

Rolling Contracts Rolling Over Contract Law

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Two decisions authored by Judge Easterbrook of the Seventh Circuit Court of Appeals have drawn considerable attention to rolling contracts.¹ A rolling contract is a deal in which the contract either is not formed until, or is modified when, the last terms are presented for assent. In a rolling contract, the buyer does not see most of the terms until after the goods are shipped, and the buyer has already paid for them. The seller simply includes a copy of its standard terms in the box in which it delivers the goods. Enclosed instructions from the seller also inform the buyer that it must return the goods within a specified time period or become bound by the additional terms. The issue raised by rolling contracts is whether the seller's additional standard terms are enforceable.

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1. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

This paper criticizes two distinct approaches advanced by advocates of the rolling contract concept. Judge Easterbrook's approach is based upon principles of contract formation. This essay shows that his analysis is replete with distortion and avoidance of the relevant contract principles.² Professor Robert Hillman focuses on the contract terms, arguing that, irrespective of faulty analysis concerning contract formation, the terms included in the box should nevertheless be part of the contract between the parties.³ This essay challenges his doctrinal bases to support inclusion of the terms in the contract and argues, in addition, that inclusion of the terms represents an inappropriate normative choice.

I. CONTRACT FORMATION

The initial decision by the Seventh Circuit is *ProCD, Inc. v. Zeidenberg*.⁴ The case involved the purchase of computer software that was sold in a box packaged in cellophane shrinkwrap. The software was on a CD-ROM disc ("compact disc-read only memory") and contained more than 3000 telephone directories. ProCD offered this database to consumers and to merchants at different prices. The box containing the software that was directed toward the consumer market was much less expensive but contained a restriction that limited its use to noncommercial purposes. This license actually popped up on the computer screen each time the software was run. A buyer purchased the consumer package of the software at a retail outlet, but subsequently ignored the license restriction by using it in his business. When ProCD filed suit to enjoin this use, the primary issue was whether the restrictions that were not revealed until the box was opened constituted effective terms to the contract. In an opinion by Judge Easterbrook, the Seventh Circuit held that the terms were part of the contract because they were part of the acceptance by the buyer.⁵ In the court's view,

2. The parties unquestionably are free to vary the effect of provisions of Article 2 of the Uniform Commercial Code. *See* U.C.C. § 1-102(3) (2002). The parties thus could negotiate to use a rolling contract format as the basis to establish any resulting contract. Rolling contracts, however, are a variation of the effect of the relevant Article 2 provisions, and in order to be effective, the variation must be by agreement. *Id.*

3. Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743 (2002).

4. *ProCD, Inc.*, 86 F.3d 1447.

5. The court simply assumed that Article 2 governed the transaction. Most cases that have addressed the issue have concluded that software licensing agreements are "transactions in goods" within the scope of Article 2. *See, e.g.*, *Colonial Life Ins. Co. of Am. v. Elec. Data Sys. Corp.*, 817 F. Supp. 235 (D.N.H. 1993); *Novacore Techs., Inc. v. GST Communications Corp.*, 20 F. Supp. 2d 169 (D. Mass. 1998), *aff'd*, 229 F.3d 1133 (1st Cir. 1999); *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046 (D. Minn. 2001). *But see* *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. Ct. App. 1984); *Adobe Sys. Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002).

ProCD had extended an offer that invited acceptance through conduct by the buyer that was specified in the offer's terms.

The decision by Judge Easterbrook took a particularly disturbing turn when he subsequently extended it to apply to a transaction that clearly involved a sale of goods. In *Hill v. Gateway 2000, Inc.*,⁶ a customer ordered a computer from Gateway over the telephone and paid for it by giving a credit card number. Gateway shipped the computer to the customer, but inside the box was a list of terms and a notice that stated the terms would apply unless the customer returned the computer within thirty days. When the customer filed an action with respect to the computer and its components, Gateway insisted that the arbitration clause included in the list of terms applied. After losing on this position before the district court, Gateway succeeded on appeal before the Seventh Circuit.⁷

Judge Easterbrook simply applied the *ProCD* case in *Hill*, stating that *ProCD* "holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them

6. *Hill*, 105 F.3d at 1147.

7. The *ProCD* and *Hill* opinions have been followed in other cases. *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d 1060 (N.Y. Sup. Ct. 1997) (stating that an arbitration provision was included in the standard terms delivered with a computer system); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (Sup. Ct. 1998) (discussing a computer with standard terms in the box; arbitration clause); *Westendorf v. Gateway 2000, Inc.*, 41 U.C.C. Rep. Serv. 2d 1110 (Del. Chan. 2000) (discussing same), *aff'd*, 763 A.2d 92 (Del. 2000); *Rinaldi v. Iomega Corp.*, 41 U.C.C. Rep. Serv. 2d 1143 (Del. Super. Ct. 1999) (discussing a computer Zip drive with standard terms in a box; disclaimer of implied warranty); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000) (discussing the shrinkwrap packaging of software with licensing agreement; limitation of remedies) (includes a dissenting opinion); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519 (W.D. Pa. 2000) (discussing packing of software with limitation and disclaimer of warranties), *aff'd without opinion*, 234 F.3d 1265 (3d Cir. 2000); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003) (stating that term included in telephone packaging was accepted based on the failure to return the telephone). For an earlier case employing similar reasoning see *Monsanto Agric. Prods. Co. v. Edenfield*, 426 So. 2d 574 (Fla. Dist. Ct. App. 1982) (concluding that when the buyer learned of a warranty limitation after the sale but used the product with knowledge of the limitation, the limitation became part of the contract because the book of directions stated that the product could be returned if the limitation was not satisfactory). The Court in a recent opinion, *Defontes v. Dell Computers Corp.*, 52 U.C.C. Rep. Serv. 2d 795 (R.I. Super. Ct. 2004), applied the reasoning of *ProCD* and *Hill*, but distinguished its case in the absence of a clear indication that a customer who was unwilling to agree to the new terms could simply return the product. The court concluded that the plaintiffs "did not 'knowingly consent' to the terms and conditions of the agreement because they were not given sufficient notice of the method to reject those terms." *Id.* at 804.

by returning the product”⁸ and concluding that the same principle applies to any goods. Such a proposition is far too broad. As the rest of this section of the essay demonstrates, it overthrows several basic contract principles. The customer was bound under the *Hill* decision simply by failing to return the computer within the designated time period.⁹

The core of the problem with the analysis of the Seventh Circuit is the court’s blind insistence that a statement, made originally in *ProCD* and repeated in *Hill*, applies to the facts of the cases. The statement is as follows: “A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.”¹⁰ The statement is entirely accurate as a general statement of law, but it does not fit the facts that were before the court.

This point is the most obvious in *Hill*. The customer called Gateway and agreed to purchase a specified computer. Most likely, the Gateway representative promised to ship such a computer to the customer. This exchange of promises created a contract.¹¹ Even if the Gateway representative did not make this promise, Gateway shipped the computer, which would also be the basis of finding contract formation. These results are particularly clear in the *Hill* context because of Uniform Commercial Code (UCC) section 2-206(1)(b). It provides that “an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.” The court ignores the agreed upon exchange made between the parties and simply begins its analysis with the unwarranted assumption that the seller extends the offer in shipping the goods together with a list of contract terms.¹² In reality, a contract was already formed and the seller sought to impose additional terms unilaterally by

8. *Hill*, 105 F.3d at 1148.

