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Uniform Commercial Code—Statutory Construction—Additional Terms in Acceptance or Confirmation.—*Roto-Lith, Ltd. v. F. P. Bartlett & Co*

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the easier it is to conceal a conspiracy in restraint of trade. Legislation has been suggested to meet problems where there is a monopoly by a few firms.²⁴ That may well be the answer and it should be more effective than a judicially evolved section 1 violation. The court in the instant case, by clarifying the language of previous cases, has taken a strong step in solidifying the usefulness of conscious parallelism, *viz.*, it does not of itself constitute conclusive proof of conspiracy but it is relevant evidence to be weighed with other factors in the detection of an antitrust conspiracy.

EDWARD J. McDERMOTT

Uniform Commercial Code—Statutory Construction—Additional Terms in Acceptance or Confirmation.—*Roto-Lith, Ltd. v. F. P. Bartlett & Co.*¹—Plaintiff, a manufacturer of cellophane bags for packing vegetables, ordered from the defendant some emulsion which serves as a cellophane adhesive. The defendant acknowledged before sending the product, the acknowledgment including a disclaimer of all warranties and guaranties. Upon receiving the emulsion, the plaintiff found it to be non-adhesive for his purposes, and brought suit for breach of warranty, whereupon the defendant set up the disclaimer as a defense. The United States District Court for the District of Massachusetts found for the defendant, and the United States Court of Appeals for the First Circuit affirmed. HELD: Section 2-207 of the Uniform Commercial Code controls, and the written acknowledgment was effective even though it materially altered the offer, where plaintiff, knowing of the alteration, voiced no objection and accepted and used the goods.

The law of acceptance prior to the adoption of the Uniform Commercial Code had been subjected to much criticism. At first, and for a considerable period of time, it was certain that an acceptance varying the terms of the offer constituted a rejection;² such acceptance could constitute a counter-offer.³ However, even under these rules, "an acceptance which merely requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on assent to the changed or added terms."⁴

The drafters of the Uniform Commercial Code attempted to resolve all doubts in this area. To this end, Section 2-207⁵ was incorporated into the

²⁴ See articles *supra* note 15.

¹ 297 F.2d 497 (1st Cir. 1962).

² *Kehlor Flour Mills Co. v. Lindon & Lindstroem*, 230 Mass. 119, 119 N.E. 698 (1918); *Saco-Lowell Shops v. Clinton Mills Co.*, 277 Fed. 349 (1st Cir. 1921).

³ *Kennedy v. Russell*, 280 Mass. 510, 182 N.E. 834 (1932); Restatement, Contracts § 60 (1932).

⁴ Restatement, Contracts § 62 (1932).

⁵ Mass. Gen. Laws Ann. ch. 106, § 2-207 (1958) provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it

Code. Under subsection (2) of this Section, the additional terms become part of the contract between merchants unless, (b), they materially alter it. According to the Code, the additional terms which effect a material alteration are not part of the contract, but there is a contract; the additional terms merely being proposals for additions to the contract. Now the question becomes, what significance has a proposal for an addition which materially alters the offer? It is submitted that, under the Code, it has no significance unless expressly accepted. The correct interpretation of the Code, as gleaned from the Section as well as the Comments which follow, is that if the extra terms materially alter the offer, they will not be included unless expressly agreed to by the offeror. If, however, they are not so material, they will be incorporated unless offeror notifies offeree that he objects.

The principal case falls into this category, in that there were terms in the acceptance which materially altered the offer; consequently, these additional terms did not become part of the contract. The rationale of the decision in the principal case is somewhat ambiguous. Actually, the court is holding "that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an 'acceptance . . . expressly conditional on assent to the additional . . . terms.'"⁶ In effect, however, the court rejects Section 2-207 completely, and concludes that defendant's acceptance did not create a contract. It seems to assume that the acceptance was a counteroffer and the ultimate contract was formed by plaintiff's consent to defendant's offer, manifested by plaintiff's silent acceptance of the goods. This is the reasoning of the common law.⁷ It is submitted that the court did not come to grips with the problem as it now exists under the Uniform Commercial Code.

The argument concerning the issue of the inclusion or non-inclusion of the additional terms centers around the Code comments. Defendant relies on Comment 6,⁸ while plaintiff relies on Comment 3.⁹ The court ignores Comment 3 as unreasonable. When read in context, however, Comment 6 is parenthetical to Comment 5 and Section 2-207, both of

states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it;

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

⁶ 297 F.2d at 500.

⁷ Restatement, Contracts § 72 (1932).

⁸ Comment 6 to UCC § 2-207: "If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. . . ."

⁹ Comment 3 to UCC § 2-207: "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. . . ."

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which involve clauses of no unreasonable surprise (i.e., which do not materially alter the offer), and which are, therefore, to be included in the contract. Comment 6 directs itself to this type of fact situation. But the present case involves additions which materially alter the offer, and it is to this situation that Comment 3 pertains. An intelligent reading of the Comment and, more importantly, of the statute itself leads to a result diametrically opposite from that reached by the court. The court in the principal case reaches the anomalous result that, regardless of the fact that the additional terms do materially alter the offer, they also become a part of the contract, even though they were not expressly accepted. The court stated: "If plaintiff's contention is correct that a reply to an offer stating additional conditions unilaterally burdensome upon the offeror is a binding acceptance of the original offer plus simply a proposal for the additional conditions, the statute would lead to an absurdity."¹⁰ It is submitted that this is simply not so.

The court believes that it is too much of a burden for an offeree expressly to condition his acceptance on assent by the offeror to the additional terms. The court is wary of the situation where, as in the principal case, the offeree accepts but adds terms which materially alter the offer.¹¹ As aforementioned, unless he has expressly conditioned his acceptance on assent by the offeror to the additional terms, the result is that he is now bound to a contract which does not include his additional terms, a result he may not have intended at all. But surely, forcing the offeree to take the simple precaution of using language explicitly conditioning his acceptance on the offeror's assent to the additional terms is not imposing an unreasonable burden on him. It is, in fact, a small price to pay for enabling merchants in the business of buying and selling goods to know exactly where they stand. And, it is to this end that the Uniform Commercial Code is, in part at least, aimed.

STEPHEN J. PARIS

¹⁰ 297 F.2d at 500.

¹¹ Obviously the court is not concerned with the situation in which the additional terms do not materially alter the offer, for in that situation, under subsection (1), the additional terms become part of the contract unless the offeror expressly rejects it.