

South Carolina Law Review

Volume 44
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 4

Fall 1992

Commercial Law

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Recommended Citation

F. Scott Pfeiffer, Commercial Law, 44 S. C. L. Rev. 14 (1992).

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COMMERCIAL LAW

I. UNDER UNIFORM COMMERCIAL CODE A CONTRACT MAY INCLUDE TERMS OF THE ACCEPTANCE THAT WERE DIFFERENT FROM OR ADDITIONAL TO THE TERMS OF THE OFFER

In *Weisz Graphics Division v. Peck Industries*¹ the South Carolina Court of Appeals settled a “battle of forms” by applying section 2-207 of the Uniform Commercial Code (UCC).² The court relied primarily on the parties’ course of dealings and trade usage and held that the delivery term in the seller’s standard acceptance form became part of the parties’ sales contract.³ The court implied that both “different” and “additional” terms contained in a confirmation or acceptance may become part of a contract under UCC section 2-207(2).⁴

Weisz Graphics (“Weisz”) manufactures custom graphic materials for a variety of national customers. Weisz typically manufactures and ships the graphics to customers upon completion of the order, however, Weisz occasionally contracts to sell under release arrangements.⁵ Peck Industries (“Peck”) manufactures commercial signs and had been a customer of Weisz since 1985. Some of Peck’s previous contracts with Weisz were for immediate delivery while other contracts were for release shipment. None of Peck’s previous release contracts extended beyond one year in duration.⁶

Peck sent a purchase order to Weisz on April 8, 1986, specifying that the graphics were “TO BE BILLED AND SHIPPED AS RELEASED.”⁷ The purchase order contained no other shipping information. Weisz immediately confirmed Peck’s order by mailing to Peck an “Acknowledgement of Order” that contained the shipping term “On

1. 304 S.C. 101, 403 S.E.2d 146 (Ct. App. 1991).

2. S.C. CODE ANN. § 36-2-207 (Law. Co-op. 1976).

3. *Weisz Graphics*, 304 S.C. at 107, 403 S.E.2d at 149.

4. *See id.*

5. *Id.* at 102-03, 403 S.E.2d at 147. Under a release arrangement, Weisz produces a customer’s entire order at one time, but instead of shipping the entire order upon completion, Weisz warehouses the merchandise until the customer requests shipment of specified lots. Weisz bills the customer as the goods are shipped. A release arrangement allows customers to achieve the benefit of economies of scale in production and to protect against price increases. Release arrangements are generally limited in the industry to a one-year period. *Id.*

6. *Id.* at 103-04, 403 S.E.2d at 150.

7. *Id.* Peck actually sent the order to the Decker Company, a manufacturer’s representative in Memphis, on April 7. Decker forwarded the order to Weisz on April 8. *Id.*

Releases over 12 Months.”⁸ Weisz completed Peck’s order by early June 1986 and warehoused the decals for future shipment. Peck requested and Weisz released seven shipments during the next twelve months. At the end of twelve months, however, Weisz demanded payment for the remaining unshipped graphics and refused to release any additional shipments until Peck paid for the remaining goods. Peck refused to pay and filled its requirements from another supplier. Weisz subsequently brought an action under the UCC for the unpaid balance of the order.⁹ The trial court entered judgment for Weisz in the amount of \$80,935.97 plus interest, and Peck appealed.¹⁰

The court of appeals began its analysis with UCC section 2-709, which provides:

When the buyer fails to pay the price as it becomes due the seller may recover . . . the price . . . (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances indicate that such effort will be unavailing.¹¹

The court held that the goods in question were identified to the contract.¹² The court next examined the issue of failure to pay when due.

Peck argued on appeal that the twelve-month shipment term was not a part of the contract and that payment was not due because Peck had not requested shipment of the remaining goods.¹³ However, the court held that the twelve-month delivery term was part of the contract based on the parties’ course of dealing, course of performance, and usage of trade.¹⁴

8. *Id.* at 104, 403 S.E.2d at 148.