9. Gateway made the burden greater subsequently by reducing the time period from thirty days to five days. *See Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

10. *ProCD*, 86 F.3d at 1452; *Hill*, 105 F.3d at 1149.

11. U.C.C. § 2-204(1) (2002).

12. The effect of such broad categorizations as a substitute for analysis of the specific transaction is shown in a subsequent case against Gateway on precisely the same issues. The court in *Brower*, 676 N.Y.S.2d at 572, perpetuated the categorization: “Transactions involving ‘cash now, terms later’ have become commonplace, enabling the consumer to make purchases of sophisticated merchandise such as computers over the phone or by mail—and even by computer.” Referencing the *ProCD* and *Hill* cases, the New York court concluded expansively that “we agree with their rationale that, in such transactions, there is no agreement or contract upon the placement of the order or even upon the receipt of the goods.” *Id.*

requiring the buyer either to accept them or to forgo its contract benefit.

The Seventh Circuit, and the courts that have followed its lead, use section 2-204 for support, but they distort the provision in the process.¹³ Section 2-204(2) provides that “[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.” The moment of the making of the contract in cases like *Hill*, however, is not undetermined. Depending upon the response of the sales representative, it occurred upon a promise to ship the computer or upon shipment of the computer.¹⁴ The Seventh Circuit analysis ignores the legal effect of the prior exchange between the parties and arbitrarily selects the terms sent by the vendor with the goods as the offer to form a contract. Section 2-204(2) does not grant courts a license to disregard contracts that the parties have created in order to achieve a different result.

Judge Easterbrook also makes a disingenuous attempt in *ProCD* to draw support from section 2-606.¹⁵ This section binds a buyer to acceptance of goods tendered by the seller if the buyer fails to make an effective rejection following a reasonable opportunity to inspect the tendered goods.¹⁶ Judge Easterbrook views the *ProCD* and *Gateway* method of contracting as an opportunity for buyers to reject following an opportunity to inspect the *terms* submitted with the goods. He sees support in section 2-606 because it shows that the UCC allows parties to structure transactions in which the buyer is given a chance to make a final decision after detailed review.¹⁷ Every buyer in a sales contract has a duty to accept conforming goods that are properly tendered.¹⁸ In the event that the goods fail to conform to the contract, the buyer has the right to reject them,¹⁹ but the buyer must act expeditiously in order to invoke its right to reject.²⁰ Buyers that delay excessively will be held to have accepted the goods,²¹ thereby invoking the legal consequences of

13. See, e.g., *ProCD*, 86 F.3d at 1452; *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 312–13 (Wash. 2000).

14. U.C.C. § 2-206(1)(b).

15. 86 F.3d at 1452–53.

16. U.C.C. § 2-606(1)(b).

17. The final decision afforded to the buyer by section 2-606 has to do with conformance of the goods to the contract, not with the terms of the deal.

18. U.C.C. §§ 2-301, 2-507(1).

19. *Id.* § 2-601.

20. *Id.* § 2-602.

21. *Id.* § 2-606(1)(b).

an acceptance,²² including waiver of any right to reject.²³ Even if the buyer does rightfully reject the goods, the buyer retains its rights under the contract.²⁴ On the other hand, buyers do not have a duty to either accept terms submitted by their sellers after the contract is formed or reject the goods.²⁵ Furthermore, under the *ProCD* approach, a buyer that rejects Gateway's additional terms by returning the goods is forced into giving up its benefits under the contract.

The federal district court in Kansas rejected the *ProCD* and *Hill* analysis of the Seventh Circuit in *Klocek v. Gateway, Inc.*²⁶ The plaintiff sought to bring a class action suit concerning breach of contract and warranty, but Gateway argued that the plaintiff was required to arbitrate the claims. The same standard terms, including the arbitration clause that was at issue in *Hill*, were included with the computer delivered to the plaintiff, except that the time allowed to reject the terms and the contract had been shortened from thirty days to five days. The court found nothing in either of the opinions of the Seventh Circuit to support the proposition that the vendor was the offeror.²⁷ In the case before it, the evidence was in dispute as to whether Klocek purchased the computer over the telephone or in person at a retail establishment. The court determined that Gateway did not provide any evidence in either instance that it was the offeror. It stated:

The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff).²⁸

22. *Id.* § 2-607.

23. *Id.* § 2-607(2).

24. *Id.* § 2-711(1).

25. Buyers, of course, are free to agree to modifications of contract terms. *Id.* § 2-209(1).

26. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1338–39 (D. Kan. 2000). The district court subsequently granted the defendant's motion to dismiss based on the lack of subject matter jurisdiction. The plaintiff joined in the motion to dismiss. *Klocek v. Gateway, Inc.*, 2000 WL 1372886 (D. Kan.). The Klocek analysis is consistent with some prior cases. *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (contract for purchase of software was already created before the vendor presented the buyer with the license agreement); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (terms of licensing agreement sent with the software were not part of the contract); *United States Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201 (D. Kan. 1998) (sales contracts for surgical instruments were concluded upon receipt of the customer orders), *aff'd*, 185 F.3d 885 (D.C. Cir. 1999); *see also Paul v. Timco, Inc.*, 811 A.2d 948 (N.J. Super. Ct. App. Div. 2002) (arbitration provision sent with an extended warranty after the contract for the purchase of an automobile had been formed was unenforceable).

27. *Klocek*, 104 F. Supp. 2d at 1341.

28. *Id.* at 1340.

The Seventh Circuit does raise some important policy considerations in its decisions in *ProCD* and *Hill*. It would be an inefficient and frustrating way to conduct business for the computer sales representative to read several pages of contract terms to buyers over the telephone. Furthermore, disputes could easily arise concerning real or fake assertions that the sales representative did not read a particular term. On the other hand, there are ways to proceed with a rolling contract without resorting to Judge Easterbrook's approach. The sales representative can at least be required to divulge during the conversation that several contract terms will be included with the shipped product and that the buyer must take specified action to avoid being bound to a contract with these terms.²⁹ If the customer then proceeds with the transaction, the vendor then indeed would be the master of its counter-offer.³⁰

Easterbrook's opinions, however, sweepingly make any terms that a vendor includes together with the ordered goods terms of the contract if the customer has the option to return the goods and forgo the contract. He supports for this proposition by comparing tickets purchased for transportation that contain several terms on the subsequently delivered tickets and insurance contracts that become effective before the actual policy, with its detailed terms, is forwarded to the customer.³¹ He also points out the inclusion of a manufacturer's express warranty that is included inside the factory sealed carton of consumer goods.³² From the existence of contracts in these transactions where there is payment first and the terms are sent later, Easterbrook extrapolates and characterizes all such transactions as comparable.

