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# THE DUBIOUS STATUS OF THE ROLLING CONTRACT FORMATION THEORY

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***THE DUBIOUS STATUS OF THE ROLLING CONTRACT FORMATION THEORY***

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## ***Introduction***

In the waning years of the twentieth century, an influential court announced a radical change in contract formation theory.<sup>1</sup> What has been labeled the “rolling” or “layered” theory proved highly controversial. Analyses of the two Seventh Circuit opinions creating the theory have revealed several of its analytical defects, but other flaws and their unintended effects have not been emphasized. The conventional wisdom suggests that subsequent cases have installed the rolling theory as the prevailing view,<sup>2</sup> but that conclusion is at least premature. An analysis of the case law progeny reveals pervasive confusion and inconsistent results. Without express reference to the theory, contrary holdings make it difficult to discern its current status in a given jurisdiction. The case law rejecting the theory is relatively clear, but opinions that distinguish their facts leave questions as to its potential application. The underlying purpose of the theory is the “efficacy” of form contracting,<sup>3</sup> but an alternate economic analysis suggests a major flaw in the theory. Commentators generally agree that the theory ignores statutory language and precedent,<sup>4</sup> but they may not be as troubled by the results of its application.<sup>5</sup>

The great majority of jurisdictions have not had the opportunity to decide its fate. As the theory approaches its fifteenth anniversary, it is important to revisit its origins and analyze its progeny as well as the surrounding commentary in pursuit of a definitive analysis to facilitate future decisions concerning its application or rejection.

### ***I A Brief Statement of the Rolling (“Layered”) Formation Solution***

Where a buyer has an opportunity to review a vendor’s standardized terms before contracting and chooses to ignore them, unless the terms are unconscionable they will be enforced under the traditional “duty to read” rule. Where the vendor’s terms arrive only after the purchase of the

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<sup>1</sup> The theory was created and affirmed in two opinions, both written by Judge Frank Easterbrook for the court: *ProCD, Inc. v. Zeidenberg*, 86 F. 3d 1447 (7<sup>th</sup> Cir. 1996); *Hill v. Gateway 2000, Inc.*, 105 F. 3d 1147 (7<sup>th</sup> Cir. 1997).

<sup>2</sup> Eric A. Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. Chi. L. Rev. 1181, 1194 (2010), suggesting that, apparently, the theory has been accepted “despite the objections of law professors.”

<sup>3</sup> In his article, *Unintelligent Design in Contract*, 2008 U. Ill.L. Rev. 505, 522 (2008), Peter Alces suggests that “[Judge] Easterbrook’s argument is an argument from efficacy, not from Contract theory or even, it would seem, from Contract law.”

<sup>4</sup> See note 30, *infra*.

<sup>5</sup> A notable exception to the critics is found in a commentary applauding the theory and viewing its author, Judge Easterbrook, as a worthy heir to the great Benjamin Nathan Cardozo. Posner, note 2, *supra* at 1193.

product (“terms later”) and include additional terms that had not been previously negotiated or discussed, courts may treat such terms as totally inoperative. If the Uniform Commercial Code applies, the later arriving document may be viewed as a confirmation of the contract making any additional terms that materially alter the original terms inoperative.<sup>6</sup>

Under the rolling theory, however, such additional terms are operative and §2-207 is deemed “irrelevant” for reasons that contradict statutory language and precedent. If the terms allow the buyer to object and receive a refund of the purchase price, all of the vendor’s additional term that arrive with the product become part of the contract through the buyer’s silence in failing to object to them. This effect is secured through a radical theory of contract formation which is said to be postponed until the last moment the buyer is permitted to object to the terms. The final “layer” in contract formation is the buyer’s silence in not objecting to the vendor’s additional terms within the prescribed time..

