co. v. Allmetal, Inc.*, 856 N.E.2d 55, 60 (Ill. App. Ct. 2006) (holding that the seller’s repeated sending of invoices containing a conspicuous disclaimer of warranties established a prior course of dealing).

156. Murray, *supra* note 92, at 10–11.

157. Ranere, *supra* note 85, at 690.

158. *See id.* at 687–88 (noting the conflict among the jurisdictions and the resulting uncertainty).

159. *See infra* discussion accompanying notes 239–41.

160. *See infra* discussion accompanying notes 178, 209–19.

161. *See infra* discussion accompanying notes 376–79.

162. *See infra* discussion accompanying notes 324–29.

in a departure from the past in which some courts commonly held that a disclaimer of warranties,<sup>163</sup> indemnification<sup>164</sup> and arbitration provisions *per se* materially altered the party's contracts, courts analyzing these additional terms opted for a fact specific approach.<sup>165</sup>

### 3. *The Irrelevance of the Negation of Implied Terms*

The final observation that can be drawn from the cases reviewed relates to whether an additional term materially alters the contract. An additional term negating a U.C.C. implied term alone was not a sufficient basis for finding that the additional term materially altered the parties' agreement. As expressed by one commentator, "The issue is whether the deal proposed by the offeror is materially altered by the new term, not whether a standard deal envisioned by the Code drafters is so altered."<sup>166</sup> The courts appear to have followed that view in finding that an additional term negating a gap-filler term (e.g., a disclaimer of an implied warranty) is not, by itself, a material alteration.<sup>167</sup>

## III. ANALYSIS OF SPECIFIC CLAUSES

The Article will now discuss the judicial treatment of six clauses that often appear as additional terms in acceptance and confirmation documents. These include: (1) arbitration; (2) warranty disclaimer; (3) limitation of remedy; (4) pre-judgment interest; (5) attorney's fees, and (6) forum selection. The discussion begins with arbitration clauses.

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163. Brown, *supra* note 53, at 936 (observing that courts commonly find a warranty disclaimer to materially alter the contract without taking into account all of the factual circumstances, including trade usage and prior course of dealing); Alex Devience, Jr., *The Renewed Search for the "Bargain in Fact" Under U.C.C. 2-207: Battle of the Forms, Part II? Comments on the Recommendation to Revise Section 2-207*, 9 DEPAUL BUS. L.J. 349, 371-72 (1997) (suggesting that courts at that time invariably found that an additional term disclaiming implied warranties materially altered the agreement); Murray, *supra* note 92, at 11 (observing courts' tendency to find that a warranty disclaimer clause constituted a material alteration).

164. Murray, *supra* note 92, at 11 (observing that courts commonly held that an indemnification clause constituted an additional term that materially altered the contract).

165. See *infra* text accompanying notes 178, 209-19.

166. Brown, *supra* note 53, at 937. Professor Brown added that:

[O]nly in the presence of evidence tending to show that the offeree's term is extremely unusual in the industry or between the parties should a gap-filler weigh heavily in determining whether the term constitutes a material alteration. This is so even if the evidence of the term's observance falls far short of the standard of regularity necessary to show a usage or course of dealing.

*Id.* at 936.

167. *Id.*



### A. Arbitration Provisions: Summary of Findings

In sixteen reviewed cases, courts addressed whether an arbitration provision constituted a material alteration.<sup>168</sup> In four cases, courts ruled that section 2-207(2)(b) was inapplicable either because, pursuant to sections 2-207(a) or (c), the non-assenting party had objected to the arbitration provisions inclusion in the agreements,<sup>169</sup> or because the arbitration provision was a term of the offer and, as such, should be included in the parties' contract.<sup>170</sup> Of the remaining twelve cases, only one court concluded that arbitration provisions materially altered the agreement.<sup>171</sup>

Courts, finding that an arbitration clause did not materially alter, rejected a *per se* standard in favor of a case-by-case approach.<sup>172</sup> These courts also adopted a surprise or hardship test to gauge materiality.<sup>173</sup> Courts overwhelmingly ruled or assumed, without discussion, that surprise and hardship are independent tests and that the presence of either renders an additional term a material alteration.<sup>174</sup>

The presence of either a trade usage establishing that arbitration was a common industry practice or a course of dealing based on an arbitration provision that appeared in forms previously communicated between the parties was particularly instrumental to courts deciding that an arbitration provision did not materially alter a contract. Five cases focused on trade usage<sup>175</sup> and five on

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168. See, e.g., *Glencore Ltd. V. Degussa Engineered Carbons, L.P.*, 848 F. Supp. 2d 410, 429 (S.D.N.Y. 2012).

169. *Stemcor USA, Inc. v. Trident Steel Corp.*, 471 F. Supp. 2d 362, 369–70 (S.D.N.Y. 2006); see *Gen. Steel Corp. v. Collins*, 196 S.W.3d 18, 21–22 (Ky. Ct. App. 2006) (detailing how the deleted arbitration provision in the contract did not become a part of the agreement).

170. *Newark Bay Cogeneration P'ship, LP v. ETS Power Grp.*, No. CIV.A 11-2441 (ES)(CLW), 2012 WL 4504475, at \*11–12 (D.N.J. Sept. 28, 2012) (holding the materiality analysis in section 2-207(2)(b) is inapplicable when the disputed term is contained in the offer rather than an acceptance or confirmation); *Vicor Corp. v. Concurrent Computer Corp.*, No. 051437A, 2006 WL 1047522, at \*5 (Mass. Super. Ct., Mar. 6, 2006).

171. *Hitchiner Mfg. Co., v. Modern Indus., Inc.*, No. 09-cv-242-PB, 2009 WL 3643471, at \*4 (D.N.H. Oct. 29, 2009) (establishing that an arbitration clause included in an order confirmation materially alters the contract because the order confirmation is deemed an acceptance).

172. See, e.g., *Glencore*, 848 F. Supp. 2d at 429.

173. See, e.g., *id.*

174. See, e.g., *Welsh v. TEX-MACH, Inc.*, No. 08-cv-11401-DPW, 2009 WL 2922955, at \*7–9 (D. Mass. Aug. 28, 2009); *Cheboygan Cement Prods., Inc. v. Glawe, Inc.*, No. 309745, 2014 WL 2351772, at \*10 (Mich. Ct. App. May 29, 2014).

175. In the following cases, courts relied on the existence of industry custom of arbitration in rejecting a party's assertion that including an arbitration provision in the agreement would result in surprise or hardship and thus materially alter the agreement: *Shany Co., Ltd. v. Crain Walnut Shelling, Inc.*, No. S-11-1112 KJM EFB, 2012 WL 1979244, at \*7 (E.D. Cal., June 1, 2012); *ICC Chem. Corp. v. Vitol, Inc.*, 425 F. App'x. 57, 59–60 (2d Cir. 2011); *Glencore*, 848 F. Supp. 2d at 430; *Newark Bay*, 2012 WL 4504475, at \*12 (adopting the approach adhered to in the foregoing cases that there is no surprise where arbitration is an established practice in the parties' industry); *Colo.-Ark.-Tex. Distrib., L.L.C. v. Am. Eagle Food Prods., Inc.*, 525 F. Supp. 2d 428, 434–35 (S.D.N.Y. 2007). The court in *Am. Eagle* also relied on a prior course of dealing, specifically

a course of dealing, which involved the repetitive sending by the offeree of a form containing an arbitration clause.<sup>176</sup> Other grounds for finding an arbitration provision did not materially alter were the failure of the non-assenting party to allege surprise or hardship<sup>177</sup> and the express assent to the additional term by the party challenging the inclusion of the arbitration clause.<sup>178</sup>

1. *Section 2-207(2)(b) Inapplicable*

In *Stemcor USA, Inc. v. Trident Steel Corp.*,<sup>179</sup> the court found that section 2-207(2)(a) rather than section 2-207(2)(b) governed whether to include an additional term in the contract.<sup>180</sup> The buyer initiated contract formation by sending a purchase order to the seller.<sup>181</sup> The seller responded with an acknowledgment form and a sales invoice.<sup>182</sup> Each of the seller's forms included an arbitration clause to govern disputes.<sup>183</sup> The court ruled that the parties' exchange of forms gave rise to a contract under section 2-207(1), given the absence of unambiguous conditional acceptance language in the seller's forms.<sup>184</sup> The court then addressed whether the arbitration provision in the seller's acceptance forms was a part of the contract.<sup>185</sup> The court found that even assuming that the arbitration provision was not material, the clause nevertheless must be excluded from the contract because the buyer's purchase order expressly provided that no terms outside of the purchase order would bind the buyer.<sup>186</sup>

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arbitration clauses appearing in documents in previous transactions between the parties to negate the non-assenting party's surprise or hardship argument. *Id.*

176. *Dumont Tel. Co. v. Power & Tel. Supply Co.*, 962 F. Supp. 2d 1064, 1079 (N.D. Iowa 2013); *Hagrpota for Trading & Distrib., Ltd. v. Oakley Fertilizer Inc.*, No. 09 Civ. 9770(CM)(KNF), 2010 WL 2594286, at \*7-8 (S.D.N.Y., June. 18, 2010), *aff'd*, 531 F. App'x 131 (2d Cir. 2013); *Cargill, Inc. v. Biodiesel of Las Vegas, Inc.*, No. 2:09-cv-02134-JCM-RJJ, 2010 WL 4121850, at \*5 (D. Nev. Sept. 8, 2010) (establishing that because arbitration provisions were included in sales agreements used in dozens of previous transactions between the parties, its inclusion in the contract was supported); *Oceanconnect.com, Inc. v. Chemoil Corp.*, No. H-07-1053, 2008 WL 194360, at \*5 (S.D. Tex. Jan. 23, 2008); *Am. Eagle*, 525 F. Supp. 2d at 434-35 (employing the usage of arbitration in the nut industry to negate the non-assenting party's surprise or hardship argument).

177. *Astra Oil Co., LLC v. Hydro Syntec Chem., Inc.*, No. 1:13-cv-08395(ALC), 2014 WL 630676, at \*5 (S.D.N.Y. Feb. 18, 2014); *Beck Aluminum Int'l, LLC v. Aluar Aluminio Argentino, S.A.I.C.*, No. 1:09 CV 2978, 2010 WL 3260017, at \*6 (N.D. Ohio Aug. 18, 2010).

178. *Newark Bay*, 2012 WL 4504475, at \*11-13.

179. 471 F. Supp. 2d 362 (S.D.N.Y. 2006).

180. *Id.* At 369-70.

181. *Id.* At 364.

182. *Id.*

183. *Id.*

184. *Id.* At 367.

185. *Id.* At 369-70.