The contexts, however, are different in these transactions. Federal law and international treaties require the inclusion of many terms on transit

29. The transaction in *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627 (Fla. Dist. Ct. App. 1999), is illustrative. The software ordered by the buyer arrived with a license agreement affixed to the outside of the box and a sticker on the package indicating that by opening the package the buyer indicated its consent to the license agreement. In addition, however, the sales order form for the software specifically stated that it incorporated a license agreement and indicated that the license agreement was available for review by the buyer prior to signing the order. The court held that the sales contract incorporated the license agreement by reference.

30. See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 644 (2002) ("There is no reason in principle why contracts cannot be formed in stages, provided the circumstances or prior practice makes this clear or adequate notice is provided.").

31. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

32. *Id.*

tickets,³³ and even consumers who secure a binder for an insurance policy fully expect to receive a policy later that spells out more detailed terms. Some courts have recognized that express warranties delivered to the consumer with the product are binding if they become part of the basis of the bargain,³⁴ but they generally have also refused to recognize a disclaimer of implied warranties delivered in this manner because of the absence of the buyer's indication of assent.³⁵ In the absence of any prior notification or applicable trade usage or course of dealing,³⁶ however, parties purchasing goods are not going to anticipate that their contract rights and remedies on the purchase are going to be contingent upon terms that the vendor includes with delivery of the product. Under these circumstances, the understanding is that the deal has been closed, and

33. "Try looking at what comes with the airline ticket—it is mostly stuff required by federal regulation (no smoking and exit-row seating restrictions) or international treaty (Warsaw Convention, Hague Protocol Amendment, and the like)." *See The Gateway Thread—AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1195 (2000) (comments of Professor Jean Braucher).

34. "If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209)." U.C.C. § 2-313 cmt. 7. *See, e.g.*, *Autzen v. John C. Taylor Lumber Sales, Inc.*, 572 P.2d 1322 (Or. 1977) (involving post-sale representation by the seller concerning the soundness of the hull of the purchased boat); *Jones v. Abriani*, 350 N.E.2d 635 (Ind. Ct. App. 1976) (involving post-sale assurance of repair as a binding express warranty); *Paskell v. Nobility Homes, Inc.*, 871 S.W.2d 481 (Tenn. 1994) (involving post-sale guarantee extended by the manufacturer of the roof and rafters of a mobile home as a modification of the terms of the sale); *Marston v. E.I. du Pont de Nemours & Co.*, 448 F. Supp. 172 (W.D. Va. 1978) (discussing an enforceable warranty included in a label on chemical containers); *Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984) (involving buyer who did not make safety modifications in reliance on the seller's postsale representations).

35. "According to most pre-Code law, 'if a bargain with even an implied warranty has once arisen, a subsequent disclaimer of warranty when the goods are delivered will not avail the seller.' The same rule has generally prevailed under the Code." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 435–36 (5th ed. 2000); *see, e.g.*, *Gold Kist, Inc. v. Citizens & S. Nat'l Bank*, 333 S.E.2d 67 (S.C. Ct. App. 1985) (disclaimer of implied warranties and limitation of remedies printed on delivered bags of corn seed were ineffective to modify the contract already created because there was no evidence that the buyer was aware of the term or had accepted it); *Morgan Bros., Inc. v. Haskell Corp.*, 604 P.2d 1294 (Wash. Ct. App. 1979) (inclusion of a limitations-of-damages provision in the seller's invoice did not result in a modification of the contract); *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. Dist. Ct. App. 1972) (disclaimer in new car manual delivered to buyer after sale consummated held ineffective); *Vandalia Ranch, Inc. v. Farmers Union Oil & Supply Co.*, 718 P.2d 647 (Mont. 1986) (disclaimer and remedy limitation in herbicide manufacturer's manual received after the sale was not effective because buyer was not aware of the terms at the time of contracting). For numerous additional cases see the cases cited in WILLIAM H. HENNING ET AL., *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* § 11:32 (2002).

36. In *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000), the parties had a course of dealing over several years under which all of the software provided was distributed under a licensing agreement.

that understanding establishes a contract under Article 2 of the UCC.

The result in *ProCD*, unlike *Hill*, arguably can be justified on this basis if the commercial expectation among consumers is that software will be accompanied by restrictions concerning its use. Evidence presented in *M.A. Mortenson Co. v. Timberline Software Corp.*³⁷ showed that licensing agreements are used extensively throughout the software industry. A primary rationale for the promulgation of the Uniform Computer Information Transactions Act (UCITA)³⁸ was to establish a legal framework for computer information models that is based more on the licensing of intellectual property than on a model such as the sale of goods.³⁹ The Seventh Circuit chose to extend *ProCD* beyond software,⁴⁰ but it also distorted the contract formation framework in both cases.

The propositions advanced in the *ProCD* and *Hill* opinions cause problems in the typical case that invokes the battle of the forms. In such a case, the seller and the buyer send each other forms printed with their standard terms, and those forms are not consistent with one another. When a dispute subsequently arises between the parties, the contract forms are inconsistent with respect to some of the terms. Section 2-207 abrogates the mirror image rule by providing that a definite and seasonable expression of acceptance operates as an acceptance even though it states terms that are additional to or different from those that are offered, unless the acceptance is expressly made conditional upon assent to the additional or different terms. In the absence of the conditional acceptance, a contract is formed. Any of the additional or

37. *Id.*

38. UCITA was promulgated as a model statute in 1999 by the National Conference of Commissioners of Uniform State Law.

39. UCITA covers “computer information transactions.” UCITA § 103(a). It allows customers to become bound to terms that are available after access to the product or service. The customer must manifest its assent to the terms after an opportunity to review them. The customer has a right of return if it decides to reject the terms. *Id.* §§ 208(1), 209(a), (b), 112(e); *see also* note 93 *infra*.

40. “Plaintiffs ask us to limit *ProCD* to software, but where’s the sense in that? *ProCD* is about the law of contract, not the law of software.” *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997). *But see* Shubha Ghosh, *Where’s the Sense in Hill v. Gateway 2000?: Reflections on the Visible Hand of Norm Creation*, 16 *TOURO L. REV.* 1125, 1136 (2000). Ghosh states:

The central holding in *ProCD* is that copyright law does not pre-empt contract law, and therefore a creator can protect his interest in a database not protected by copyright law through the use of contract terms. A more appropriate generalization is that *ProCD* is about the law of intellectual property and hence irrelevant to the facts of *Gateway 2000*.

Id.

different terms that are material will not become part of the contract formed, even between merchants, “unless expressly agreed to by the other party.”⁴¹

The Seventh Circuit’s position (that terms included by the vendor in the packaging with the goods that it delivers will become part of the contract unless the buyer complies with the vendor’s requirements to return the goods) runs counter to the provisions of section 2-207. If a buyer extends an offer through its form and the seller accepts through its form, but does not make its acceptance conditional upon the buyer’s assent to any additional or different terms, a contract is formed at that point. The seller can neither unilaterally modify the contract thereafter by sending further terms with the goods,⁴² nor condition the rights of the buyer under the contract already formed to assent by the buyer to further terms.⁴³

The court in both *ProCD* and *Hill* ignores any relationship to section 2-207 with the cavalier conclusion that the section is irrelevant when the transaction involves only one written form. This position is simply an inaccurate statement of law. Section 2-207(1) clearly applies when parties form an oral contract and one of them sends the other party a written confirmation of the terms of their contract.⁴⁴ If the written material sent in the package with the computer constituted the vendor’s written confirmation,⁴⁵ the additional terms would all have been treated as proposals for addition to the contract, and they would not have become operative because the recipient had not expressly assented to them.⁴⁶

41. U.C.C. § 2-207 cmt. 3 (2002). The new proposed amendments to section 2-207 delete any special rules with respect to merchants. For a discussion of the proposed amendment, see text accompanying notes 91–97 *infra*.