## ***II. Origins–ProCD v. Zeidenberg***

A candidate for a Ph.D. in computer science, Matthew Zeidenberg, took a package containing software discs from a retail store shelf, paid the \$150 price and left the store with his purchase. The computer program on the discs produced by the ProCD corporation cost millions to compile and keep current. It provided computerized access to 95 million residential and commercial listings taken from 3000 public telephone books. A commercial version of this software sold at a higher price. A “user guide” inside the package included license terms that stated a restriction limiting the use of the software to a single user for individual or personal use. Only a small notice was printed on the outside stating that there were license terms inside the package.<sup>7</sup> When Matthew “ran” the software, the single user restriction appeared on the computer screen. Both the written and electronic warnings were ignored. Matthew copied the ProCD software containing the public phone book material that was not subject to copyright protection and established a corporation to compete with ProCD.

***(1) ProCD v. Zeidenberg in the District Court.***<sup>8</sup> In ProCD’s action to enjoin such use, the district court found no copyright infringement. Turning to the single user notice, it followed the dominant case law in construing agreements to buy software as contracts for the sale goods requiring an analysis of contract formation under Article 2 of the Uniform Commercial Code.

The court recognized the general formation section of the UCC, §2-204, that permits a contract to be formed in any reasonable manner as well as the more specific offer and acceptance section, 2-206, recognizing any reasonable manner of acceptance unless the offer unambiguously requires a

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<sup>6</sup> UCC §2-207(2)(b). This split of authority is discussed Part II (6), *infra*.

<sup>7</sup> “The sole reference to the user agreement was a disclosure in small print at the bottom of the package, stating that defendants were subject to the terms and conditions of the enclosed license agreement.” 908 F. Supp. at 654.

<sup>8</sup> ProCD v. Zeidenberg, 908 F. Supp. 640 (W. D. Wis. 1996)

particular manner of acceptance. Following generally accepted precedent, the court found that the offer was made by the store's display of the package on the shelf and concluded that the acceptance occurred no later than the buyer's payment of the \$150 price.<sup>9</sup> Terms appearing after the contract was formed were deemed to raise issues under §2-207 (additional or different terms in a confirmation) or §2-209 (modification of contracts).

(2) *The Step-Saver Analysis.* The district court relied heavily on a Third Circuit case, *Step-Saver Data Systems v. Wyse Technology*,<sup>10</sup> where a buyer telephoned offers for software which the seller accepted. The buyer followed this oral agreement with a purchase order. The seller shipped software with an invoice repeating the terms the parties had discussed. The product arrived in a package on which license terms that the parties had not discussed were printed (a "box-top" license). The terms stated that the buyer had only purchased a personal, non-transferable license to use the program, all express and implied warranties were disclaimed and the sole remedy was the replacement of defective discs. The terms concluded with,

Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it within fifteen days from date of purchase and your money will be refunded to you by that person.<sup>11</sup>

The seller argued that the contract was not formed until the buyer received the product, saw the license terms and opened the package. The court concluded that the contract had been formed prior to the sending of the package and the terms printed on the package constituted additional terms in a confirmation of the previously formed contract. Under UCC §2-207(1), a contract was formed notwithstanding such additional terms in the confirmation. The disclaimer of warranties and limitation of remedies were additional terms that did not become part of the contract since

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<sup>9</sup> In a self-service transaction, courts generally hold that the acceptance occurs when the buyer takes possession of the displayed goods though the buyer may return the goods to the shelf with impunity on the footing that there is an implied power of termination in the contract formed when she took possession. The court cited the leading case in support of that analysis, *Barker v. Allied Supermarket*, 596 P. 2d 870 (Okla. 1976). Even if the offer was not accepted until the buyer paid for the goods (a view supported by an English case, *Pharmaceutical Soc'y of Great Britain v. Boots Cash Chemists (Southern) Ltd.*, (1953) 1 Q. B. 401-- perhaps to avoid criminal prosecutions), the contract was certainly formed no later than the time of payment. Neither theory, however, effectively recognizes buyers' expectations.. For an alternate theory see John E Murray, Jr., *Murray on Contracts*, §36C which is discussed in *Corbin on Contracts*, §2.: "Professor Murray has developed an intellectually satisfying theory under which supermarket customers' expectations of being able to purchase goods at advertised prices can be squared with their expectations of being able to change their minds after selecting goods from the shelves."

<sup>10</sup> 939 F. 2d 91 (3d Cir. 1991).