186. *Id.*

This language satisfied section 2-207(2)(a) and therefore excluded the seller's additional terms from the contract.<sup>187</sup>

Section 2-207(2)(b) was inapplicable in *Vicor Corp. v. Concurrent Computer Corp.*<sup>188</sup> because the arbitration provision appeared in the buyer's purchase order, which constituted an offer (the buyer, who also sold products, sent the seller the form that the buyer typically used when it was in the position of a seller).<sup>189</sup> The seller's acknowledgement form was silent as to arbitration, so it accepted the buyer's offer, including the arbitration provision.<sup>190</sup> Other courts have made the same holding.<sup>191</sup>

## 2. Arbitration Clause Does not Materially Alter

The presence of trade usage and prior course of dealing figured prominently in the nine decisions in which courts concluded that an arbitration provision did not materially alter the parties' contract.<sup>192</sup> *Glencore Ltd. v. Degussa Engineered Carbon, L.P.*,<sup>193</sup> in which a federal district court applied New York law, is illustrative of these cases. In *Glencore*, the buyer sued the seller arguing that oil the seller had delivered failed to conform to the contract specifications.<sup>194</sup> The seller demanded that the dispute be submitted to arbitration pursuant to an arbitration clause contained in the general terms and conditions that had been incorporated, by reference, into a sales contract the seller had emailed to the buyer.<sup>195</sup> The court found that the buyer had assented to the terms of the sales contract, including the arbitration provision.<sup>196</sup> Alternatively, the court concluded that absent express assent, the arbitration clause should be included into the parties' contract because it was an additional term that did not materially alter the contract.<sup>197</sup> In so concluding, the court relied on *Aceros Prefabricados, S.A. v. Tradearbed, Inc.*,<sup>198</sup> a Second Circuit case applying New York law, and held that a mandatory arbitration provision is neither *per se* material nor immaterial and any such determination must be made on a case-by-case basis.<sup>199</sup>

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187. *Id.*

188. No. 051437A, 2006 WL 1047522 (Mass. Super. Ct. Mar. 6, 2006), *aff'd*, 861 N.E.2d 810 (Mass. App. Ct. 2007).

189. *Id.* At \*4–5.

190. *Id.* At \*5.

191. *See, e.g.*, Newark Bay Cogeneration P'ship, LP v. ETS Power Group, No. 11-2441(ES)(CLW), 2012 WL 4504475, at \*11 (D.N.J. Sept. 28, 2012) (arbitration provision was in the offer).

192. *See, e.g.*, *Glencore Ltd. v. Degussa Engineered Carbons, L.P.*, 848 F. Supp. 2d 410, 429–31 (S.D.N.Y. 2012).

193. 848 F. Supp. 2d 410 (S.D.N.Y. 2012).

194. *Id.* At 413.

195. *Id.* At 414–15.

196. *Id.* At 429.

197. *Id.* At 429–30.

198. 282 F.3d 92 (2d Cir. 2002).

199. *Glencore*, 848 F. Supp. 2d at 429.

Thus, the court rejected conclusively finding arbitration provisions to materially alter unless a party expressly and separately assented to the provision, which had been characterized as the “New York Rule.”<sup>200</sup> Quoting *Aceros*, the court stated that a material alteration is “one that would result in surprise or hardship if incorporated without express awareness by the other party.”<sup>201</sup> It further held that surprise includes:

[B]oth a subjective element of what a party actually knew and an objective element of what a party should have known; thus, a profession of surprise is insufficient to establish surprise unless the non-assenting party can also establish that, under the circumstances it cannot be presumed that a reasonable merchant would have consented to the additional term.<sup>202</sup>

The court buttressed its conclusion that the buyer had failed to establish the surprise by finding a trade usage in the petroleum industry where arbitration provisions are often invoked.<sup>203</sup>

The *Glencore* court’s approach was generally adopted in four cases applying California, New York, and Texas law, in which a trade usage favoring arbitration was either determinative or an important factor in the courts’ decisions that an arbitration provision did not materially alter the contract.<sup>204</sup> In these cases, courts concluded that absent subjective/actual knowledge by the non-assenting party of the presence of an arbitration provision in the other party’s form, the presence of trade usage satisfied the objective component of surprise, so as to prevent a finding of a material alteration.<sup>205</sup> Applying Texas law, a federal court noted that “[t]he U.C.C. does not require that a party to a contract have actual knowledge of a usage of trade before that usage of trade is incorporated into the contract.”<sup>206</sup>

Four courts used a prior course of dealing to reject a non-assenting party’s claim that an arbitration provision materially altered the parties’ contract.<sup>207</sup> In

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200. *Id.* At 430 n.17.

201. *Id.* At 429 (quoting *Aceros Prefabricados, S.A. v. Tradearbed, Inc.*, 282 F.3d 92, 100 (2d Cir. 2002).

202. *Id.* At 429–30 (internal quotation marks omitted).

203. *Id.* At 431.

204. *Shaney Co., Ltd. v. Crain Walnut Shelling, Inc.*, No. S-11-1112(KJM)(EFB), 2012 WL 1979244, at \*7 (E.D. Cal. June 1, 2012); *ICC Chem. Corp. v. Vitol, Inc.*, 425 F. App’x 57, 59–60 (2d Cir. 2011); *Oceanconnect.com, Inc. v. Chemoil Corp.*, No. H-07-1053, 2008 WL 194360, at \*4 (S.D. Tex. Jan. 23, 2008); *Colo.-Ark.-Tex. Distrib., L.L.C. v. Am. Eagle Food Prods., Inc.*, 525 F. Supp. 2d 428, 434–35 (S.D.N.Y. 2007) (relying in part on the presence of trade usage of arbitration in the nut industry to negate the non-assenting party’s surprise or hardship argument).

205. See *ICC Chem.*, 425 F. App’x at 59–60; *Shaney*, 2012 WL 1979244, at \*6–7; *Oceanconnect*, 2008 WL 194360, at \*4; *Am. Eagle*, 525 F. Supp. 2d at 434–35.

206. *Oceanconnect*, 2008 WL 194360, at \*4.

207. *Dumont Tel. Co. v. Power & Tel. Supply Co.*, 962 F. Supp. 2d 1064, 1079–80 (N.D. Iowa 2013); *Hagrpota for Trading & Distrib., Ltd. v. Oakley Fertilizer Inc.*, No. 9779(CM)(KNF), 2010 WL 2594286, at \*7–8 (S.D.N.Y. June 18, 2010), *aff’d*, 431 F. App’x 131, 2013 U.S. App. LEXIS

these decisions, the courts allowed a course of dealing to be created by the repeated presence of an arbitration clause in the offeree's acceptance of a seller's confirmation.<sup>208</sup> In *Dumont Telephone Co. v. Power & Telephone Supply Co.*,<sup>209</sup> a buyer argued that an arbitration clause in a seller's invoices should not be a term of the contract because they had failed to read the back of the invoices on which the clause appeared.<sup>210</sup> The court rejected the buyer's argument because the seller had sent 510 invoices in previous transactions, thereby establishing a course of dealing.<sup>211</sup> The court expressed doubt that the buyer would not have been subjectively aware of the arbitration provision given the number of times it appeared in the seller's invoices.<sup>212</sup> Assuming a lack of actual knowledge, the court further stated that given the prior course of between the parties, "it is not objectively reasonable for Dumont, a merchant corporation, to be unaware of a contract provision it has received 510 times before in its prior dealings with Power & Tel."<sup>213</sup>

In *OceanConnect.Com, Inc. v. Chemoil Corp.*,<sup>214</sup> the arbitration provisions in seven previous sales contracts between the parties were sufficient to rebut the non-assenting party's claim of surprise.<sup>215</sup> Similarly, in *Hagrpotra for Trading & Distribution, Ltd. v. Oakley Fertilizer Inc.*,<sup>216</sup> arbitration clauses in documents incorporated by reference into confirmations on at least twenty-one previous transactions between the parties was sufficient to establish a course of dealing of arbitration and to support the court's decision to include the provision in the contract.<sup>217</sup>

Courts tended to focus on the surprise strand of the surprise or hardship standard in concluding that an arbitration provision did not materially alter and therefore should be included in the contract. Courts referred to hardship in only two cases. In *Dumont*, the court rejected the buyer's argument that, if included, the arbitration provision's deprivation of its right to a judicial forum constituted a hardship resulting in a material alteration.<sup>218</sup> The court explained "the mere fact that an arbitration provision deprives a party of a judicial forum cannot

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17828 (2d Cir. 2013); *Oceanconnect*, 2008 WL 194360, at \*5; *Am. Eagle*, 525 F. Supp. 2d at 434–35 (finding the presence of trade usage).

208. See *Dumont*, 962 F. Supp. 2d at 1079–80.

209. 962 F. Supp. 2d 1064 (N.D. Iowa 2013).

210. *Id.* at 1078.

211. *Id.* at 1079.

212. *Id.*

213. *Id.*

214. No. H-07-105, 2008 WL 194360 (S.D. Tex. Jan. 23, 2008).

215. *Id.* at \*5.

216. No. 9779(CM)(KNF), 2010 WL 2594286 (S.D.N.Y. June 19, 2010).

217. *Id.* at \*7–8; see also *Colo.-Ark.-Tex. Distrib., L.L.C.*, 525 F. Supp. 2d at 434–35 (finding that the presence of arbitration provisions in the seller's confirmations in several previous transactions created a course of dealing and undermined the buyer's surprise argument).

218. *Dumont*, 962 F. Supp. 2d at 1080.

constitute ‘hardship’ for the purpose of materially altering a contract.”<sup>219</sup> In *Oceanconnect.com*, the court examined the question of whether hardship constitutes a separate basis for establishing a material alteration or if it’s simply a consequence of a material alteration.<sup>220</sup> Without deciding on this issue, the court adopted the approach taken by courts that have relied on hardship to determine a material alteration. The court found a hardship arises when a “term is one that creates or allocates an open-ended and prolonged liability.”<sup>221</sup>

### 3. Arbitration Clause Materially Alters

In two of the cases, the courts held that an arbitration provision materially altered the contract.<sup>222</sup> In one decision, the court applied a *per se* approach;<sup>223</sup> in the other, the court applied a case-by-case approach.<sup>224</sup> In *Hitchiner Manufacturing Co. v. Modern Industries, Inc.*,<sup>225</sup> a seller’s price quote and acknowledgment sent in response to a buyer’s purchase order included an arbitration clause.<sup>226</sup> Because the court found that the price quote was not an offer, the court initially rejected the seller’s argument that the presence of the arbitration provision in its price quote made it a part of the agreement.<sup>227</sup> It then turned to section 2-207(2)(b) to determine if the additional term—the arbitration provision in the seller’s acknowledgement, which the court deemed an acceptance of the buyer’s purchase order/offer—was a part of the agreement.<sup>228</sup> In excluding the arbitration provision from the agreement, the *Hitchiner* court relied on a 1990 case that applied what was then considered the majority rule that arbitration provisions materially alter the contract.<sup>229</sup> Importantly, the court neglected to inquire into whether inclusion of the provision would result in surprise or hardship to the buyer.<sup>230</sup>

Applying a facts-based approach, the court in *Cogent Computer Systems, Inc. v. Turbochef Technologies, Inc.*,<sup>231</sup> ruled that the inclusion of additional terms, including an arbitration provision, materially altered the contract between parties. Finding that additional terms would result in surprise or hardship if

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219. *Id.*

220. *Oceanconnect*, 2008 WL 194360, at \*5.

