



- Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we're doing another episode in our "Listen and Learn" series – this one discussing UCC 2-207 – "battle of the forms". Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.
- Lee Burgess: Welcome back to the "Listen and Learn" series from the Law School Toolbox podcast. We sometimes get requests for specific topics, and we really appreciate that! In particular, one student messaged us recently to ask us to cover a UCC topic. Great idea! So today, we're going to be talking about UCC 2-207, or "battle of the forms" as it's commonly called. We chose this topic because it can be confusing and it's also reasonably commonly tested on Contracts exams. So, let's jump in!
- Lee Burgess: First things first, whenever you write a Contracts essay, you want to make sure you start off by stating which law applies. A header that says "Applicable Law" is almost always the first thing a professor wants to see on the page.
- Lee Burgess: Remember that the Uniform Commercial Code, or UCC, applies whenever the agreement has to do with a sale of goods. Normally, in a fact pattern, it will be clear whether you're dealing with goods or not. Goods are things that are moveable and tangible at the time the contract is made. So, jars of spaghetti sauce, widgets, crops, and livestock are all goods.
- Lee Burgess: Some professors make an issue over whether something is a good; others don't. When in doubt, the "predominant purpose" test applies. What does this mean? Whatever the main, central point of the contract is will decide whether the contract is governed by the goods rules, the UCC, or the regular old common law.
- Lee Burgess: So, for example, if a homeowner ordered a bunch of wood from a carpenter so the carpenter could build them a fence – that agreement involves both a good, the lumber, and a service – the work to build the fence, right? So, it might not be totally clear whether we are dealing with a UCC goods type of contract or the regular common law.
- Lee Burgess: However, what you need to do is ask yourself what, at the end of the day, the predominant purpose of the contract was. Was the homeowner's goal to just get a big random pile of wood in his yard? No. The main purpose of the contract



was not just to buy wood; it was to pay the carpenter for the skill and labor it takes to turn that wood into a fence. So, the main point was actually a service – building a fence. That means the common law and not the UCC applies. Make sense?

Lee Burgess: Now, back to the UCC and section 2-207 in particular. To understand this rule, it's important to know a tiny bit of background first. Remember the "mirror image" rule from the common law? That's the rule that says that the acceptance has to mirror the offer. If the acceptance comes back and adds terms or changes anything, then it is not going to work, and the contract does not get formed.

Lee Burgess: Now, imagine two merchants. They have their standard boilerplate contracts that no one ever reads. The offeror sends a request for two tons of steel and includes a blurb about terms and conditions, and a forum selection clause. The offeree thinks the two tons of steel idea sounds great and agrees. But that offeree has an arbitration clause in its fine print and it doesn't match with the fine print from the offer. So, what happens under the old mirror image rule? The agreement just falls apart. Uh-oh! You can see how this would be super frustrating for two merchants who probably aren't going to read all that boilerplate language and just want to buy and sell their steel in peace. So, enter UCC 2-207 – the mirror image eraser! The main idea to remember when it comes to the UCC 2-207 is that this rule came in to change the common law mirror image idea and say that the acceptance does not have to exactly match the offer.

Lee Burgess: Okay, with me so far? Now let's get down to the basics of how the rule works. The rule is that where there is a definite and seasonable expression of acceptance with additional terms, that expression will operate as an acceptance. So, let's unpack that a bit.

Lee Burgess: "Definite" means terms aren't left up in the air. If the buyer wants steel but doesn't say how many tons, that's not definite enough. Or, if he says he wants metal but doesn't specify what kind, that's not going to work either. "Definite" means there's nothing waiting to be decided. Both people know what is being bought and sold and for how much. "Seasonable" – what does that mean? It means within the right timeframe. These aren't rule elements that typically make or break your analysis.

Lee Burgess: But what about the idea of "additional terms"? That's just what it sounds like: When the acceptance comes back with stuff added that was not in the original offer. So, what that rule I just stated means is that if the acceptance comes back and it looks totally normal but happens to add something extra, that's not going to automatically defeat the agreement. The contract doesn't get thrown out like it would under the old mirror image rule.