9. *Id.* at 104-05, 403 S.E.2d at 147. Weisz’s lawsuit actually involved three purchase orders by Peck for custom graphics, but the court’s analysis centered on the largest of the three. *See id.* at 104-05, 403 S.E.2d at 147-48.

10. *Id.* at 102, 403 S.E.2d at 147.

11. S.C. CODE ANN. § 36-2-709 (Law. Co-op. 1976), construed in *Weisz Graphics*, 304 S.C. at 105, 403 S.E.2d at 148.

12. *Weisz Graphics*, 304 S.C. at 105, 403 S.E.2d at 148 (citing S.C. CODE ANN. § 36-2-501(1)(b) (Law. Co-op. 1976)).

13. *Id.* at 105-06, 403 S.E.2d 148. Peck argued that the delivery term should be three years, the period that Peck considered to be a “reasonable time” pursuant to S.C. CODE ANN. § 36-2-309 (Law. Co-op. 1976). *Weisz Graphics*, 304 S.C. at 106, 403 S.E.2d at 148.

14. *Weisz Graphics*, 304 S.C. at 107, 403 S.E.2d at 149. Under UCC § 1-205(3) the course of dealing between the parties and trade usage in the industry can “supplement and qualify the terms of an agreement.” S.C. CODE ANN. § 36-1-205(3) (Law. Co-op. 1976). Additionally, UCC § 2-208(1) provides that the course of the parties’ performance under an agreement is “relevant to determine the meaning of the

The course of dealing between the parties had been to include a twelve-month delivery term for release sales, and the standard in the industry was to include a twelve-month delivery term. Furthermore, Peck failed to object to the twelve-month term in Weisz's Acknowledgement. Accordingly, the court held that "the twelve month release period supplemented the express provisions of the written form and was part of the contract."¹⁵

The court also analyzed the twelve-month release term under the provisions of UCC section 2-207.¹⁶ Under this section, an acceptance containing terms that are "different" or "additional" from the offer can constitute an acceptance sufficient to form a contract.¹⁷ Additional terms become part of a contract between merchants under section 2-207(2) 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 . . . is given within a reasonable time after notice of them is received."¹⁸ The court found that Peck's offer was not expressly limited in its terms, that Peck did not object to Weisz's terms within a reasonable time, and that the twelve-month term did not constitute a material alteration of the terms of the offer.¹⁹ The court held that under section 2-207(2) a term does not constitute a material alteration of the contract if "it conformed to existing trade usage and prior course of dealing between the parties."²⁰ Therefore, the court affirmed the lower court's judgment against Peck by concluding that the twelve-month release term was part of the contract.²¹

The most interesting aspect of the *Weisz Graphics* opinion is the court's interpretation of UCC section 2-207(2). Section 2-207(1) provides

agreement." S.C. CODE ANN. § 36-2-208(1) (Law. Co-op. 1976).

15. *Weisz Graphics*, 304 S.C. at 108, 403 S.E.2d at 150.

16. S.C. CODE ANN. § 36-2-207 (Law. Co-op. 1976). Section 2-207 was enacted to dispense with the "mirror-image" rule. *Weisz Graphics*, 304 S.C. at 107, 403 S.E.2d at 149. At common law the "mirror-image" rule provided that an acceptance which contained terms different from those in the offer constituted a rejection and counter-offer; therefore, no contract was formed. *See, e.g., Sossamon v. Littlejohn*, 241 S.C. 478, 129 S.E.2d 124 (1963).

17. *See* S.C. CODE ANN. § 36-2-207 cmt. 1 (Law. Co-op. 1976).

18. *Id.* § 36-2-207(2) & cmt. 3.

19. *Weisz Graphics*, 304 S.C. at 108, 403 S.E.2d at 150.

