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# Logocratic Analysis of Logical Pathology in *Dale Horning* and *Trans-Aire*

(projection 07-10-18)

## 2-207 rule enthymeme

§ 2-207. Additional Terms in Acceptance or Confirmation.

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

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

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

(b) they materially alter it; or

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

## 2-207 rule enthymeme: how should we rulify it [?]

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

## how should we rulify the rule enthymeme in § 2-207(2) [?]

First we must assign propositional constants

## 2-207 rule enthymeme – process of rulification

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

(a) **[E]** the offer expressly limits acceptance to the terms of the offer;

**(b) [M] they materially alter it; or**

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

## 2-207 rule enthymeme – process of rulification

[I] The agreement is between merchants

[B] the terms become part of the contract

[E] the offer expressly limits acceptance to the terms of the offer

[M] the terms materially alter the agreement

[A] notification of objection to the terms has already been given

[R] notification of objection to the terms is given within a reasonable time after notice of them is received

$$(I \supset B) \not\vee (E \vee M \vee (A \vee R))$$

## 2-207 Official Comment 4 rule enthymeme

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

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## 2-207 Official Comment 4 rule enthymeme

"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:"

**How should we rulify (interpretive abduction) this part of Official Comment 4[?]**

**Use these propositional constants:**

M: a clause materially alters the contract

S: a clause results in surprise if incorporated without express awareness by the other party

H: a clause results in hardship if incorporated without express awareness by the other party

$$M \supset (S \vee H)$$

# Rulification (interpretive abduction) of 2-207 Official Comment 4 in Trans-Aire, followed by *Dale Horning*

Section 2-207 of the Illinois Commercial Code provides that additional terms included in a written confirmation "are to be construed as proposals for addition to the contract" and will not become part of the contract if "they materially alter it." . . . **A term is considered to be a material alteration if its inclusion would "result in surprise or hardship if incorporated without express awareness by the other party."** Ill.Ann.Stat. ch. 26, para. 2-207 Comment 4 (Smith-Hurd 1963); Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill.App.3d 29, 32, 437 N.E.2d 22, 24, 62 Ill.Dec. 785, 787 (1982); see also Chicago Litho Plate Graining Co. v. Allstate Can Co., 838 F.2d 927, 931 (7th Cir. 1988). . . . **As we stated above, Comment 4 to section 2-207 defines a material alteration as one which would "result in surprise or hardship if incorporated without the express awareness"** of the nonassenting party. Ill.Ann.Stat. ch. 26, para. 2-207 Comment 4 (Smith-Hurd 1963) (emphasis added) . . . . **Under this language, an additional term may be characterized as a material alteration if it either "surprises" the nonassenting party or if its inclusion, without an express meeting of the minds, would impose an unreasonable "hardship" upon the nonassenting party.**

# How should *we* rulify Trans-Aire' rulification of the material alteration rule in Official Comment 4[?]

Section 2-207 of the Illinois Commercial Code provides that additional terms included in a written confirmation "are to be construed as proposals for addition to the contract" and will not become part of the contract if "they materially alter it." . . . **A term is considered to be a material alteration if its inclusion would "result in surprise or hardship if incorporated without express awareness by the other party."** Ill.Ann.Stat. ch. 26, para. 2-207 Comment 4 (Smith-Hurd 1963); Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co., 107 Ill.App.3d 29, 32, 437 N.E.2d 22, 24, 62 Ill.Dec. 785, 787 (1982); see also Chicago Litho Plate Graining Co. v. Allstate Can Co., 838 F.2d 927, 931 (7th Cir. 1988). . . . **As we stated above, Comment 4 to section 2-207 defines a material alteration as one which would "result in surprise or hardship if incorporated without the express awareness"** of the nonassenting party. Ill.Ann.Stat. ch. 26, para. 2-207 Comment 4 (Smith-Hurd 1963) (emphasis added) . . . . **Under this language, an additional term may be characterized as a material alteration if it either "surprises" the nonassenting party or if its inclusion, without an express meeting of the minds, would impose an unreasonable "hardship" upon the nonassenting party.**

**Again, use these propositional constants:**

M: a clause materially alters the contract

S: a clause results in surprise if incorporated without express awareness by the other party

H: a clause results in hardship if incorporated without express awareness by the other party

$$(S \vee H) \supset M$$

## Which is the superior rulification (interpretive abduction) of the rule for material alteration in UCC 2-207 Official Comment 4[?]