- Lee Burgess: Well, what happens with those additional terms? The acceptance says new stuff, so what does the offeror do with that information? Well, the second part of the rule deals with that. The rule says that whether the additional terms will become part of the contract depends on whether the contract is between two merchants. If both the offeror and the offeree are merchants, then the additional terms will become part of the contract. Makes sense, right? Merchants buy and sell things for a living. They are presumably savvy and efficient in a way that normal people may not be.
- Lee Burgess: So, we have two merchants. Are their additional terms always going to become part of the contract? No. There are three exceptions. The rule to remember is that when it comes to two merchants, any additional terms will become part of the contract, unless: Number 1 – they materially alter the contract; number 2 – the offeror objects within a reasonable time; or number 3 – the offer expressly limits acceptance to the terms of the contract.
- Lee Burgess: So, what does all that mean? Basically, unless the new terms throw off everything, the other guy says “No”, or the offer itself says, “Hey, don’t add anything” – the new term will get into the contract. Makes sense, right?
- Lee Burgess: Now, what happens if one or both people are not merchants? The rule in that situation is different. If the acceptance comes back with additional terms, acceptance still works, but that new term will be treated as a proposal for addition to the contract. That means the other party can accept or reject it.
- Lee Burgess: Finally, sometimes, you’ll see a situation where the offer will say something like, “Acceptance is expressly conditioned on the assent to additional terms.” That’s the scenario from exception number 3 that I just mentioned. In that case, the exception will be treated as a counteroffer.
- Lee Burgess: Okay, so hopefully you’re starting to get a basic understanding of these rules. Let’s walk through a couple of quick hypos to make sure. Here’s the first fact pattern:
- Lee Burgess: “Rod likes to restore vintage cars and has been working on one particular old coupe with flames on the side. He finally finishes it and drives it down to the grocery store. While he is shopping, Ritchie walks by and sees the car and falls in love. He sticks a note under the windshield wiper that reads, ‘I would like to buy your car for \$100,000. If you agree, please come to my house on December 20th’, and lists his home address.
- Lee Burgess: Rod finds the note and thinks it’s a great deal and plans to sell the car to Ritchie. However, he already promised to drive the flame sided coupe in the New Year’s Eve parade in town. He mails a letter to Ritchie which Ritchie receives on December 15th (just in time), that says, ‘I would like to sell you the coupe for



\$100,000 if you loan it back to me on New Year's Eve so I can drive it in the parade.'

Lee Burgess: Do Rod and Ritchie have a contract, and if so, what are the terms?"

Lee Burgess: Well, first things first – are we dealing with goods or something else? Is a car a tangible, moveable item? Yes, it is, so no question about that. So, the applicable law is the UCC. Next question: Was there an offer? Yes, Ritchie put the note on the windshield offering to buy the car for \$100,000. Pretty slam dunk issue there. Now, what about acceptance? The offer said to come to Ritchie's house, and instead Rod mailed the letter. So, the terms of the offer don't quite match the terms of the purported acceptance. Do the offer and acceptance have to be mirror images of each other under the UCC? Nope, so this part is fine. Now that we see the offer and acceptance don't match, we can look into UCC 2-207.

Lee Burgess: Now, the first question: Are we dealing with two merchants? Well, Rod likes to restore cars, but that sounds like a hobby. There is nothing in the facts to tell us that this is his job. What about Ritchie? We have no information on him except that he goes around grocery store parking lots falling in love with other people's cars. Does that make him a merchant? Without more facts, no. So, two non-merchant parties. What happens next? The rule is that when one or both parties are non-merchants, any deviation from the offer will be treated as a proposal for addition to the contract. So, what does that mean for these guys? Well, when Ritchie gets that letter, he can decide whether he wants to buy the car and then loan it back to Rod for one day so he can drive it in the parade.