42. See notes 66–76 *infra* and accompanying text.

43. See notes 60–61 *infra* and accompanying text.

44. The Comments to section 2-207 certainly recognize transactions in which each of the parties sends its form as a typical situation for which the section is designed. Like the text of section 2-207(1), however, the Comments also recognize the situation in which only one of the parties sends a confirmatory memorandum to an oral contract: “the written confirmation, where an agreement has been reached either *orally* or by informal correspondence between the parties and is followed by *one* or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.” U.C.C. § 2-207 cmt. 1 (emphasis added).

45. The court in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), states that the standard terms included with the packaged Gateway computer could have constituted a written confirmation and that section 2-207 applies to the transaction. The court in *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991), held that the licensing agreement on the software should have been treated as a written confirmation that could not automatically become part of the contract between the merchants because the terms in the licensing agreement materially altered the terms of the offer.

46. U.C.C. § 2-207(2); *United States Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d

Arguably, the materials sent by the vendors in *Hill* did not constitute a written confirmation of the existing contract.⁴⁷ Rather than confirming the contract terms that the parties had agreed upon previously, the written material purported to bind the buyer to additional terms unless the buyer disavowed the entire contract by taking the timely action dictated by the vendor. If the writing was not a written confirmation, the additional terms still would not have been part of the contract. The seller simply proposed an option to modify the existing contract or to rescind it.⁴⁸ Either option in this context requires the express consent of the buyer.⁴⁹ Once it enters into a contract with the buyer, the vendor cannot unilaterally change the terms of the contract—not even when allowing the alternative of ending the contract. The comments to section 2-207 clearly recognize this fundamental premise of contract law: “Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.”⁵⁰ This is certainly what happened in *Hill*: the deal had been closed in commercial understanding and the vendor subsequently sought to establish further terms to an existing contract. The fatal flaw in the *ProCD* and *Hill* analyses is the abject failure to even address the legal significance of the exchange between the parties prior to the delivery of the goods.⁵¹ Just

1201 (D. Kan. 1998), *aff'd*, 185 F.3d 885 (D.C. Cir. 1999).

47. See *Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 804 (Tex. 1991) (“The acknowledgments that followed were not a formal confirmation of [sic] parties’ agreement because they did not contain the terms specifically negotiated and agreed to by the parties.”).

48. U.C.C. § 2-209(1).

49. *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993); *Orris*, 5 F. Supp. 2d at 1201; see notes 67–76 *infra* and accompanying text for an enhanced discussion.

50. U.C.C. § 2-207 cmt. 2.

51. Judge Easterbrook’s decision in *Hill v. Gateway* has been soundly criticized for its distortion of contract formation principles. See, e.g., Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1819–24 (2000); Shubba Ghosh, *supra* note 40, at 1132–35; John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 905–07 (2002); Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205, 1217, 1223–27 (2000). The extent of the dissatisfaction with the Easterbrook approach can be discerned from the American Association of Law Schools Contracts Listserv interchanges among law professors concerning the *Gateway* decision. See *The Gateway Thread – AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1148–49 (comments of Professor Stewart Macaulay), 1153–55 (Mark Gergen), 1155 (Tom Stipanowich), 1156–57, 1168–69 (Harry Flechtner), 1174–76 (Spencer Neth), 1177–79 (Mark S. Scarberry), 1189–90 (Jay Mootz), 1190–91 (Peter Linzer) (2000) [hereinafter *Gateway Thread*]. Student

because the parties *can* contract in the manner described by the Seventh Circuit does not mean that they actually *did*.

II. CONTRACT TERMS

Professor Robert Hillman contends that Judge Easterbrook's distortion of contract formation principles should make no difference.⁵² He poses a variety of different methods by which Gateway's terms could nevertheless become binding even though the parties formed their contract before the buyers received the terms.⁵³ First, Gateway could have made out a case that retention of the computer beyond the thirty day period stipulated by Gateway constituted an implicit agreement by the buyers to modify the agreement. Second, Gateway could have argued that the buyers impliedly agreed to delegate to Gateway the right to fix the terms. Third, Gateway could have demonstrated that one of the terms that was part of the contract was an implied condition that the buyers would agree to terms that Gateway would send later.

This approach essentially perpetuates, on a different level, the same type of error in which Judge Easterbrook indulged. Whereas Judge Easterbrook addressed contract formation and focused on what the parties could have done rather than on what they actually did, Professor Hillman takes the same approach with respect to contract terms. Because mechanisms exist by which a buyer could agree to incorporate terms to be provided subsequently by the seller into an existing contract, Professor Hillman chooses to bind the buyer to these terms on the basis that any one of these mechanisms should be assumed for consumer buyers.

All of the methods advanced by Professor Hillman for inclusion of the Gateway terms are grounded in an implicit agreement by the buyer—an implicit agreement to modify the contract, an implicit agreement to

commentators have also criticized the contract analysis in *ProCD* and *Hill*. See Mark Andrew Cerny, Comment, *A Shield Against Arbitration: U.C.C. Section 2-207's Role in the Enforceability of Arbitration Agreements Included with Delivery of Products*, 51 ALA. L. REV. 821 (2000); Mark A. French, *Recent Developments: Hill v. Gateway 2000, Inc.*, 12 OHIO ST. J. ON DISP. RESOL. 811 (1997); Jason Kuchmay, *ProCD, Inc. v. Zeidenberg: Section 301 Copyright Preemption of Shrinkwrap Licenses—A Real Bargain for Consumers?*, 29 U. TOL. L. REV. 117 (1997); Kristin Johnson Hazelwood, *Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers*, 55 WASH. & LEE L. REV. 1287 (1998); Kell Corrigan Mercer, *Consumer Shrink-Wrap Licenses and Public Domain Materials: Copyright Preemption and Uniform Commercial Code Validity in ProCD v. Zeidenberg*, 30 CREIGHTON L. REV. 1287 (1997); Christopher L. Pitet, Note, *The Problem With "Money Now, Terms Later": ProCD, Inc. v. Zeidenberg and the Enforceability of "Shrinkwrap" Software Licenses*, 31 LOY. OF L.A. L. REV. 325 (1997).

52. Hillman, *supra* note 3, at 754–56.

53. *Id.* at 753–54.

allow Gateway to fix the terms, or an implicit condition based on agreement to the later terms. These “implicit” agreements are simply fictions advanced to circumvent established contract principles that preclude inclusion of the terms under the facts of the case. This reliance upon implicit agreements leads inevitably to recognition that sellers unilaterally can inject terms into a bargain that will become part of any continuing contract agreement.