<sup>11</sup> *Id.* at 97.

they were deemed to be material alterations of the contract under §2-207(2)(a).

The *ProCD* district court adopted this analysis though it viewed §2-207 as more readily applicable to transactions between merchants. Viewing Matthew Zeidenberg as a non-merchant, the court preferred to treat the license terms inside the package as an attempted modification under §2-209 of the already formed contract. Matthew never assented to the modifications. The court concluded that either the §2-207 or §2-209 analysis clearly led to the same holding: Matthew was not bound by the license terms.<sup>12</sup>

(3) *ProCD v. Zeidenberg in the Seventh Circuit*.<sup>13</sup> On appeal, the Seventh Circuit undertook the challenge of determining the enforceability of terms not previously disclosed which are delivered with the product.<sup>14</sup> The court noted the basic proposition that “One cannot agree to hidden terms,” but quickly added that the small print clause on the outside of the ProCD package could be said to have incorporated the terms inside.<sup>15</sup> Requiring sellers to include microscopic print of all terms on the outside of a package would be impractical. Thus,

Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends) may be a means of doing business valuable to buyers and sellers alike.<sup>16</sup>

Moreover, the court insisted that there was nothing unusual in such transactions, noting common “terms later” transactions such as insurance policies or airline tickets containing terms that the buyer had an opportunity to see only after the purchase. The court, however, failed to note that these illustrations involved regulated industries requiring oversight of boilerplate clauses.<sup>17</sup> In

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<sup>12</sup> 908 F. Supp.at 655.

<sup>13</sup> *ProCD v. Zeidenberg*, 86 F. 3d 1447 (7<sup>th</sup> Cir. 1996).

<sup>14</sup> The court also described “shrinkwrap” licenses where the terms are printed on the tight plastic or cellophane covering the delivered product. Some vendors, but not ProCD, would claim that the license terms become effective when the plastic is torn from the package. 86 F. 3d at 1449.

<sup>15</sup> 86 F. 3d at 1450. See note 7, *supra*.

<sup>16</sup> 86 F. 3d at 1451 citing Restatement (2d) of Contracts, §211, comment a, extolling the efficiencies of standardized agreements.

<sup>17</sup> “Judge Easterbrook claimed that delayed disclosure is a long-standing, accepted contract practice, citing insurance and airline tickets as examples. But these are examples of regulated industries, not dependent on market discipline to prevent unfairness. In the case of insurance, regulators typically have the responsibility of reviewing and approving policy terms. In addition, often state law provides for a required disclosure form setting forth key policy terms. In the case of airline tickets, most of the material in the ticket is dictated by U.S. Department of Transportation regulations requiring waivers of liability limits provided for in the Warsaw

terms of case law, it relied primarily upon the United States Supreme Court decision in *Carnival Cruise Lines v. Shute*<sup>18</sup> which upheld a forum selection clause that was part of the printed boilerplate on a cruise line ticket. Here, however, it failed to note the express “boundaries” of that decision where Mr. Justice Blackmun, writing for the majority stated,

We do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum selection clause.<sup>19</sup>

Unlike the case before the Seventh Circuit, the only question before the Supreme Court was whether such a forum selection clause was required to be the product of negotiation, not whether the respondents were aware of the clause before the contract was formed.

**(4) *The Seventh Circuit’s Startling §2-207 Analysis.*** The court attempted to distinguish the *Step-Saver* case on which the district court had relied,<sup>20</sup> first suggesting that it was not a consumer transaction but a merchant-to-merchant transaction involving a “battle of the forms.” Any notion that §2-207 is not applicable to consumer transactions contradicts the statutory language. The first sentence of §2-207(2) treats additional terms in a response to an otherwise definite expression of acceptance as mere proposals. The second sentence, however, recognizes that, “between merchants,” such additional terms become terms of the contract unless they violate any of three provisions enumerated in the subsection.<sup>21</sup> Thus, the first sentence of §2-207(2) necessarily applies where one or both of the parties are not “merchants” as defined in the Code.<sup>22</sup> Since the court deemed that Matthew was not a merchant, the additional terms in the user guide that also splashed on the computer screen would be mere proposals under §2-207(2) to which Matthew did not assent. Whether or not Matthew was deemed to be a merchant, however, would soon become moot.