20. *Id.*

21. *Id.* at 108-09, 403 S.E.2d at 150. The court also held that the final requirement of § 2-709 was satisfied because the "evidence amply supported the circuit court's finding that any effort by Weisz to resell the goods would be unavailing." *Id.* at 110, 403 S.E.2d at 151 (noting that the goods were custom-made graphics, designed to Peck's particular specifications).

that a contract is formed by an expression of acceptance, regardless of the presence of “different” or “additional” terms; however, section 2-207(2) states only that “additional” terms become part of a contract between merchants unless the offer is expressly limited, the term constitutes a material alteration, or the term is objected to.²² The court in *Weisz Graphics* apparently applied section 2-207(2) to resolve “the problem of the *different* or additional terms.”²³ Nevertheless, the court’s interpretation comports with Official Comment 3 to UCC section 2-207.²⁴

Some commentators also support this interpretation of section 2-207. Ronald Anderson states that “[i]t is . . . therefore to be expected that courts will interpret UCC § 2-207 as though it said what the draftsmen of the Code intended it to mean and conclude that it is applicable to ‘additional’ and also to ‘different’ terms.”²⁵ This rationale focuses the court’s attention on the question of material alteration instead of whether a term is “different” or simply “additional.”

It is unclear from *Weisz Graphics* whether the twelve-month shipping term was an “additional” term, supplying a time where the previous order had none, or whether it was a “different” term, substituting a twelve-month term for an indefinite one. The court’s failure to note a difference belies the importance of the distinction. Nevertheless, the determination of whether the term constitutes a material alteration of the contract remains important.²⁶

However, not all commentators agree with Anderson’s interpretation of section 2-207. Professor Summers clearly believes that section 2-207(2) “applies only to *additional* terms.”²⁷ Additionally, Professor White supports a third interpretation. He advocates deleting both the

22. See S.C. CODE ANN. § 36-2-207 (Law. Co-op. 1976).

23. *Weisz Graphics*, 304 S.C. at 107, 403 S.E.2d at 149 (emphasis added).

24. S.C. CODE ANN. § 36-2-207 official cmt. 3 (Law. Co-op. 1976) (“Whether or not additional *or different* terms will become part of the agreement depends on the provisions of subsection (2).”) (emphasis added).

25. 2 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-207:33, at 292 (3d ed. 1982).

26. See *Weisz Graphics*, 304 S.C. at 108-09, 403 S.E.2d at 150. This analysis centers on both the parties’ prior course of dealings and on industry custom. In *Weisz Graphics* the court of appeals held that the 12-month term was not a material alteration “[b]ecause it conformed to existing trade usage and prior course of dealing between the parties.” *Id.* at 108, 403 S.E.2d at 150. The court relied on Official Comments 4 and 5 to § 2-207 in concluding that a “clause within range of trade usage does not constitute a material alteration.” *Id.* at 108-09, 403 S.E.2d at 150.

27. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3, at 34 (3d ed. 1988).

“additional” and “different” terms, replacing them with gap-filling provisions of the UCC.²⁸

The *Weisz Graphics* court relied heavily on the parties' prior dealings and industry trade standards, but it is unclear whether the court was in fact relying on the “knock-out” rule because the court never expressly called the terms in question “different” or stated that it was using gap fillers. Although each of these three principal interpretations of section 2-207(2) is supported by credible authority, courts should select and adhere to a single, reasonable approach to supply predictability to commercial transactions.

The South Carolina Court of Appeals in *Weisz Graphics* took an important first step in clarifying the application of a confusing and much-debated section of the UCC. Although the court may not have completely clarified its views, it made the law in South Carolina somewhat more predictable. In future decisions the court should build on the foundation it laid in *Weisz Graphics* and further clarify this statute.

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28. *Id.*; see also *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578-80 (10th Cir. 1984). See generally CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 257-60 (2d ed. 1987). This is known as the “knock-out” rule. *Id.*
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