The advancement of a theory that an implied condition was created under which the Hills agreed to agree to terms that would be sent later by Gateway is particularly disturbing. It grants the seller an open opportunity to convert its acceptance into a conditional acceptance simply by enclosing additional terms with the goods shipped, and it accomplishes this monumental transformation through the process of implication. This approach to contract formation is one that exceeds even the debunked *Roto-Lith* opinion.⁵⁴ Despite the inclusion of different or additional terms, a definite and seasonable expression of acceptance is an acceptance under section 2-207(1), “unless acceptance is *expressly* made conditional on assent to the additional or different terms.”⁵⁵ The *Roto-Lith* opinion essentially concluded that the acceptance in the seller’s form was *by implication* conditional simply through the conspicuous inclusion of additional material terms. The opinion met with widespread disapproval, and the First Circuit later overruled it.⁵⁶ Professor Hillman’s theory goes even further than *Roto-Lith*: Simply through the process of entering into the contract, the seller’s agreement is, by implication, conditioned upon the buyer’s agreement to any later terms supplied by the seller. Unlike the situation in *Roto-Lith*, the acceptance is made conditional, even though the additional terms were not even provided at the time of contract formation.

Analysis of the theory does not improve by characterizing the additional terms as part of a written confirmation sent by the seller. The contract in *Hill* was already formed, either with Gateway’s promise to ship or with its prompt shipment of the computer.⁵⁷ Gateway could not later unilaterally undo the contract simply by sending a written confirmation that expressly required the Hills to agree to new or

54. *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), *overruled by Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184 (1st Cir. 1997).

55. U.C.C. § 2-207(1) (emphasis added).

56. *Ionics*, 110 F.3d 184.

57. U.C.C. § 2-206(1)(b); see notes 11 & 12 *supra* and accompanying text.

different terms.⁵⁸ A contrary approach enables the seller that has committed itself to a contract to deprive the buyer of its bargain and require the buyer who wants the goods to contract again on the modified terms of the seller.⁵⁹ Similarly, Gateway cannot convert its acceptance into a conditional acceptance simply by sending a written confirmation with the goods that requires the buyer to take specified actions or be bound by the seller's additional terms.⁶⁰ A contrary approach here is

58. "A party should not be able to escape an oral contract through a confirmation." WHITE & SUMMERS, *supra* note 35, at 44 n.45. Section 2-207(1) addresses the situation when the parties form an oral contract and one or both of the parties send a written memorandum of the terms agreed upon as well as some additional or different terms. U.C.C. § 2-207 cmt. 1. Under these circumstances the confirmation operates as an acceptance, which inevitably means a continuation of any acceptance that forms the oral contract. *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1047 (Ill. App. Ct. 1980). The additional terms in the confirmation sent to a consumer are only proposals for addition to the contract under section 2-207(2). *Am. Parts Co. v. Am. Arbitration Ass'n*, 154 N.W.2d 5, 15 (Mich. Ct. App. 1967) (noting that sending a form with terms following oral agreement does not "change the agreement or prevent the formation of the contract, or place one party or another in the position of waiving the benefit of the agreement or becoming bound to unagreed small or large print by proceeding with performance of those terms upon which the parties, in fact, did orally agree").

59. In *ProCD*, on the other hand, Judge Easterbrook indicated that if the consumer opened the box and discovered an insert that stated that the consumer owed the seller an additional \$10,000, the buyer could simply prevent contract formation by returning the package. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

60. Section 2-207(1) requires an acceptance to be expressly made conditional on assent to the additional or different terms. When the parties orally conclude an agreement and one of the parties anticipates sending a confirmation that will include additional or different terms, that party must, when orally concluding the agreement, expressly make its commitment to the agreement conditional on assent to the new or different terms. Otherwise, the contract is formed on the initial terms and the new or different terms are merely a proposal for a modification of those initial terms. Gateway, for example, could have made its agreement expressly conditioned to its standard terms by making it clear to the buyer that additional important terms to the contract would be included with the computer and that the seller was willing to sell the computer only if the buyer agreed to those terms. As the court in *Klocek v. Gateway, Inc.* determined, however, Gateway "provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement." 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000); *see also* *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991) (during negotiations leading to purchase of the programs, vendor never mentioned the box-top license or obtained buyer's express assent to it). "[A] conditional acceptance analysis very rarely is appropriate in cases in which a contract has been formed, at the latest, by performance, but the goods arrive with conditions attached." *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 765 (D. Ariz. 1993). The last clause of section 2-207(1) "can only refer to an 'acceptance' that is expressly made conditional and not to a written confirmation because the confirmation serves only as a memorandum of an agreement and cannot impose additional or different terms conditionally since the contract has already been formed." *Album Graphics*, 408 N.E.2d at 1048.

Surely a party who has entered into an agreement cannot change that agreement by the simple expedient of sending a written "confirmation"

even more undesirable because it enables the seller to ensnare an inattentive buyer into a continued contractual relationship on the seller's dictated terms.⁶¹

The respective analyses of *Hill* by both Easterbrook and Hillman go even further. They both allow the seller to add terms unilaterally to the contract not only after the contract has been formed, but also after it has already predominantly been performed. Gateway fulfilled its contract obligation to tender delivery of the goods when it shipped the computer to the Hills.⁶² The Hills also performed their payment obligation because they authorized payment in the form of a charge to their credit card. The seller thus added terms to the contract after it was both formed and performed. The buyer's only recourse against these additional terms was to spot the offensive terms included in the literature that the seller sent with the merchandise and to take the action specified by the seller within the time frame allowed by the seller. Otherwise, the buyer was in a contract that included all of the seller's terms, even though the buyer was not even apprised of these terms until after the contract was formed and performed by both parties.⁶³

Professor Hillman argues that consumer buyers should be bound to the additional terms because these buyers really do not bother to read the terms anyway.⁶⁴ Buyers clearly can become bound to contract terms that they do not bother to read because the courts recognize a duty to read,

containing additional or different terms including an additional "conditional assent" term providing that the other contracting party, by performing the previously agreed upon terms, agrees to all the unagreed upon additional or different terms.

American Parts Co., 154 N.W.2d at 15.

61. Even when a seller makes its acceptance expressly conditioned on its additional terms, the buyer's assent to those terms should not be implied. *See* *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440 (9th Cir. 1986) (concluding that the buyer's continuance with performance after receiving the seller's conditional acceptance did not constitute the unequivocal assent by the buyer that is required for contract formation under section 2-207(1)). When the parties nevertheless proceed with their performance, contract formation and terms are governed under section 2-207(3). U.C.C. § 2-207 cmt. 7.

62. *See* U.C.C. § 2-301.

63. Under the Gateway analysis, the buyer could be bound to additional terms of which it had not yet even become aware. Gateway reduced the time to return the computer from thirty days to five days. One can easily imagine cases in which the buyer would not have even opened the packaging material within that reduced time frame. For example, a computer purchased as a Christmas present might be placed under the tree unopened for a longer period, with the buyer entirely unaware that the additional terms lurk within.