221. *Id.*

222. *Hitchner Mfg. Co., Inc. v. Modern Indus., Inc.*, No. 09-cv-242-PB, 2009 WL 3643471, at \*4 (D.N.H. Oct. 29, 2009); *Cogent Comput. Sys., Inc. v. Turbochef Tech., Inc.*, No. 06-280S, 2008 U.S. Dist. LEXIS 5302, at \*12 (D.R.I. Jan. 24, 2008).

223. *Cogent*, 2008 U.S. Dist. LEXIS 5302, at \*12.

224. *Hitchiner*, 2009 WL 3643471, at \*4.

225. No. 09-cv-242-PB, 2009 WL 3643471 (D.N.H., Oct. 29, 2009).

226. *Id.* at \*1.

227. *Id.* at \*3.

228. *Id.* at \*4.

229. *Id.* at \*4.

230. *See id.*

231. No. 06-280S, 2008 WL 219343 (D.R.I. Jan. 24, 2008).

incorporated without Cogent's express consent,<sup>232</sup> the court relied, in part, on precedent, which held that an arbitration provision is a *per se* material alteration.<sup>233</sup> It further explained, however, that there was no evidence to suggest that the seller would have had reason to think that it would be subject to arbitration.<sup>234</sup> This undue surprise warranted excluding the clause from the agreement.<sup>235</sup> The court distinguished *Cogent* from those cases where arbitration could be established on the basis of a course of dealing.<sup>236</sup> It also noted that the arbitration provision was not conspicuous.<sup>237</sup> Finally, it found that because the additional terms required the arbitration to take place in Atlanta, Georgia, the seller would suffer an undue hardship.<sup>238</sup>

The cases reviewed represent a shift in courts' treatment of arbitration provisions. Historically, there was considerable uncertainty surrounding whether arbitration provisions materially alter the parties' contract.<sup>239</sup> The shift may be a consequence of the increased use of arbitration to resolve commercial disputes,<sup>240</sup> which makes it easier for arbitration to be a trade usage, leading to the demise of the New York rule under which arbitration clauses were deemed *per se* material alterations.<sup>241</sup> The above cases suggest the shift is a consequence of courts' greater application of a case-by-case approach in determining when clauses materially alter agreements.

#### *B. Disclaimer-of-Warranty Clause*

The terms and conditions often incorporated into or attached to a seller's acknowledgment, invoice, sales contract, or confirmation will likely provide for some kind of express warranty, while disclaiming implied warranties. If a disclaimer of implied warranties complies with section 2-316(2) or (3), it will be effective.<sup>242</sup> The following is a sample disclaimer that might appear in a seller's documents:

Disclaimer. EXCEPT AS EXPRESSLY SET FORTH IN THE SPECIFIC WARRANTY FOR A PRODUCT, SELLER MAKES NO

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232. *Id.* at \*12.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at \*12–13.

237. *Id.* at \*13.

238. *Id.* at \*12.

239. See Stephens, *supra* note 2, at 246 (noting the uncertainty regarding whether arbitration clauses were considered material alterations).

240. See MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION §6.1 (3D ED. 2015) (commenting that the use of arbitration to resolve various types of commercial disputes has increased dramatically, expanding from an estimated 6,448 filings in 1981 to 187,596 filings in 2011).

241. See *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F. Supp. 2d 410, 430 n.17 (S.D.N.Y. 2010).

242. U.C.C. § 2-316(2)–(3) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, WRITTEN OR ORAL, RELATING TO THE PRODUCTS, OR THE PERFORMANCE OF ITS OBLIGATIONS UNDER THE TRANSACTION DOCUMENTS, AND SELLER HEREBY DISCLAIMS ALL IMPLIED WARRANTIES OR MERCHANTABILITY IMPOSED BY LAW (INCLUDING, WITHOUT LIMITATION, WARRANTIES OF DESCRIPTION, MERCHANTABILITY OR FITNESS . . . TO THE EXTENT PERMISSIBLE.<sup>243</sup>

Seven cases were decided over the past decade in which courts addressed whether a disclaimer-of-warranty clause, appearing in a seller's document as an additional term, constituted a material alteration.<sup>244</sup> In four of these cases, the courts ruled that the disclaimer was not a material alteration and, therefore, became a term of the contract.<sup>245</sup> The opposite result was reached in the three other cases.<sup>246</sup>

Courts finding that a warranty disclaimer clause was not a material alteration tended to adopt a case-by-case approach and the surprise or hardship test for determining whether a warranty disclaimer clause amounted to a material alteration.<sup>247</sup> In contrast, courts finding that a warranty disclaimer materially altered the contract did not engage in analysis that was as fact intensive.<sup>248</sup> As noted previously<sup>249</sup> and as was true of arbitration clauses, the case results represent a departure from previous decades when courts, relying on the language of comment four, gravitated toward finding that disclaimer of warranty clauses constituted material alterations.<sup>250</sup> Over the last decade, courts astutely avoided placing too much reliance on comment four's examples of terms that

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243. *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, 872 F. Supp. 2d 1191, 1200 n.8 (D. Colo. 2012). A limited remedy provision and a disclaimer of consequential damages, both of which are discussed *infra*, will often appear in tandem with a seller's warranty disclaimer.

244. *See infra* notes 245–46.

245. *BVS, Inc. v. CDW Direct, LLC*, 936 F. Supp. 2d 1013, 1027 (N.D. Iowa 2013), *rev'd*, 759 F.3d 869 (8th Cir. 2014); *NIC Holding Corp. v. Lukoil Pan Americas LLC*, No. 05 CIV 9372, 2008 WL 4212462, at \*1 (S.D.N.Y. Sept. 10, 2008); *Monarch Nutritional Labs., Inc. v. Maximum Human Performance, Inc.*, No. 2:03CV474TC, 2005 WL 1683734, at \*10 (D. Utah Jul. 18, 2005); *R.O.W. Window Co. v. Allmetal, Inc.*, 856 N.E.2d 55, 61 (Ill. App. Ct. 2006).

246. *Leica*, 872 F. Supp. 2d at 1200; *Hartford Fire Ins. Co. v. Roadtec, Inc.*, No. 09 Civ. 06747(PGG), 2010 WL 4967979, at \*4–5 (S.D.N.Y. Nov. 29, 2010); *Distinctive Cabinetry, Inc. v. Home Depot U.S.A., Inc.*, No. 08-10233, 2009 WL 1448954, at \*8 (E.D. Mich. May 22, 2009).

247. *See infra* notes 252–63.

248. *See infra* notes 264–73.

249. *See supra* text accompanying notes 87–92.

250. *Brown*, *supra* note 53, at 936 (stating that warranty disclaimer clauses were commonly found to be material alterations); *Murray*, *supra* note 92, at 11 (stating that in 2000, courts at the time conclusively presumed that warranty disclaimers constituted materially alterations); *see Ranere*, *supra* note 85, at 680 (identifying warranty disclaimer as illustrating the type of clauses in which courts tended to find were *per se* material alterations).



materially alter and instead engaged in the fact-based analysis contemplated by the surprise or hardship test of materiality.<sup>251</sup>

*1. Warranty Disclaimer Clause Does Not Materially Alter*

In two cases, the existence of course of dealings between the parties was the basis for the courts' decisions that a warranty disclaimer was not a material alteration.<sup>252</sup> In both instances, the course of dealing arose from the seller's repeated sending of its terms and conditions without objection by the buyer.<sup>253</sup> In *Monarch Nutritional Laboratories, Inc. v. Maximum Human Performance, Inc.*,<sup>254</sup> in twelve previous transactions, the buyer had received the seller's terms and conditions that contained conspicuous warranty disclaimers in the packing paper or invoices.<sup>255</sup> Applying a surprise or hardship test for determining materiality, the court found that the buyer's failure to object and to otherwise offer proof of surprise or hardship resulted in its failure to carry its burden of establishing that a limitation of damages and disclaimer provision were material alterations.<sup>256</sup> In *R.O.W. Window Co. v. Allmetal, Inc.*,<sup>257</sup> the court ruled the buyer's material alteration argument was negated by a course of dealing arising from the seller's invoices conspicuously disclaiming warranties, which were sent over a sixteen-year period.<sup>258</sup> A course of dealing was also instrumental in the Eighth Circuit's remand of a lower court decision that a disclaimer in the seller's terms and conditions was part of a course of dealing that supplemented the parties' contract.<sup>259</sup> The district court found that the seller established a course of dealing to defeat the buyer's materiality argument by proving that more than 250 of the seller's confirmation invoices and other documents from previous transactions included a warranty disclaimer.<sup>260</sup> In *BVS, Inc. v. CDW Direct, LLC*,<sup>261</sup> the Eighth Circuit accepted the notion that a party can overcome a non-assenting party's materiality argument by establishing a course of dealing and remanded the case because the uniqueness of the contract formation process

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251. See, e.g., *Pycsa Panama, S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198 (S.D. Fla. 2008), *aff'd*, 329 F. App'x. 257 (11th Cir. 2009); see also *Monarch Nutritional Labs., Inc. v. Maximum Human Performance, Inc.*, No. 2:03CV474TC, 2005 WL 1683734 at \*7–9 (D. Utah July 18, 2005).

252. *Monarch Nutritional Labs.*, 2005 WL 1683734, at \*8–10; *R.O.W. Window Co. v. Allmetal, Inc.*, 856 N.E.2d 55, 60–61 (Ill. App. Ct. 2006).

253. *Monarch Nutritional Labs.*, 2005 WL 1683734, at \*8–10; *R.O.W. Window*, 856 N.E.2d at 60–61.

254. No. 2:03CV474TC, 2005 WL 1683734 (D. Utah July 18, 2005).

255. *Id.* at \*2–3.

256. *Id.* at \*9–10.

257. 856 N.E.2d 55 (Ill. App. Ct. 2006).

258. *Id.* at 60–61.