Lee Burgess: On an essay, what you would want to do is state the possible outcomes and then conclude in a reasonable way one way or the other. See, you can use some facts to show why you're concluding the way you are. That will get you more points. So, for example, you could say something like, "Since New Year's is just one day and a single parade would not add a lot of mileage to the car, Ritchie would probably accept the additional term. Assuming he did, acceptance is satisfied and Rod's new term would become part of the contract."

Lee Burgess: Pretty straightforward so far, right? Now, let's do one more hypo so you can practice. This one is a bit more complicated. Here we go:

Lee Burgess: "Tutu is a ballet clothing company that needs to make some new leotards. Tutu orders pink fabric from Fabby's Fabrics. Tutu sends a boilerplate form that requests fabric and contains a clause at the end that says, 'Tutu reserves the right to return any fabric within 60 days of purchase for any reason.' Fabby's replies with their own boilerplate form accepting the offer, but the fine print at the bottom of the form states, 'No returns for any reason.'

Lee Burgess: So, did the parties form a contract, and if so, what are the terms?"



- Lee Burgess: First things first – is fabric a good? Is it tangible? Yes. Moveable? Yes. Definitely a good. Next step: Are the parties merchants? Well, Tutu makes ballet clothes and Fabby’s sells fabric. So yes, there’s no doubt about it, we are dealing with two merchants. Was there an offer? Yes, Tutu asked for pink fabric. Was there an acceptance? Looks like it. Fabby’s replied back and said “Yes”. What’s the problem? The two forms don’t match. The offer says Tutu can return items, and the purported acceptance says they can’t. So what happens next?
- Lee Burgess: Under UCC 2-207, the difference between the terms would not be a deal-breaker because no mirror image is required. Because we’re dealing with two merchants, the general rule tells us that the new term will become part of the contract so long as it doesn’t, one – materially alter the contract; two – the other party objects; or three – the offer expressly limits acceptance to the terms laid out in the offer.
- Lee Burgess: Did we have any of those exceptions here? Well, we don’t have facts about Tutu objecting or limiting terms of the acceptance, so you’d need to look at whether the new term materially alters the contract. You could argue either way about that.
- Lee Burgess: Now, something about this might be bugging you. Is the new term an “additional” term? Not really, right? It’s sort of a contradiction to an existing term. One form says “Yes” to returns the other form says “No”. So, what do we do in this situation?
- Lee Burgess: Well, surprise surprise – courts differ on this. Some courts say that UCC 2-207 is about “additional” terms, not “different” terms. So because the change in the return policy was not adding something, it was actually changing something – that new term in the acceptance would fall away and the contract would be formed on the original language from the offer about the 60-day return policy.
- Lee Burgess: Other courts treat “additional” or “different” terms the same way regardless of whether they just add something or change it. This is where you’d want to look at the three exceptions mentioned above, to get into analyzing whether any applied, like materiality of the return policy.
- Lee Burgess: And finally, some other courts follow a third approach where the different terms will knock each other out. This is why you might hear UCC 2-207 referred to as the “knockout rule”. Under this approach, the two terms cancel each other out and the missing information is filled in by something like trade usage in the industry or a gap-filler term. Remember, we are dealing with two merchants, so that information shouldn’t be too hard for the court to find.



Lee Burgess: On a given law school exam essay, the important thing to do is to use each and every fact you are given and walk your way through the steps. As I was explaining the rule earlier, you may have found it tricky to visualize. Totally understandable! This is why I always encourage students to write this one out by hand as a flow chart. It's a lot easier to conceptualize that way.

Lee Burgess: And, on your exam, remember that UCC 2-207 comes up as a sub-part to acceptance. That means you still need to talk about whether or not there was an offer first. And then afterwards, make sure you don't skip discussing whether there was consideration.

Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always reach us via our website [contact form](https://www.lawschooltoolbox.com/contact-form) at LawSchoolToolbox.com. Thanks for listening, and we'll talk soon!

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