64. Hillman, *supra* note 3, at 746-47, 755, 757.

which forms the basis for the buyer's assent. The situation here, however, is different. In the *Gateway* case, the contract was already formed and the parties had proceeded with their respective performances. The additional terms sent by the seller were nothing more than proposals for modifications to the contract, and the seller cannot modify the contract unilaterally.⁶⁵ The duty to read does not create an obligation to peruse all of the literature enclosed with the product by the seller.⁶⁶ The absence of a duty to read at this stage of the transaction undercuts another of the mechanisms indicated by Professor Hillman to support inclusion of the seller's terms—that the Hills' retention of the computer beyond the thirty-day period stipulated by Gateway constituted an implicit agreement by the Hills to modify the agreement.⁶⁷

The other problem with the implicit agreement to a modification is that the agreement would have to be express under the *Gateway* scenario. In some cases an implicit agreement can qualify as a modification under section 2-209.⁶⁸ A course of performance between the parties can be relevant to show a modification of an inconsistent term.⁶⁹ The parties in

65. *Rupe v. Triton Oil & Gas Corp.*, 806 F. Supp. 1495, 1502–03 (D. Kan. 1992) (a party cannot modify the contract unilaterally in the absence of a contract provision that expressly grants such power); *Reliable, Inc. v. Airco Plumbing & Sheet Metal, Inc.*, 547 S.W.2d 720, 722 (Tex. Civ. App. 1977) (noting that the seller could not unilaterally modify the contract by sending invoices that fixed the place of payment for purposes of establishing venue).

66. “The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak.” RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

67. The decision in *Gateway Co. v. Charlotte Theatres, Inc.*, 297 F.2d 483 (1st Cir. 1961), appears to indicate otherwise. After the parties had reduced their agreement to a writing that did not fix a completion date, the buyer specified a date in its cover letter. The seller ignored the specified date and completed its performance after that date. The court held that the seller could have accepted the proposed modification through its conduct because a modification under section 2-209 does not require consideration. Binding the seller to the completion date could be readily supported through section 2-309. “The obligation of good faith under this Act requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired.” U.C.C. § 2-309 cmt. 5. “Effective communication of a proposed time limit calls for a response, so that failure to reply will make out acquiescence.” *Id.* at cmt. 6.

68. WHITE & SUMMERS, *supra* note 35, at 53 (discussing course of performance and “conduct by both parties not constituting a course of performance but which may fairly be construed as a modifying agreement”). “[I]f a court asks whether the conduct of the parties amounted to a ‘modification,’ it will determine whether there was assent by applying the usual rules for the formation of contracts . . .” E. ALLAN FARNSWORTH, CONTRACTS 562 (1982); *see* *Ho v. Wolfe*, 688 S.W.2d 693 (Tex. App. 1985) (stating that a modification requires an offer and acceptance with respect to it).

69. U.C.C. § 2-208(3); *see, e.g.*, *Mulberry-Fairplains Water Ass'n v. N. Wilkesboro*, 412 S.E.2d 910 (N.C. Ct. App. 1992) (supplying excess water beyond what the contract required resulted in a modification of the contract through a course of performance); *Ray v. Metro. Life Ins. Co.*, 858 F. Supp. 626 (S.D. Tex. 1994) (holding that course of performance established a change in the mailing address).

Gateway, however, had not had repeated occasions for performance by the other party that would give rise to a course of performance.⁷⁰ Consent to a modification can also sometimes be implied from other conduct by the parties as well. For example, if a party to a sales contract were to notify the other party of a different time or location for delivery of the goods and the other party simply proceeded accordingly, the contract term would be effectively modified.⁷¹

The modification in *Hill*, however, was of a very different nature. The seller's notice that was included with the standard terms stated that the customer would be considered to have accepted the terms if the customer kept the computer for more than thirty days. The problem here is that the buyer was already entitled to keep the goods beyond thirty days.⁷² Because the actions of retaining and using the computer were basic legal rights already acquired by the buyer,⁷³ such action is simply

70. U.C.C. § 2-208(1). *Ray Dancer, Inc. v. DMC Corp.*, 530 N.E.2d 605 (Ill. App. Ct. 1988) (concluding that the plaintiff could not establish a pattern of purchasing which would constitute a modification of the original contract by producing evidence of one purchase); *Prewitt v. Numismatic Funding Corp.*, 745 F.2d 1175 (8th Cir. 1984) (stating that a single occasion of conduct did not establish a course of performance).

71. *Paramount Supply Co. v. Sherlin Corp.*, 475 N.E.2d 197 (Ohio Ct. App. 1984); *see also Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 467 F. Supp. 830 (E.D. Mich. 1979) (stating that where the seller claimed that the original contract was modified to improve the quality of material and to increase the price accordingly, the acts that the buyer received and made use of the improved products furnished a basis for concluding that the parties had modified the terms of the original contract), *rev'd, In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905 (6th Cir. 1982).

72. "Section 2-209 requires assent to proposed modifications and this court, like the court in *Step-Saver*, concludes that the assent must be express and cannot be inferred merely from a party's conduct in continuing with the agreement." *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 764 (D. Ariz. 1993); *accord United States Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201, 1206 (D. Kan. 1998) (concluding that a post-sale proposed restriction included with delivery of the product required assent to be binding and the assent had to be express), *aff'd*, 185 F.3d 885 (D.C. Cir. 1999). The court in *Klocek* found "that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms" and that its "decision would be the same if it considered the Standard Terms as a proposed modification under UCC § 2-209." *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 & n.13 (D. Kan. 2000); *see also Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991); *Pennington Grain & Seed, Inc. v. Tuten*, 422 So. 2d 948 (Fla. Dist. Ct. App. 1982) (holding that tags on bags of seed that stated disclaimers of implied warranties, limitations on measures of damages, and an instruction to return the seed for a refund if these terms were unacceptable held unenforceable as a post-contractual unilateral attempt to limit the seller's obligations).

73. "A 'sale' consists in the passing of title from the seller to the buyer for a price." U.C.C. § 2-106(1) (2002). The buyer also would not be bound under the Restatement. "An offeree who does any act *inconsistent* with the offeror's ownership of

too ambiguous to support an inference of consent to the seller's additional terms.⁷⁴ Buyers purchase goods in order to acquire title to the goods. In entering into a sales contract with the Hills, Gateway was obligated to deliver and transfer the goods.⁷⁵ Gateway had already tendered delivery of the goods,⁷⁶ and was obligated to relinquish its entire claim to title over them.⁷⁷ If Gateway's statement about continued retention of the goods was an indication that it would not transfer title to the Hills if the Hills did not consent to the standard terms, Gateway repudiated its contract obligation.⁷⁸

The doctrinal basis by which the terms become part of the contract do not really matter to Professor Hillman. His concern is that they get incorporated. His argument is premised around his normative approach: "Put another way, courts should presume 'blanket assent' to the terms consumers, such as the Hills, choose not to read, provided that the terms

offered property is bound in accordance with the offered terms unless they are manifestly unreasonable." RESTATEMENT (SECOND) OF CONTRACTS § 69(2) (1981) (emphasis added).