259. *BVS, Inc. v. CDW Direct, LLC*, 759 F.3d 869, 873 (8th Cir. 2014).

260. *BVS, Inc. v. CDW Direct, LLC*, 936 F. Supp. 2d 1013, 1019, 1026–27 (N.D. Iowa 2013), *rev'd*, 759 F.3d 869 (8th Cir. 2014).

261. 759 F.3d 869 (8th Cir. 2014).

in the transaction at issue required further findings of fact as to the existence of a course of dealing.<sup>262</sup> Another court ruled, without explanation, that “[t]he warranty provision at issue constituted neither a ‘surprise’ nor a ‘hardship’ within the meaning of section 207(2)(b),” and therefore did not materially alter the contract.<sup>263</sup>

## 2. Warranty Disclaimer Clause Materially Alters

The two courts finding that a disclaimer of warranty provision materially altered the contract took similar approaches. In *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*,<sup>264</sup> following negotiations and the seller’s sending of price quotes, the buyer sent a seller a purchase order for helicopter equipment.<sup>265</sup> In response, the seller delivered the equipment and sent an invoice acknowledging delivery of the equipment.<sup>266</sup> Appearing on the invoice was a link to the seller’s websites concerning its warranty terms, including a disclaimer of warranties.<sup>267</sup> Because the court concluded that a contract was consummated upon the delivery of the equipment under section 2-204(1) (of Colorado’s corresponding statute),<sup>268</sup> it found that the invoice constituted a confirmation of the parties’ contract and that the disclaimer was an additional term subject to section 2-207(2)(b).<sup>269</sup> The court relied on precedent stating that disclaimers of warranties “shift the distribution of risk between the parties” and the language in Comment four that describing as a material alteration a “clause negating such standard warranties as that of merchantability or fitness for a particular purpose . . . .”<sup>270</sup> Without specifically discussing the facts of the case before it, in *Distinctive Cabinetry, Inc. v. Home Depot U.S.A., Inc.*,<sup>271</sup> the court also relied on precedent and comment three<sup>272</sup> in finding that the warranty disclaimer was a material alteration.<sup>273</sup>

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262. *Id.* at 873.

263. *NIC Holding Corp. v. Lukoil Pan Americas LLC*, No. 05 Civ.9372(LAK), 2008 WL 4212462, at \*1 (S.D.N.Y. Sept. 10, 2008).

264. 872 F. Supp. 2d 1191 (D. Colo. 2012).

265. *Id.* at 1194, 1196.

266. *Id.* at 1196.

267. *Id.*

268. *Id.* at 1198. Note that the court did not apply section 2-206(1), which covers contract formation where a buyer sends a purchase order and the seller ships the goods. U.C.C. § 2-206(1). The court also avoided the thorny issue of the effect to give to a purported confirmation after the contract has been formed. *See, e.g., Rocheux Int’l of N.J., Inc. v. U.S. Merchants Fin. Grp., Inc.*, 741 F. Supp. 2d 651, 677–80 (D.N.J. 2010).

269. *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, 872 F. Supp. 2d 1191, 1199–1200 (D. Colo. 2012).

270. *Id.* at 1200.

271. No. 08-10233, 2009 WL 1448954 (E.D. Mich. May 22, 2009).

272. The court referred to comment three but comment four refers to warranty disclaimers as an example of a term that materially alters.

273. *Distinctive Cabinetry Inc. v. Home Depot U.S.A., Inc.*, No. 08-10233, 2009 WL 1448954, at \*8 (E.D. Mich. May 22, 2009); *see also Hartford Fire Ins. Co. v. Roadtec, Inc.*, No. 06747(PGG),

### C. Limited Remedy Clause

A seller will often include a limited remedy and/or a disclaimer of consequential damages in its terms and conditions. The following is a sample limited remedy clause that might appear in a seller's documents:

Limitation. Seller's total liability and buyer's exclusive remedy for any and all losses and damages arising out of any cause whatsoever related to this agreement under any theory of contract, tort, strict liability or other legal or equitable theory shall be limited to buyer's actual direct damages not to exceed the purchase price of the goods that caused the damages, or the repair or replacement of such goods. And in no event shall seller be liable for lost profits, special, incidental, consequential, or punitive damages.<sup>274</sup>

U.C.C. section 2-719 regulates the effectiveness of a limited remedy provision.<sup>275</sup>

Comment five to section 2-207 specifically identifies a limited remedy provision as an example of clauses that do not materially alter.<sup>276</sup> According to the comment:

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 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[.]<sup>277</sup>

The following discussion reveals that courts have not strictly adhered to the Comment's suggestion.

In eleven cases decided between January 1, 2005 and July 1, 2015, courts addressed whether a limited remedies provision, as an additional term, became a term of the parties' contract.<sup>278</sup> In three cases, courts ruled that limited remedies clauses were not material alterations and, therefore, became terms of the parties' contracts.<sup>279</sup> In four of the cases reviewed, limited remedies

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2010 WL 4967979, at \*4-6 (S.D.N.Y. Nov. 29, 2010) (finding that a party's attempt to disclaim the implied warranty of merchantability was ineffective because the disclaimer was neither conspicuous nor timely).

274. *ASi Indus. GMBH v. MEMC Elec. Materials, Inc.*, No. 4:06CV951(CDP), 2008 U.S. Dist. LEXIS 10732, at \*13-14 (E.D. Mo. Feb. 13, 2008).

275. U.C.C. § 2-719 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

276. *See* U.C.C. § 2-207 cmt. 5 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

277. *Id.*

278. *See infra* notes 281-85.

279. *Pycsa Panama, S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1250-51 (S.D. Fla. 2008); *Monarch Nutritional Labs., Inc. v. Maximum Human Performance, Inc.*, No. 2:03CV474TC, 2005 WL 1683734, at \*9 (D. Utah July 18, 2005); *Paul Gottlieb & Co. v. Alps South Corp.*, 985 So.2d 1, 7-8 (Fla. Dist. Ct. App. 2007).

provisions were deemed to constitute material alterations.<sup>280</sup> In three other cases, courts rejected motions for summary judgment because of the presence of issues of fact as to whether a limited remedy or disclaimer of consequential damages materially altered the contract.<sup>281</sup> Similarly, the Eighth Circuit stated that a course of dealing could overcome a buyer's materiality argument in regards to additional terms, including limited remedy and disclaimer clauses, but remanded for further factual findings as to the existence of a course of dealing.<sup>282</sup> Finally, section 2-207(2)(b) was inapplicable where a limited remedies clause became a term of the contract given that it appeared in the seller's offer, which was accepted by the buyer.<sup>283</sup>

### 1. Limited Remedy Clause Does Not Materially Alter

As was true of disclaimer of warranty clauses, course of dealing was instrumental in each judicial finding that a limited remedy provision did not constitute a material alteration. In *Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc.*,<sup>284</sup> and *Monarch Nutritional Laboratories, Inc. v. Maximum Human Performance, Inc.*,<sup>285</sup> the surprise or hardship test was adopted for determining materiality.<sup>286</sup> The sellers' repetitive sending of invoices containing the limited remedy provisions, without objection by the buyer, established a course of dealings that negated surprise and resulted in holdings that the clauses did not materially alter the parties' contracts.<sup>287</sup>

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280. *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 912–13 (8th Cir. 2005); *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, 872 F. Supp. 2d 1191, 1201 (D. Colo. 2012); *BVS Inc. v. CDW Direct, LLC*, 936 F. Supp. 2d 1013, 1026–27 (N.D. Iowa 2003); *Cheboygan Cement Prods., Inc. v. Glawe, Inc.*, No. 309745, 2014 WL 2351772, at \*10–11 (Mich. Ct. App., May 29, 2014).

281. *Keywell, L.L.C. v. Perkinelmer, Inc.*, No. 11-CV-182-HKS, 2013 WL 4520017, at \*7 (W.D.N.Y. Aug. 26, 2013); *Grovenor House, L.L.C. v. E.I. DuPont De Nemours & Co.*, No. 09-21698-Civ., 2010 WL 3385344, at \*8–9 (S.D. Fla. Aug. 25, 2010); *ASi Indus. GMBH v. MEMC Elec. Materials, Inc.*, No. 4:06CV951 CDP, 2008 U.S. Dist. LEXIS 10732, at \*5 (E.D. Mo. Feb 13, 2008).

282. *BVS, Inc. v. CDW Direct, LLC*, 759 F.3d 869, 873 (8th Cir. 2014). For a more detailed discussion of *BVS*, see *supra* text accompanying notes 207–08 (warranty disclaimer discussion).

283. *Kalzip, Inc. v. TL Hill Construction, LLC*, No. 8:11-cv-01842-T-27/TBM, 2013 WL 1909604, at \*4 (M.D. Fla. May 8, 2013).

284. 625 F. Supp. 2d 1198 (S.D. Fla. 2008).

285. No. 2:03CV474TC, 2005 WL 1683734 (D. Utah Jul. 18, 2005).

286. *Pycsa Panama, S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1250 (S.D. Fla. 2008); *Monarch Nutritional Labs., Inc. v. Maximum Human Performance, Inc.*, No. 2:03CV474TC, 2005 WL 1683734, at \*9 (D. Utah July 18, 2005).

287. *Pycsa*, 625 F. Supp. 2d, at 1250–51 (holding that the seller's inclusion of limited remedy provision in at least fourteen invoices sent by the seller in previous transactions with the buyer established a prior course of dealings); *Monarch*, 2005 WL 1683734, at \*7–8 (holding that a limited remedy provision in at least twelve copies of terms and conditions, included in pacing paper or with invoices, established a course of dealings).

Course of dealings was also influential in *Paul Gottlieb & Co. v. Alps South Corp.*,<sup>288</sup> where the court adopted the Seventh Circuit's approach that hardship is merely a consequence of surprise.<sup>289</sup> Nevertheless, it analyzed whether the inclusion of seller's additional term, a disclaimer of consequential damages, would result in surprise or hardship.<sup>290</sup> With respect to surprise, the court stated that the burden of proof was imposed on the non-assenting party—the buyer—to prove “that under the circumstances it cannot be presumed that a reasonable merchant would have consented to the additional term.”<sup>291</sup> In concluding that the buyer failed to carry its burden, the court identified facts that included the parties' prior dealings—the contract at issue was the sixth in a series between the two parties, and in each of the previous contracts, the seller's documents included the limitation of liability term, which was visible of the face of the documents.<sup>292</sup> The court also noted that the failure of the buyer to have read the seller's documents would not, under Florida law, excuse the buyer from being bound by the terms.<sup>293</sup> It also pointed to the language in comment five as support for its holding.<sup>294</sup>

The *Gottlieb* court determined that the record was equally devoid of evidence of hardship.<sup>295</sup> Adopting a test of whether inclusion of the additional term would “impose substantial economic hardship on the non-assenting party,”<sup>296</sup> the court ruled that the buyer could not sustain its burden by arguing that incorporating the limitation of liability clause would result in severe economic hardship.<sup>297</sup> In this regard, the court found that the seller never represented that it would reimburse the buyer for consequential damages sustained because of the seller's breach, and the buyer neglected to inform the seller of the potential consequences of the breach.<sup>298</sup>

## 2. *Limited Remedy Clause Materially Alters*

Courts in two of the three cases, finding that a limited remedy clause was a material alteration, engaged in a case-by-case analysis. In *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*,<sup>299</sup> the Eighth Circuit adopted the surprise or

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288. 985 So.2d 1 (Fla. Dist. Ct. App. 2007).