**Rule enthymeme: "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:"**

**propositional constants:**

M: a clause materially alters the contract

S: a clause results in surprise if incorporated without express awareness by the other party

H: a clause results in hardship if incorporated without express awareness by the other party

*Trans-Aire* and *Dale Horning* $(S \vee H) \supset M$

Our alternative: $M \supset (S \vee H)$

# Posner's correction of his fellow 7th Circuit judge

**Posner:** "Not infrequently the test is said to be "surprise or hardship," e.g., **Trans-Aire International, Inc. v. Northern Adhesive Co**., 882 F.2d 1254, 1260-61 (7th Cir.1989); 1 Farnsworth, supra, s 3.21, at p. 266 **but this appears to be a misreading of Official Comment 4 to UCC s 2-207**. The comment offers 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" (emphasis added). **Hardship is a consequence, not a criterion.** (Surprise **can be either.)** Schulze & Burch Biscuit Co. v. Tree Top, Inc., supra, 831 F.2d at 714. . . . You cannot walk away from a contract that you can fairly be deemed to have agreed to, merely because performance turns out to be a hardship for you, unless you can squeeze yourself into the impossibility defense or some related doctrine of excuse. Market Street Associates Limited Partnership v. Frey, 941 F.2d 588, 594 (7th Cir.1991)." *Union Carbide*, 947 F. 2d 1333 (Posner, J.)

**How should we rulify what Posner asserts about the relation among propositions M, S, and H [?]**

$M \supset H$

Where is S on his analysis?

"surprise can be either"

# UCC 2-207 Official Comments 4 and 5

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

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

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# Diagnosing the problem in *Trans-Aire*: The "Law of Deductive Form"

Here is a striking fact about the practice of legal argument. If, in a context of doubt about the criteria of application of a legal concept that appears in a legal rule ('consideration,' 'vehicle,' 'material alteration', etc.) a judge is to conclude that a given party has satisfied the criteria for that concept, then the judge will specify sufficient conditions for application of that concept. Having specified those criteria, she may offer a valid then deductive inference to conclude that the party satisfied the concept in question. Similarly, if in a context of doubt a judge is to conclude that a given party has not satisfied the criteria for an applicable legal concept, she will specify necessary conditions for the application of that concept. Having specified them, she may then offer a valid deductively inference to conclude that the party did not satisfy those criteria. This is a ubiquitous pattern of justificatory legal interpretive reasoning. This argumentative pattern allows a judge to offer valid deductive inferences in cases in which "sub rules" are specified for terms in rules that are unclear -- valid inferences that would not be possible if the judge articulated only a sufficient condition of a concept and also held that the concept did not apply, or articulated only a necessary condition while also holding that it did apply. This argumentative pattern seems to reflect the deep connection that members of this culture of legal argument believe exists between legal justification and deduction.

Modified from Brewer, *Exemplary Reasoning*, 109 Harv. L. Rev. at 997-998.

# Truth-functional interpretation of *unless*

| P | Q | ~Q | ~P | P ≡ ~Q | ~P ≡ Q | P ⊻ Q | ~Q ≡ P |
|---|---|---|---|---|---|---|---|
| T | T | F | F | F | F | F | F |
| T | F | T | F | T | T | T | T |
| F | T | F | T | T | T | T | T |
| F | F | T | T | F | F | F | F |