74. "When the conduct is [sic] alleged to establish a particular modification of the contract is itself ambiguous, it will not support a claim of modification." 2A RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-209:142 (3d ed. 1997). In an illustration of when a promise may be inferred, Professor Farnsworth indicates that if "the offeree exercises dominion over the goods *by acting inconsistently with the offeror's ownership*, as by carrying them from the railroad station to his place of business, he is taken to have accepted the offer and is bound to pay the price." FARNSWORTH, *supra* note 68, at 142-43 (emphasis added). The buyer in *Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991), made partial payments on an account after the seller enclosed an acknowledgment with a shipment that added a term requiring the buyer to pay interest. Because the amount of the partial payments was less than the principal amount due, the court held that the conduct was not sufficient to establish consent to the contract modification because the partial payment could refer only to reduction of the principal debt. *See also* Deering, Milliken & Co. v. Drexler, 216 F.2d 116 (5th Cir. 1954) (concluding that the buyer's retention of the shipped goods and acceptance of another shipment of goods when the seller had sent a writing that contained an arbitration clause did not bind the buyer to the new clause because the buyer did not act "in any way inconsistent with his reliance on the original contract"); Rupe v. Triton Oil & Gas Corp., 806 F. Supp. 1495 (D. Kan. 1992) (stating that a seller under a gas purchase agreement acted consistently with its contract rights by retaining payments that were less than required under the contract, even though the buyer had sent a letter indicating a change to lower payments).

75. U.C.C. § 2-301.

76. *Id.* § 2-503.

77. "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . ." *Id.* § 2-401(2).

78. The buyer's right to retain and use the computer entitles the buyer to assert its "freedom from" the contract modification that the seller sought to impose based on the buyer's actions. *See* Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193, 194 (1982) ("[T]he spirit of a people at any given time may be measured by the opportunity and incentive to exercise 'freedom to' and the felt necessity to assert 'freedom from.'").

are not unfair in presentation or substance.”⁷⁹ From this perspective, consumer buyers are subjected to any terms of their sellers’ choosing unless they object and cancel the contract in a timely manner. Consumer buyers are instructed to look to the doctrine of unconscionability to protect themselves against seller abuses.⁸⁰

The term “rolling contract” is quite apt under this analysis because the consumer certainly is getting rolled. Consumer protection is rolled back in wholesale fashion. Anticipating the certain outcry from consumer advocates, Professor Hillman argues that their complaints should not be directed toward him. Instead, the critics should address lawmakers over the inadequacies of the current law to police unconscionable terms.⁸¹

An approach that depends for its sense of fairness on an enforcement mechanism that is admittedly too weak to provide the necessary protection is not a good normative choice.⁸² In the context of rolling contracts, it gives sellers nearly unfettered rein to add terms of their choosing after the contract has been formed and performed. It extends the considerable advantage that sellers already have over consumers. It imposes a significant burden on the consumer to establish that offensive provisions rise to the level of unconscionability. It permits sellers to prevail on terms that are heavily in favor of the seller. It limits buyers to challenge only highly egregious and oppressive terms. Karl Llewellyn may have advocated that courts should find blanket assent to conscionable standard terms,⁸³

79. Hillman, *supra* note 3, at 755.

80. Professor Hillman draws upon Karl Llewellyn for support: “As with any standard-form contract context, courts should follow Llewellyn’s model of enforcing bargained-for terms and conscionable boilerplate, and excising egregious terms.” *Id.* But see note 82 *infra* and accompanying text.

81. Hillman, *supra* note 3, at 757.

82. Professor Hillman also mentions subsection (3) of section 211 of the *Restatement (Second) of Contracts*, which provides as follows: “Where the other party has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.” Hillman, *supra* note 3, at 749. He also recognizes, however, that to date the courts have applied this section mostly to insurance contracts. Early drafts of the revised Article 2 included a comparable provision with respect to consumer contracts, but it was eliminated due to industry pressure. See Braucher, *supra* note 33, at 1816.

83. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960) (stating that courts should strike any “unreasonable or indecent” boilerplate). Llewellyn’s earlier assessment was in more restrictive terms. See also K.N. Llewellyn, Book Review, 52 *HARV. L. REV.* 700, 704 (1939) (claiming that he would not extend a presumption of assent to “utterly unreasonable clauses”).

but the law of unconscionability has not evolved to reflect his assessment that unreasonable terms are not entitled to this assent.⁸⁴

The issue posed in *Hill* demonstrates the high barriers facing consumers under an unconscionability challenge. The Hills contested the additional term, which Gateway added to the rolling contract, that required the Hills to arbitrate any disputes under the contract. In order to make the most effective case for unconscionability of the clause, the Hills would have to demonstrate both procedural and substantive unconscionability.⁸⁵ Professor Hillman believes that Gateway's rolling contract is procedurally conscionable for precisely the same reasons advanced by Judge Easterbrook: the method is cost-efficient, consistent with other types of transactions in which terms are provided after payment, and convenient.⁸⁶ These are rationales that have been advanced in favor of standard form contracting.⁸⁷ If they are also heralded as the test for procedural unconscionability that is the control against abuses in such contracting, the protection available for buyers simply evaporates on this score. Professor Hillman dismisses a claim of substantive unconscionability of the Gateway arbitration term with a simple reference to national policy that favors arbitration.⁸⁸ Arguably, the policy is that parties should be encouraged to agree knowingly to arbitration, but not that one party should be forced into giving up the democratic right to legal remedies in court.⁸⁹ The critical point here, however, is that Professor Hillman's own analysis of the unconscionability protection that he advocates as the means to protect against abuses by sellers in rolling contracts shows the meager state to which the protection is quickly reduced.

The fairness of mandatory arbitration clauses in the context of

84. Murray, *supra* note 51, at 890 ("Llewellyn's great hope for a reasoned elaboration of the principle of unconscionability and the explicit requirement of 'good faith' remains unfulfilled.").

85. "Most courts take a 'balancing approach' to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability." WHITE & SUMMERS, *supra* note 35, at 168; *see also* Hillman, *supra* note 3, at 749.

86. Hillman, *supra* note 3, at 755.

87. For a very good survey of the extensive literature concerning standard form contracts see Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 430–55 (2002).

88. Hillman, *supra* note 3, at 756 (comments of Professor Franklin G. Snyder) ("[I]t's hard to argue that an arbitration clause itself is unconscionable, given that Congress has declared that the national policy favors it.") (citing *Gateway Thread*, *supra* note 51, at 1172).

89. "[T]he FAA [Federal Arbitration Act] was not enacted to force parties to arbitrate in the absence of an agreement. . . . The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked." *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1286–87 (10th Cir. 1997).

consumer sales has certainly been called into question.⁹⁰ A requirement for consumers to arbitrate any dispute precludes the availability of a class action because of arbitration system rules. With consumer claims of about \$300 for each consumer in Gateway, a class action was the only economically viable means for dispute resolution.⁹¹ Professor Hillman's response to this criticism, like his response to concerns over unconscionability as an adequate policing mechanism to deter seller abuses, is that the critics should campaign for legislative reforms.⁹²

The state legislatures have been approached recently concerning changes in sales law, and the proposals advanced do not bode well for the course charted by Professor Hillman. The Permanent Editorial

90. "Constructive assent [to arbitration], manufactured through the manipulation of the rules of contract formation and the interpretation of silence as assent (because it is read by the light of the judge's belief that he knows what is best for the consumer or for the economy), is inappropriate and undemocratic." Post, *supra* note 51, at 1238. "The question is rather under what circumstances the Gateways of the world—excellent product or not—are entitled to immunity from the public justice system, with the public access and public accountability that this system entails." *The Gateway Thread*, *supra* note 51, at 1173 (comments of Professor Charles Knapp).