289. *Id.* at 7.

290. *Id.* at 8.

291. *Id.* at 7.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 8.

296. *Id.* (quoting *Trans-Aire Int'l, Inc. v. N. Adhesive Co., Inc.*, 882 F.2d 1254 (7th Cir. 1989)).

297. *Id.* at 8.

298. *Id.* (quoting *Bayway Ref. Co. v. Oxygenated Mktg. & Trading*, 215 F.3d 219, 224 (2d Cir. 2000)).

299. 401 F.3d 901 (8th Cir. 2005).

hardship test to determine materiality.<sup>300</sup> With respect to surprise, the court rejected the seller's argument that there could be no surprise because the clause limiting the buyer's remedies to the contract price appeared in sixty-six acknowledgements the seller sent to the buyer.<sup>301</sup> Although the clause appeared in the acknowledgments, the court stated the inclusion of the clause into the contract would amount to unreasonable surprise because the provision was in boilerplate language, small print, and was not bargained for. Several witnesses testified to being subjectively surprised and there was evidence that in the past the seller and other manufacturers had not strictly enforced the limited remedy provision.<sup>302</sup> As to hardship, the court first ruled that it should be considered independent of surprise for finding a material alteration.<sup>303</sup> The court further explained that the limited remedy clause would cause a hardship to the non-assenting party because the buyer would not be able to recover the full extent of the expected remedies otherwise available.<sup>304</sup>

In *Cheboygan Cement Products, Inc. v. Glawe, Inc.*,<sup>305</sup> the Michigan court applied a surprise or hardship test for materiality.<sup>306</sup> The court concluded the buyer would suffer a hardship if the contract included the clause limiting the buyer's remedy to the contract price and granting only three days after delivery to discover and identify "exceptions and claims" arising from use of a defective product.<sup>307</sup> A *per se* approach rather than a case-by-case approach, however, was taken in *Leica Geosys, Inc.*,<sup>308</sup> where the court summarily resolved the question of the materiality of a clause disclaiming the buyer's recovery of incidental and consequential damages.<sup>309</sup> Relying on Colorado precedent, the court held that the limitation clause was a material alteration of the contract and as such should not be included in the contract.<sup>310</sup>

As was true prior to the last decade, courts continue to be split on whether a limited remedies provision constitutes a material alteration.<sup>311</sup> What has changed, however, is the greater application by courts of a case-by-case approach in making this determination.<sup>312</sup> Consequently, courts are less likely to rely solely on the language in comment five suggesting that a limited remedy clause does not materially alter, or alternatively, to assume that because a limited

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300. *Id.* at 911–12.

301. *Id.* at 910, 912.

302. *Id.* at 912–13.

303. *Id.* at 911 n.6.

304. *Id.* at 912.

305. No. 309745, 2014 WL 2351772 (Mich. Ct. App., May 29, 2014).

306. *Id.* at 10.

307. *Id.* at 10.

308. 872 F. Supp. 2d 1191 (D. Colo. 2012).

309. *Id.* at 1201.

310. *Id.*

311. *See supra* discussion accompanying notes 278–310.

312. *See id.*

remedy provision holds the potential to significantly shift liability, it constitutes a material alteration *per se*.<sup>313</sup>

#### *D. Interest and Attorney's Fees Provisions*

Sellers commonly incorporate into confirmations, acknowledgments, and invoices provisions obligating a buyer to pay interest on overdue accounts and attorneys' fees incurred in a seller's efforts to collect payment from a buyer. The following is a sample pre-judgment interest and attorney's fee clause that might appear in a seller's documents:

Past due accounts are subject to interest charge of 1-1/2% per month, maximum 18% per annum. Buyer agrees to pay collection costs, including collection agency fees, reasonable attorney's fees, and court costs if this account is placed in collection.<sup>314</sup>

This survey identified twenty-five cases decided between January 1, 2005 and July 1, 2015 in which courts determined whether interest and/or attorneys' fees provisions materially altered parties' agreements.<sup>315</sup> Courts addressed whether

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313. See Murray, *supra* note 92, at 12 (“[A] number of courts ignore this language and conclude that such a limitation of remedy clause is a *per se* material alteration because of its essential nature in shifting substantial risks to a buyer.”); Ranere, *supra* note 85, at 680 n.64 (establishing warranty disclaimer and limited remedy provisions as clauses where courts tend to identify them as materially altering as a matter of law).

314. AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Servs. Inc., No. 06 Civ. 2142(GEL), 2007 WL 4302514, at \*7 (S.D.N.Y. Dec. 7, 2007).

315. Echo, Inc. v. Timberland Machines. & Irrigations, Inc., 661 F.3d 959, 967 (7th Cir. 2011); Coosemans Specialties, Inc. v. Gargiulo, 485 F.3d 701, 708 (2d Cir. 2007); Tomato Mgmt., Corp. v. CM Produce LLC, No. 14-CV-3522(JPO), 2014 WL 2893368, at \*2–3 (S.D.N.Y. June 26, 2014); Hop Hing Produces Inc. v. X & L Supermarket, Inc., No. 2012-1401(ARR)(MDG), 2013 U.S. Dist. LEXIS 47518, at \*11–12 (E.D.N.Y. March 4, 2013); Bearden v. Great Lakes Produce and Mktg. LLC, No. 1:12-CV-700, 2013 WL 2318857 at \*2 (W.D. Mich. May 28, 2013); Food Team Int'l, Ltd. v. Unilink, LLC., 872 F. Supp. 2d 405, 421–22 (E.D. Pa. 2012), *aff'd in part, rev'd in part*, 595 F. App'x 146 (3d Cir. 2014); Rocheux Int'l of N.J., Inc. v. U.S Merchants Fin. Grp. Inc., 741 F. Supp. 2d 651, 676–77 (D.N.J. 2010); Minnesota Elevator, Inc. v. Imperial Elevator Servs., Inc., 758 F. Supp. 2d 533, 540–41 (N.D. Ill. 2010); Sato & Co. LLC v. S & M Produce, Inc., No. 08-cv-7352, 2010 WL 431601, at \*5 (N.D. Ill. Feb. 2, 2010); Bounty Fresh, LLC v. Paradise Produce, Inc., No. CV 2009-5577(FB)(MDG), 2010 WL 3781997, at \*3 (E.D.N.Y. Aug. 18, 2010); EBM-Papst Inc. v. Aeiomed, Inc., No. 09-551 ADM/JJK, 2010 WL 4720848, at \*5–6 (D. Minn. Nov. 15, 2010); Jada Toys, Inc. v. Chicago Import, Inc., No.07C699, 2009 WL 3055370, at \*7 (N.D. Ill. Sept. 18, 2009); Ger-Nis Int'l, LLC v. FJB, Inc., No.07CV898(CM), 2008 WL 2704384, at \*11 (S.D.N.Y. July 3, 2008); Palmareal Produce Corp. v. Direct Produce #1, Inc., No. 07-CV-1364(SLT)(RLM), 2008 WL 905041, at \*2–3 (E.D.N.Y. March 31, 2008); Argi Exotic Trading, Inc. v. New Man Designed Sys., Ltd, No. 07-CV-0049 (NG)(MDG), 2008 WL 2397565, at \*3 (E.D.N.Y. June 12, 2008); AFL Fresh, 2007 WL 4302514, at \*7–8; Smith & Loveless, Inc. v. Caicos Corp., 471 F. Supp. 2d 1140, 1151 (D. Kan. 2007); Brigiotta's Farmland Produce & Garden Center, Inc. v. Przykuta, Inc., No. 05-CV-273S, 2006 WL 3240729, at \*5–6 (W.D.N.Y. July 13, 2006); Review Video, LLC. v. Enlighten Techs., Inc., No. C04-0123, 2005 WL 91297, at \*2–3 (N.D. Iowa Jan. 12, 2005); Top Banana, L.L.C. v. Dom's Wholesale & Retail Center, Inc., No. 04CV2666(GBD), 2005 WL 1529736, at \*5 (S.D.N.Y. June 28, 2005), *aff'd*, 485 F.3d 701 (2d Cir. N.Y.); Monarch Nutritional Labs., Inc. v. Maximum Human Performance, Inc., No. 2:03CV474TC,

interest clauses materially altered the parties' contracts in twenty of the twenty-five cases.<sup>316</sup> In none of the twenty cases did a court find that an interest clause materially altered the contract. The materiality of attorney's fees was considered in twenty of the twenty-five cases reviewed.<sup>317</sup> In two of these cases, buyers successfully convinced courts that attorney's fee clauses materially altered the parties' agreement.<sup>318</sup>

In each of the cases surveyed, the courts adopted the surprise or hardship standard for determining if interest or attorney's fee provisions constitute material alterations. While articulating this, with a limited number of exceptions, the tendency was for the court to address only the surprise component of the test.<sup>319</sup> In regard to surprise, several courts acknowledged that it consists of subjective and objective components.<sup>320</sup> As was true of arbitration provisions, courts imposed the burden of demonstrating surprise or hardship on the buyer or non-assenting party.<sup>321</sup> Courts engaging in more than a superficial

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2005 WL 1683734, at \*6 (D. Utah July 18, 2005); *Dayoub Mktg., Inc. v. S.K. Produce Corp.*, 04 Civ. 3125 (WHP), 2005 U.S. Dist. LEXIS 26974, at \*14–17 (S.D.N.Y. Nov. 9, 2005); *ConocoPhillips v. Williams Alaska Petroleum*, 322 P.3d 114, 121–22 (Alaska 2014); *A.E. Robinson Oil Co., Inc. v. County Forest Prods., Inc.*, 40 A.3d 20, 23 (Me. 2012); *Serge Dore' Selections Ltd. v. Universal Wines & Spirits*, 20 Misc.3d 1121(A), 11–12 (N.Y. Sup. Ct. 2008).

316. *Tomato*, 2014 WL 2893368, at \*2–3; *ConocoPhillips*, 322 P.3d 114 at 141; *Hop Hing*, 2013 U.S. Dist. LEXIS 47518, at \*10–12; *A.E. Robinson*, 40 A.3d at 23; *Food Team*, 872 F. Supp. 2d at 420; *Echo*, 661 F.3d at 966–67; *Rocheux*, 741 F. Supp. 2d at 680–81; *Bounty Fresh*, 2010 WL 3781997, at \*2–3; *Minnesota Elevator*, 758 F. Supp. 2d at 540; *Jada Toys*, 2009 WL 3055370, at \*7–8; *Ger-Nis*, 2008 WL 2704384, at \*11; *Argi*, 2008 WL 2397565, at \*3; *Palmareal*, 2008 WL 905041, at \*3; *Smith & Loveless*, 471 F. Supp. 2d at 1151; *AFL Fresh*, 2007 WL 4302514; *Brigiotta's*, 2006 WL 3240729, at \*5–6; *Review Video*, 2005 WL 91297, at \*2; *Dayoub*, 2005 U.S. Dist. LEXIS 26974, at \*14–16; *Top Banana*, 2005 WL 1529736; *Monarch*, 2005 WL 1683734, at \*6.

317. *Coosemans*, 485 F.3d at 708; *Tomato*, 2014 WL 2893368, at \*2; *Hop Hing*, 2013 U.S. Dist. LEXIS 47519, at \*11–12; *Bearden*, 2013 WL 2318857, at \*2; *A.E. Robinson*, 40 A.3d at 23; *Food Team*, 872 F. Supp. 2d at 419–20; *Rocheux*, 741 F. Supp. 2d at 676–77; *EBM-Papst*, 2010 WL 4720848, at \*5–6; *Bounty Fresh*, 2010 WL 3781997, at \*3–4; *Sato*, 2010 WL 431601, at \*5; *Jada Toys*, 2009 WL 3055370, at \*7–8; *Ger-Nis*, 2008 WL 2704384, at \*11–12; *Serge Dore'*, 20 Misc.3d 1121(A) at \*11–12; *Argi*, 2008 WL 2397565, at \*3; *Palmareal*, 2008 WL 905041, at \*2–3; *Smith & Loveless*, 471 F. Supp. 2d at 1151–52; *AFL Fresh*, 2007 WL 4302514, at \*7–8; *Brigiotta's*, 2006 WL 3240729, at \*5–6; *Dayoub*, 2005 U.S. Dist. LEXIS 26974, at 14–17; *Top Banana*, 2005 WL 1529736, at \*5.

318. *Food Team*, 872 F. Supp. 2d at 422; *A.E. Robinson*, 40 A.3d at 23–24.

319. See, e.g., *EBM-PABST*, 2010 WL 4720848, at \*6; *Bearden*, 2013 WL 2318857, at \*2–3; *Top Banana*, 2005 WL 1529736, at \*5.

320. See, e.g., *Coosemans*, 485 F.3d at 708; *AFL Fresh*, 2007 WL 4302514, at \*8 (stating that surprise includes subjective and objective elements); *Top Banana*, 2005 WL 1529736, at \*5 (finding the buyer failed to present evidence to demonstrate subjective or objective surprise or hardship).

321. See, e.g., *Coosemans*, 485 F.3d at 708; *Bearden*, 2013 WL 2318857, at \*3.



analysis also accepted the notion that determinations of material alteration should be made on a case-by-case basis.<sup>322</sup>

### 1. *Pre-Judgment Interest Clause*

In assessing the materiality of an interest clause as an additional term, courts generally adopted the surprise or hardship standard for material alteration.<sup>323</sup> These courts rarely, however, engaged in more than a superficial analysis. Rather, they tended to summarily reject buyers' material alteration argument, adopting something akin to a *per se* rule in finding interest clauses did not materially alter.<sup>324</sup> In adopting this approach, courts relied on the language in comment five to section 2-207, which states that clauses that do not involve unreasonable surprise include "a clause providing for interest or overdue invoices."<sup>325</sup> These courts also relied on precedent,<sup>326</sup> the existence of a course

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322. See, e.g., *Bearden*, 2013 WL 2318857, at \*3 (stating that whether an additional term materially alters a contract depends on the facts of each case).

323. See, e.g., *A.E. Robinson*, 40 A.3d at 23–24; *Top Banana*, 2005 WL 1529736, at \*5; *Review Video*, 2005 WL 91297, at \*2–3 (relying on comment five and also stating that a clause calling for interest on past due accounts even if substantially greater than the default interest rate does not give rise to unreasonable surprise). *But see*, *Rocheux Int'l of N.J., Inc. v. U.S. Merchants Fin. Grp., Inc.*, 741 F. Supp. 2d 651, 682–85 (D.N.J. 2010) (applying the surprise or hardship test, but acknowledging that questions have been raised as to whether hardship is an independent basis for establishing a material alteration).

324. See *A.E. Robinson*, 40 A.3d at 23; *Top Banana*, 2005 WL 1529736, at \*5.

325. U.C.C. § 2-207 cmt. 5 (AM. LAW INST. & UNIF. LAW COMM'N 2002); see *Echo, Inc. v. Timberland Machs. & Irrigations, Inc.*, 661 F.3d 959, 967 (7th Cir. 2011); *Tomato Mgmt., Corp. v. CM Produce LLC*, No. 14-CV-3522(JPO), 2014 WL 2893368, at \*2 (S.D.N.Y. June 26, 2014); *Food Team Int'l, Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 405, 421 (E.D. Pa. 2012); *Jada Toys, Inc. v. Chicago Imp., Inc.*, No. 07C699, 2009 WL 3055370, at \*2 (N.D. Ill. Sept. 18, 2009 (finding a prior course of dealing whereby the seller included the interest provision into invoices in hundreds of previous transactions between the parties)); *Brigiotta's Farmland Produce & Garden Center, Inc. v. Przykuta, Inc.*, No. 05-CV-273S, 2006 WL 3240729, at \*5 (W.D.N.Y. July 13, 2006); *Dayoub Mktg, Inc. v. S.K. Produce Corp.*, No. 04 Civ. 3125(WHP), 2005 WL 3006032, at \*4 (S.D.N.Y. Nov. 9, 2005); *Review Video*, 2005 WL 91297, at \*2–3 (relying on comment five and also stating that a clause calling for interest on past due accounts even if substantially greater than the default interest rate does not give rise to unreasonable surprise); see also *Ger-Nis Int'l, LCC v. FJB, Inc.*, No. 07CV898(CM), 2008 WL 2704384, at \*15–16 (S.D.N.Y. July 3, 2008) (adopting the rule articulated in *Dayoub* that interest provisions do not materially alter the contract in regards to several defendants, but remanding for consideration of whether one buyer objected to the clause); *A.E. Robinson*, 40 A.3d at 23 (relying on the language in comment five in finding no material alteration but also finding a prior course of dealing supported including an interest provision in the parties' contract).

326. See, e.g., *Hop Hing Produces Inc. v. X & L Supermarket, Inc.*, No. CV 2012-1401(ARR)(MDG), 2013 WL 1232919, at \*4 (E.D.N.Y. March 4, 2013); *Echo, Inc.*, 661 F.3d at 967; *Minnesota Elevator, Inc. v. Imperial Elevator Servs., Inc.*, 758 F. Supp. 2d 533, 540–41 (N.D. Ill. 2010).

of dealings,<sup>327</sup> and the buyer's failure to either proffer evidence of or to plead surprise or hardship.<sup>328</sup>

## 2. Attorney's Fees Clause

Courts' approaches varied in the twenty cases reviewed in which the materiality of an attorney's fee clause was disputed. In several instances, courts summarily rejected buyers' surprise or hardship arguments relating to an attorney's fee clause, although less often than for interest provisions.<sup>329</sup> This was particularly true when the subject matter of the contract involved perishables and thereby implicated the Perishables Agricultural Commodities Act ("PACA"), which has been interpreted to allow for the recovery of reasonable attorney's fees where the parties' contract so provides.<sup>330</sup> Courts addressing this issue determined that the PACA undercuts buyers' unreasonable surprise argument.<sup>331</sup> In five cases, the non-assenting party (the buyer) failed to present any evidence in support of their claim of or to plead surprise or hardship.<sup>332</sup>

Course of dealing figured prominently in four cases rejecting buyers' arguments that an attorney's fee provision was a material alteration.<sup>333</sup> In

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327. See, e.g., *Rocheux Int'l of N.J., Inc. v. U.S Merchants Fin. Grp. Inc.*, 741 F. Supp. 2d 651, 683–84 (D.N.J. 2010) (establishing that the seller's sending of hundreds of invoices containing an interest clause constituted a prior course of dealing sufficient to overcome the buyer's surprise or hardship claim); *Jada Toys*, 2009 WL 3055370, at \*8.

328. See, e.g., *Bounty Fresh, LLC v. Paradise Produce, Inc.*, No. CV 2009-5577(FB)(MDG), 2010 WL 3781997, at \*2 (E.D.N.Y. Aug. 18, 2010); *Argi Exotic Trading, Inc. v. New Man Designed Sys., Ltd.*, 2008 WL 2397565, at \*3 (E.D.N.Y. June 12, 2008); *Smith & Loveless v. Caicos Corp.*, 471 F. Supp. 2d 1140, 1152 (D. Kan. 2007); *AFL Fresh & Frozen Fruits & Vegetable, Inc. v. De-Mar Food Servs. Inc.*, No. 06 Civ. 2142(GEL), 2007 WL 4302514, at \*7–8 (S.D.N.Y. Dec. 2007) (addressing a situation where the buyer failed to raise issue of material alteration); *Serge Dore' Selections Ltd. v. Universal Wines and Spirits*, 20 Misc. 3d 1121(A), No.23509/2007, at \*12 (N.Y. Sup. Ct. 2008) (finding that a buyer cannot establish surprise when they previously signed an invoice containing a provision providing for attorney's fees).

329. See *Tomato*, 2014 WL 2893368 at \*2; *Palmareal Produce Corp. v. Direct Produce #1, Inc.*, No. 07-CV-1364, 2008 WL 905041, at \*3–4 (E.D.N.Y. Mar. 31, 2008).

330. See, e.g., *Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 709 (2d Cir. 2007); *Tomato*, 2014 WL 2893368, at \*2; *Hop Hing*, 2013 WL 1232919 at \*4; *Palmareal*, 2008 WL 905041, at \*2–3; *Ger-Nis*, 2008 WL 2704384, at \*11–12; (adopting rule articulated in *Dayoub* that a provision calling for attorney's fees in cases implicating the PACA does not materially alter the contract); *Dayoub Mktg., Inc. v. S.K. Produce Corp.*, No. 04 Civ. 3125(WHP), 2005 WL 3006032, at \*5 (S.D.N.Y. Nov. 9, 2005); *Top Banana, L.L.C. v. Dom's Wholesale & Retail Center, Inc.*, No. 04 CV 2666(GBD), 2005 WL 1529736, at \*5 (S.D.N.Y. June 28, 2005).