[W]hat is really going on in this case [Gateway] is an attempt to take advantage of the consumers' practical common sense knowledge of how sales agreements are usually constructed and to count on the likelihood that they will not be aware of the term and will not object to its inclusion in the contract. The seller is manipulating the buyers' normative expectations as to what sort of terms and norms are typically included in their agreements, and is trading on the inability of individuals to take in all the features that are present in a novel buying event.

Beverly Horsburgh & Andrew Cappel, *Cognition and Common Sense in Contract Law*, 16 *TOURO L. REV.* 1091, 1116–17 (2000).

91. *The Gateway Thread*, *supra* note 51, at 1167 (comments of Professor Jean Braucher). The Gateway provision required arbitration under the rules of the International Chamber of Commerce, an organization headquartered in France whose rules were difficult for consumers to even locate. A consumer claim would have required an advance fee of \$4000, including a nonrefundable registration fee of \$2000. A consumer that did not prevail could also be responsible for Gateway's legal costs. The court in *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998), found that the requirements created an excessive cost factor that would deter consumers from invoking the process and were therefore substantively unconscionable. The same court, however, rejected an assertion that the arbitration clause was unenforceable as a contract of adhesion. It found that the consumer could reject the Gateway terms by returning the computer and purchasing the product of a competitor. The inconvenience and expense of such affirmative action on the part of the consumer was "seen as a trade-off for the convenience and savings for which the consumer presumably opted when he or she chose to make a purchase of such consequence by phone or mail as an alternative to on-site retail shopping." *Id.* at 573. The court remanded for a lower court designation of an appropriate substitute arbitrator.

92. Hillman, *supra* note 3, at 757–58.

Board of the Uniform Commercial Code has promulgated amendments to Article 2 that are being considered by the state legislatures for enactment.⁹³ The amendments deal even more explicitly with contract terms.

The amendments to Article 2 change section 2-207 considerably. The scope of the section is narrowed in that it no longer has anything to do with contract formation. Amended section 2-207 “applies only when a contract has been created under another section of this Article.”⁹⁴ Rather than determining contract formation, “[t]he purpose of this section is solely to determine the terms of the contract.”⁹⁵ The scope of the amended section is broadened, on the other hand, in that it is not restricted only to cases of the battle of the forms, but rather applies to all contracts for the sale of goods.⁹⁶ Once a contract is formed by any method under Article 2, amended section 2-207 establishes the terms of the contract. Amended section 2-207 provides as follows:

Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, are:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of this Act.⁹⁷

This section makes it explicitly clear that the contract terms with Gateway would consist of the terms to which both parties agreed and the relevant gap fillers in Article 2, but not the additional terms provided later by Gateway. The comments to the section verify this result: “Terms of a contract may be found not only in the consistent terms of records of the parties but also from a straightforward acceptance of an

93. UNIFORM COMMERCIAL CODE: PROPOSED AMENDMENTS TO ARTICLE 2 (2003). In addition to the amendments to Article 2, the National Conference of Commissioners on Uniform State Law promulgated the Uniform Computer Information Transactions Act in 1999. See note 39 *supra* for the essence of the post-transaction terms. UCITA was originally planned as Article 2B of the U.C.C. A cosponsor of the U.C.C.—the American Law Institute—withdraw its support on the grounds that “[t]he provisions on assent to post-transaction terms are inconsistent with sound contract policy and create disincentives for vendors to disclose terms at the time of the transaction.” Memorandum from the ALI Council Ad Hoc Committee on Article 2B (Dec. 1998); see Braucher, *supra* note 51, at 1840–44 (showing the resistance of state attorney generals and senior staff of the FTC). UCITA has been enacted in only Maryland and Virginia. See MD. CODE ANN. COM. LAW I §§ 22-101 to 22-816 (Supp. 2003); VA. CODE ANN. §§ 59.1-501.1 to 59.1-509.2 (2001).

94. U.C.C. § 2-207 cmt. 2 (2003).

95. *Id.*

96. *Id.* § 2-207 cmt. 1.

97. *Id.* § 2-207.

offer.”⁹⁸ Similarly, the Comments recognize the terms in a contract formed through an offeree’s performance: “If, for example, a buyer sends a purchase order, there is no oral or other agreement, and the seller delivers the goods in response to the purchase order.”

The Comments to amended section 2-207 do indicate a neutral position concerning the reasoning underlying the *Hill* decision.

The section omits any specific treatment of terms attached to the goods, or in or on the container in which the goods are delivered. This article takes no position on whether a court should follow the reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology* and *Klocek v. Gateway, Inc.* (original 2-207 governs) or the contrary reasoning in *Hill v. Gateway 2000* (original 2-207 inapplicable).⁹⁹

Amended Article 2, however, is not as neutral on the subject as the comment suggests. Amended Article 2 preserves all of the former section 2-206(1)(b), which provides that a prompt promise to ship goods or a prompt shipment of goods following an order or other offer to buy goods for prompt or current shipment constitutes an acceptance. Part I of this paper has demonstrated that Judge Easterbrook’s analysis of contract formation depends completely upon ignoring the obvious applicability of this section. His opinion has been soundly criticized for its distortion of principles of contract formation.¹⁰⁰ Although the Permanent Editorial Board unfortunately did not take the opportunity to rebuke Easterbrook’s analysis, the amended Article 2 maintains the statutory provision that undercuts its legitimacy.

III. CONCLUSION

The issue raised in a rolling contract—whether the terms subsequently provided by the seller become part of the contract—is a subset of a larger

98. *Id.* § 2-207 cmt. 3.

99. *Id.* § 2-207 cmt. 5 (citations omitted). This Comment was the aftermath of the Revised Article 2 process in which the leadership of the National Conference of Commissioners on Uniform State Laws acted under industry pressure and removed the project from further floor debate at the 1999 annual meeting. See Braucher, *supra* note 51, at 1834–35; see also Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 614–18 (2000–01); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 S.M.U. L. REV. 1683, 1684–85 (1999). The draft under consideration required express agreement for any binding effect to additional or different terms in a confirmation and added that there could be no express agreement by “mere retention or use of goods.” U.C.C. § 2-207(c)(3), (d) (Draft July 1999).

100. See note 51 *supra*.

issue concerning the enforcement of contract terms in standardized contract agreements. Considerable attention has been directed toward this larger issue over the past several years, and a wide range of perspectives has evolved among the commentators.¹⁰¹ The *Hill* line of cases, however, clearly represents a major threat for commentators who advance the necessity for some forms of control over standardized contracting. If the controls—or rather lack thereof—envisioned by Judge Easterbrook and Professor Hillman with respect to standard terms provided after both parties have performed under the contract become the national norm, the chances of reining in standardized contracting in other forms will become even more remote. Rolling contracts under the *Hill* model simply roll over contract law and advance a very poor policy choice.

101. See the review of the literature provided in Hillman & Rachlinski, *supra* note 87.