331. *Coosemans*, 485 F.3d at 708–09.

332. *Coosemans*, 485 F.3d at 708; *Bounty Fresh*, 2010 WL 3781997, at \*2–3; *Argi*, 2008 WL 2397565, at \*3–4; *AFL Fresh*, 2007 WL 4302514, at \*7–8 (buyer failed to raise issue of material alteration); *Top Banana*, 2005 WL 1529736, at \*5.

333. *Bearden v. Great Lakes Produce and Mktg. LLC*, No. 1:12-CV-700, 2013 WL 2318857, at \*3–4 (W.D. Mich. May 28, 2013); *Rocheux Int'l of N.J., Inc. v. U.S. Merchants Fin. Grp., Inc.*, 741 F. Supp. 2d 651, 683–84 (D.N.J. 2010); *Jada Toys, Inc. v. Chicago Import, Inc.*, No. 07C699, 2009 WL 3055370, at \*8 (N.D. Ill. Sept. 18, 2009).

*Rocheux Int'l of N.J., Inc. v. U.S. Merchants*,<sup>334</sup> a seller sought to recover interest and attorney's fees arising from a buyer's wrongful failure to pay for a product.<sup>335</sup> The seller asserted it was entitled to recover these expenses based on provisions in invoices it sent to the buyer.<sup>336</sup> The terms provided for an 18% annual interest rate and attorney's fees equaling 25% of the buyer's outstanding balance.<sup>337</sup>

After adopting the surprise or hardship standard and citing to comments four and five of section 2-207, the court enumerated several factors that courts examine in determining whether including an additional term in a contract would constitute an unreasonable surprise.<sup>338</sup> These included the parties' course of dealing, industry standards, the conspicuousness of the additional terms in the confirmation, and whether the terms appeared in the non-assenting party's standard terms.<sup>339</sup> The court found that the seller's inclusion of the disputed terms in hundreds of invoices and credit memos over a six-year period was sufficient to establish a course of dealing and to counter the buyer's surprise argument.<sup>340</sup> The court in *Bearden v. Great Lakes Produce and Marketing LLC*<sup>341</sup> articulated the four factors expressed in *Rocheux* to determine whether an attorney's fee clause was a material alteration.<sup>342</sup> In concluding the clause had not materially altered, the court noted that the buyer had failed to "establish that there is an absence of industry custom" of seller's including attorney's fee provisions in their forms.<sup>343</sup>

Few cases addressed the question of whether an attorney's fees provision gives rise to an undue hardship.<sup>344</sup> One of the more extensive discussions of this issue occurred in *Rocheux*.<sup>345</sup> There, the court acknowledged the cases in which courts have ruled that hardship is not an independent ground for finding a material alteration.<sup>346</sup> Finding the reasoning underlying this view to be persuasive, the court proceeded to address whether including the interest and

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334. 741 F. Supp. 2d 651 (D.N.J. 2010).

335. *Id.* at 658.

336. *Id.* at 658–59.

337. *Id.* at 681.

338. *See id.* at 682.

339. *Id.*

340. *Id.* at 683.

341. No. 1:12-CV-700, 2013 WL 2318857 (W.D. Mich. May 28, 2013).

342. *Id.* at \*3.

343. *Id.* at \*4.

344. *See Bearden*, 2013 WL 2318857, at \*6 (“[A]ttorney’s fees may impose . . . some economic hardship, but economic hardship is not equivalent to an undue hardship.”); *Rocheux*, 741 F. Supp. 2d at 684–85, 687; *Dayoub Mktg., Inc. v. S.K. Produce Corp.*, No. 04 Civ. 3125 (WHP), 2005 WL 3006032, at \*5–6 (S.D.N.Y. Nov. 9, 2005) (finding that collection costs, including interest on unpaid balances and attorney’s fees, did not constitute an undue hardship; the court reduced the seller’s recovery of attorney’s fees to an amount that was reasonable).

345. *See Rocheux*, 741 F. Supp. 2d at 684.

346. *Id.*

attorney's fee clause was a material alteration.<sup>347</sup> In rejecting the buyer's argument that the 18% interest rate exceeded the 16% rate imposed by the usury statute, the court concluded the rate did not substantially exceed the 16% usury rate and buyer's presented no evidence it was outside the range of interest charged in the trade.<sup>348</sup> The court also noted section 2-207's comment five. Turning to the attorney's fee provision, the court found that given the protracted nature of the litigation between the parties, it could not conclude that the 25% rate would be more onerous than if the term had merely called for the award of reasonable attorney's fees.<sup>349</sup> Thus, the buyer had not established hardship to support that the provision materially altered the contract.<sup>350</sup> In another case discussing course of dealing, interest and attorney's fee provisions in hundreds of invoices sent by the seller over several years supported a court's finding of no surprise.<sup>351</sup>

In only two of the cases surveyed did courts find that an attorney's fees provision constituted a material alteration.<sup>352</sup> In *A.E. Robinson Oil Co. v. County Forest Prods. Inc.*,<sup>353</sup> the seller's inclusion of an interest provision on its invoices over several years was determined to be a course of dealing that supported including the provision in the parties' contract.<sup>354</sup> The court held, however, that the attorney's fees clause was a material alteration.<sup>355</sup> This was based on the absence of evidence of course of dealing because the invoices did not contain language providing for the recovery of attorney's fees.<sup>356</sup> In *Food Team Intern, Ltd. v. Unilink, LLC*,<sup>357</sup> the court found that a provision requiring the buyer to pay "all attorneys' fees," lacked sufficient qualifying language to limit the buyer's potential exposure and thus was a material alteration."<sup>358</sup>

Unlike the other clauses discussed thus far, courts applied something close to a *per se* approach in finding that pre-judgment interest clauses do not materially alter. While courts were influenced by the language in comment five, the rule adopted may be a consequence of courts' sense that a buyer should reasonably expect that it will be responsible for paying pre-judgment interest if it defaults

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347. *Id.*

348. *Id.* at 658.

349. *Id.* at 686–87.

350. *Id.*

351. *See Jada Toys, Inc. v. Chicago Import, Inc.*, No. 07C699, 2009 WL 3055370, at \*8–9 (N.D. Ill. Sept. 9, 2009).

352. *See Food Team Int'l, Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 504, 420–21 (E.D. Pa. 2012); *A.E. Robinson Oil Co. v. County Forest Prods. Inc.*, 40 A.3d 20, 23–24 (Me. 2012).

353. 40 A.3d 20 (Me. 2012).

354. *Id.* at 23 (determining that comment five supported the conclusion that an interest charge provision did not materially alter the parties contract).

355. *Id.*

356. *Id.* at 23–24.

357. 872 F. Supp. 2d 405 (E.D. Pa. 2012).

358. *Food Team Int'l, Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 405, 421–22 (E.D. Pa. 2012).

in its obligation to pay for goods delivered.<sup>359</sup> Although courts are less likely to adopt a *per se* approach in regard to attorney's fees, here too they may be influenced by the belief that the obligation to pay costs of collection, upon default, is not something that should surprise a buyer.

#### *E. Forum Selection Clauses*

Parties often include clauses in their documents that stipulate the venue in which a matter will be adjudicated in the event of a dispute. The following is an example of a forum selection clause that appeared in a seller's document, titled as a sales contract, which accepted a buyer's offer to purchase: "Buyer agrees that any dispute arising out of this agreement shall be resolved in the Superior Court of New Jersey, Camden County, or the Federal District Court for the District of New Jersey and buyer does agree to submit generally to the jurisdiction of these courts."<sup>360</sup>

This survey identified thirty cases decided over the last decade in which courts determined whether a forum selection clause constitutes a material alteration. In all but seven of the cases reviewed, courts found that a forum selection clause was an additional term that materially altered the parties' contract and, therefore, refused to permit it to become a term of the agreement.

##### *1. Forum Selection Clause Does Not Materially Alter*

Course of dealing played a role in cases in which courts found that a forum selection clause did not materially alter the contract. In *Bell, Inc. v. IFS Industries, Inc.*,<sup>361</sup> over an eight-year period, the seller repeatedly sent invoices that included terms and conditions containing a forum selection clause to which the buyer did not object, which established a course of dealing that overcame the buyer's materiality argument.<sup>362</sup> Likewise, in *CFMOTO Powersports Inc. v. NNR Global Logistics USA, Inc.*,<sup>363</sup> *TSR Silicon Resources, Inc. v. Broadway Com Corp.*<sup>364</sup>, and *Liquid Magnetix Corp. v. Therma-Stor LLC*<sup>365</sup>, the sellers' repeated sending of forms containing forum selection clauses created a course of dealing sufficient to rebut the buyers' materiality arguments.<sup>366</sup> In cases in

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359. See, e.g., *Rocheux Int'l of N.J., Inc. v. U.S. Merchants Fin. Grp., Inc.*, 741 F. Supp. 2d 651, 685–86 (D.N.J. 2010).

360. *Metro. Alloys Corp. v. State Metals Indus.*, 416 F. Supp. 2d 561, 565 (E.D. Mich. 2006).

361. 742 F. Supp. 2d 1049 (D.S.D. 2010).

362. See *id.* at 1053.

363. No. 09-2202(JRT/JJK), 2009 U.S. Dist. LEXIS 113058 (D. Minn. Dec. 4, 2009).

364. No. 9419(NRB), 2007 U.S. Dist. LEXIS 92121 (S.D.N.Y. Dec. 14, 2007).

365. No. 12-CV-3151-WJM-KMT, 2014 WL 1389984 (D. Colo. Apr. 9, 2014).

366. *Liquid Magnetix*, 2014 WL 1389984, at \*2, \*4 (twelve invoices established a course of dealing); *CFMOTO Powersports*, 2009 U.S. Dist. LEXIS 113058, at \*14–18 (finding that terms and conditions attached to 224 invoices, each of which contained a forum selection clause, established course of dealing); *TSR Silicon Resources*, 2007 U.S. Dist. LEXIS 92121, at \*11–12 (75 seller's invoices, which included a forum selection clause sent to a buyer over a five-year

which courts found that forum selection clauses materially alter contracts, courts suggested that they would have reached a different result if a prior course of dealing was present.<sup>367</sup>

In *Quality Wood Designs, Inc. v. Ex-Factory, Inc.*,<sup>368</sup> course of dealing was one of several factors<sup>369</sup> the court identified as important in determining whether a forum selection clause constituted a surprise or hardship that would give rise to a material alteration.<sup>370</sup> Adopting this fact-based approach, the court found there was no course of dealing.<sup>371</sup> Nevertheless, it concluded the forum selection clause was not a material alteration.<sup>372</sup> The court relied on the following facts in concluding that the buyer should not have been surprised by the provision: the seller sent an invoice containing the forum selection clause to the buyer's president the day after the oral agreement was made; the conspicuousness of the relevant terms and conditions; and the buyer's failure to object to the clause despite objecting to other terms.<sup>373</sup> As for hardship, the court concluded it refers to "something other than a debate over the advantage of one's home forum or convenience of litigation in one's home state."<sup>374</sup> In addition, the court found that the buyer could foresee that any dispute between the parties could be litigated in either North Carolina or South Dakota.<sup>375</sup> In another case, in which a court concluded a forum selection clause did not materially alter the contract, the court found that the buyer's assent to the forms containing the forum selection clauses defeated any materiality argument.<sup>376</sup>

## 2. Forum Selection Clause Materially Alters

In contrast to arbitration, warranty disclaimer, limited remedy and attorney's fee provisions, courts assessing the materiality of forum selection clauses rarely discussed the surprise or hardship standard. Rather, they took an approach

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period, established a course of dealing that placed the buyer on notice and rebutted its claim that the forum selection clause materially altered the parties' contract).

367. *Ben-Trei Overseas, LLC v. Gerdau Ameristeel US, Inc.*, No. 09-CV-153-TCK-TLW, 2010 U.S. Dist. LEXIS 11792, at \*14, \*19 (N.D. Okla. Feb. 10, 2010); *Vanlab Corp. v. Blossom Valley Foods Corp.*, 04-CV-6183, 2005 U.S. Dist. LEXIS 10869, at \*6-9 (W.D.N.Y. Jan. 10, 2005).

368. 40 F. Supp. 3d 1137 (D.S.D. 2014).

369. The other factors included when, during the transaction, and how the proposed term was sent, to whom it was sent and whether the term was unusual. *Id.* at 1151.

370. *Id.*

371. *Id.* at 1150-51.

372. *Id.*

373. *Id.*

374. *Id.* at 1153.

375. *Id.*

376. *See Highland Supply Corp. v. Kurt Weiss Greenhouses, Inc.*, No. 08-859-GPM, 2009 WL 2365244, at \*2 (S.D. Ill. Apr. 28, 2009); *see also Hardwire, LCC v. Zero Int'l, Inc.*, No. 14-54-LPS-CJB, 2014 WL 5144610, at \*12-13 (D. Del. Oct. 14, 2014) (finding that a forum selection clause did not materially alter the contract because section 2-207(1) instead of section 2-207(2)(b) was applicable where the clause was in the offer).

similar to that adopted by courts in assessing the materiality of interest clauses, but reached the opposite conclusion in summarily accepting the non-assenting party's argument that a forum selection clause constitutes a material alteration. Most courts simply restated what was cast as the majority rule and turned to precedent in concluding, with cursory discussion, that a forum selection clause constitutes a material alteration.<sup>377</sup> The paucity of analysis is exemplified by courts' tendencies in several cases to not even articulate surprise or hardship as the applicable test.<sup>378</sup>

A facts-based approach, however, was applied in *Duro Textiles, LLC v. Sunbelt Corp.*<sup>379</sup> where the court concluded the forum selection clause materially altered the contract.<sup>380</sup> In a few instances, courts also articulated a rationale for finding that a forum selection clause is a material alteration.<sup>381</sup> This occurred in *Metropolitan Alloys Corp. v. State Metal Industries, Inc.*,<sup>382</sup> where the court stated a rationale that suggests materiality is derived from hardship:

There are still subtle differences between the courts in various states. Certainly the jurors are selected from different economic, political and social backgrounds, which may affect their attitudes even in commercial matters. Counsel other than the party's regular attorney may be needed, at additional expense. The bench and bar has always

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377. See *Bent Glass Design v. Scienstry, Inc.*, No. 13-4282, 2014 WL 550548, at \*9 (E.D. Pa. Feb. 12, 2014); *Barrette Outdoor Living, Inc. v. Vi-Chem Corp.*, No. 2:13-CV-289, slip op. at 3-4 (E.D. Tenn. July 21, 2014); *Compass Automotive Grp., LLC v. Denso Mfg. Tennessee, Inc.*, No. 12-10919, 2013 WL 655112, at \*4 (E.D. Mich. Feb. 22, 2013); *J.D. Fields, Inc. v. Indep. Enters., Inc.*, No. 4:12-CV-2605, 2012 WL 5818229, at \*6-7 (S.D. Tex. Nov. 13, 2012); *Armstrong Pumps, Inc. v. The Brewer-Garrett Co.*, No. 08-CV-911A, 2010 WL 447394, at \*3-4 (W.D.N.Y. Feb. 2, 2010); *Saint Francis Home Med. Equip. v. Sunrise Med. HHG, Inc.*, No.08-CV-224-TCK-PJC, 2009 WL 2461327, at \*9 (N.D. Okla. Aug. 10, 2009); *Statewide Aquastore, Inc. v. Pelseal Techs., LLC.*, No. 5:06-CV-93 (FJS/GHL), 2008 WL 1902207, at \*4 (N.D.N.Y. Apr. 28, 2008); *DTE Energy Techs., Inc. v. Briggs Elec., Inc.*, No. 06-12347, 2007 U.S. Dist. LEXIS 13523, at \*21 (E.D. Mich. Feb. 28, 2007); *Triad Int'l Maint. Corp. v. AIM Aviation, Inc.*, 473 F. Supp. 2d 666, 670-71 n.2 (M.D.N.C. 2006); *Metro. Alloys v. State Metals Indus.*, 416 F. Supp. 2d 561, 567 (E.D. Mich. 2006); *Belanger, Inc. v. Car Wash Consultants, Inc.*, 452 F. Supp. 2d 761, 765-66 (E.D. Mich. 2006); *C. Mahendra (NY), LLC v. Nat'l Gold & Diamond Ctr., Inc.*, 3 N.Y.S.3d 27, 30 (N.Y. App. Div. 2015); *Tacoma Fixture Co., Inc. v. Rudd Co.*, 174 P.3d 721, 724-25 n.4 (Wash. Ct. App. 2008); *Posh Pooch, Inc. v. Argenti*, 11 Misc. 3d 1055(A), No. 106419/2005, slip op. at 2-3 (N.Y. Sup. Ct. 2006); *Lively v. Ijam, Inc.*, 114 P.3d 487, 493 (Okla. Civ. App. 2005); see also *Office Supply Store.com v. Kan. City. Sch. Bd.*, 334 S.W.3d 574, 580-81 (Mo. Ct. App. 2011) (dictum).

378. But see *Ben-Trei Overseas, LLC v. Gerdau Ameristeel US, Inc.*, No. 09-CV-153-TCK-TLW, 2010 Dist. LEXIS 1172, at \*19 (N.D. Okla. Feb. 10, 2010).

379. 12 F. Supp. 3d 221 (D. Mass. 2014).

380. *Id.* at 224.

381. *Constr. Res. Grp., Inc. v. Gen. Technologies, Inc.*, No. 7:13-1695-TMC, 2013 WL 6284003, at \*3 (D.S.C. Dec. 4, 2013); *Tra Indus., Inc. v. Valspar Corp.*, No. CV-10-026-JLO, 2010 WL 2854251, at \*5 (E.D. Wash. July 19, 2010); *Steel Dynamic, Inc. v. Big River Zinc Corp.*, No. 1:06-CV-00110, 2006 U.S. Dist. LEXIS 38533, at \*14-15 (N.D. Ind. June 9, 2006); *Orkal Indus., LLC v. Array Connector Corp.*, 97 A.D.3d 555, 556 (N.Y. Sup. Ct. 2012).

382. 416 F. Supp. 2d 561 (E.D. Mich. 2006).

regarded choice of forum as a significant right. The Court, as a matter of common sense would regard the injection of a choice of forum clause as a proposal for a material alteration in the contract, and believes that while the argument is not as strong as in the case of an arbitration clause, the rationale is the same.<sup>383</sup>

The *Metropolitan* court's reference to arbitration provisions is troublesome because it, like other cases finding that a forum selection clause materially alters a contract, relies on precedent that analogized forum selection clauses to arbitration provisions, which at the time were more likely than not to be viewed as material alterations.<sup>384</sup> The court's reliance on such precedent seems unwarranted particularly given the shift in analysis concerning the materiality of arbitration provisions.<sup>385</sup>

#### IV. CONCLUSION

Likely, section 2-207 will continue to mystify and be the object of derision. Yet over the past decade, judicial developments regarding what constitutes a material alteration may have furthered Section 2-207(2)(b)'s purpose—preventing a party's use of an additional term in its standardized form to reallocate risks beyond those proposed in the offer and thus not binding a party to terms it could not reasonably have expected to be a term of their contract.<sup>386</sup> This has been realized through the judiciary's increased willingness to adopt a facts-based rather than a *per se* approach to assess the materiality of additional terms—a welcome departure by many courts from strict adherence to the examples set forth in official comments four and five to determine when an additional term constitutes a material alteration. This approach allows courts to examine the peculiarities of each case to determine if a clause materially alters based on both the subjective or objective circumstances surrounding the transaction and to permit the inclusion of terms that are fair and that conform to the probable intentions of parties who don't necessarily read the boilerplate terms of the other party's forms.<sup>387</sup>

Nevertheless, concerns remain, including deciding in which instances repeated use of a term in documents constitutes a course of dealing and the frequency of *per se* determinations regarding the materiality of forum selection clauses. Currently too many courts' appear predisposed to assume a course of dealing based simply on the party's repeated sending of forms containing the disputed additional term. Moreover, courts' frequent failure to engage in a fact-rich examination of forum selection clauses undermines efforts to determine if

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383. *Id.* at 567.

384. *See, e.g.*, *Posh Pooch, Inc. v. Argenti*, 11 Misc. 3d 1055(A), No. 106419/2005, slip. op. at 2–3 (N.Y. Sup. Ct. 2006) (finding the forum selection clause as a material alteration, the court relied on a 1978 case, in which a court found that an arbitration provision was a material alteration).

385. *See supra* discussion accompanying notes 163–225.

386. *Murray, supra* note 92, at 46.

387. *See Brown, supra* note 53, at 935, 937–38.



a non-assenting party would genuinely be surprised or suffer the adverse economic consequence that represent hardship if such a provision is included in the party's agreement. Notwithstanding such shortcomings, courts' willingness over the past decade to alter their approach to questions involving section 2-207(2)(b) suggests the possibility that courts will eventually directly address the remaining issues.