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Convention, and by federal regulations dealing with overbooking and liability for baggage loss.” Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 Wayne L. Rev. 1805, 1823-24 (2000).

<sup>18</sup> 499 U. S. 585 (1991).

<sup>19</sup> 499 U. S. At 590

<sup>20</sup> Note 12, *supra*.

<sup>21</sup> §2-207(2)(a) precludes any additional term where the offer expressly limits acceptance to its terms. §2-207(2)(b) precludes any additional term that would materially alter the terms of the offer. §2-207(2)(c) precludes any additional term where the offeror notifies the seller in advance of within a reasonable time after receiving the response containing the additional term.

<sup>22</sup>

§2-104.

The second basis for distinguishing *Step-Saver* was startling. Noting that there were two forms and the box top license confirmation with additional terms in *Step-Saver*, the court announced, “Our case has only one form; UCC §2-207 is irrelevant.”<sup>23</sup> The Easterbrook conclusion that §2-207 applies only where there are two forms is presented as fiat in the face of the statute recognizing “[a] definite and seasonable expression of acceptance *or a written confirmation* sent within a reasonable time operates as an acceptance. . . .”<sup>24</sup> A confirmation is not a traditional acceptance of an offer, but §2-207(1) accords it the operative effect of an acceptance. It is abundantly clear that a single confirmation of an existing oral contract may contain different or additional terms requiring the application of §2-207. A comment explains that the section was designed to deal with two typical situations. The first typical situation

is the written confirmation, where an agreement has been reached, either orally or by informal correspondence 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.<sup>25</sup>

Thus, the first illustration of a situation giving rise to §2-207 recognizes an oral contract followed by either a single confirmation from one of the parties containing different or additional terms or confirmations from both parties with non-matching terms. Comment 2 is even more direct:

Under this Article, a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different term.<sup>26</sup>

Beyond the statutory language, the comments do not require battling confirmations. The first comment refers to “a confirmation” while the second refers to “the confirmation.”

Not only did the court fail to address these points; it also failed to address diametrically opposed precedent, including its own. The application of §2-207 to cases involving a single confirmation had been clearly recognized in the Seventh Circuit and elsewhere.<sup>27</sup> Ignoring this precedent that

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<sup>23</sup> 86 F. 3d at 1452.

<sup>24</sup> §2-207(1) (emphasis supplied).

<sup>25</sup> §2-207, comment 1 (emphasis supplied).

<sup>26</sup> UCC §2-207, Comment 2. See *Schlumberger Tech. Corp. v. Greenwich Metals, Inc.*, 2009 U.S. Dist. LEXIS 121343 at \*19 (D. Kan. 2009); *Glyptal, Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 894 (D. Mass. 1992).

<sup>27</sup> *Advance Concrete forms, Inc. v. McCann Constr. Specialties, Inc.*, 916 F. 2d 412, 415 (7<sup>th</sup> Cir. 1990 ) citing *Mid-South Packers, Inc. v. Shoney’s, Inc.*, 761 F. 2d 1117, 1123 (5<sup>th</sup> Cir. 1985).

is elaborated in a later section <sup>28</sup> is inexplicable. The ukase that §2-207 no longer applies where only one form contains different or additional terms has been universally criticized. Since commentators find absolutely no redeeming virtue in this notion, they may resort to the only apt and unequivocal characterization: “wrong.”<sup>29</sup>

**(5) Creating the Rolling Formation Theory–Ignoring §2-206.** While recognizing that “the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store,” the court quickly added, “the UCC permits contracts to be formed in other ways.” Here, the court appears to view the UCC as a smorgasbord of sections from which a court may choose one section while ignoring others to support its desired result. It relies exclusively on the general contract formation section, §2-204(1):

A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

The court treats this general language as allowing it to create a new formation theory: “The vendor, as master of the offer, may invite an 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.”<sup>30</sup>

Under the new theory, this contract was not formed when Matthew paid the price and left the store with the discs. Rather it was formed only when he had an opportunity to review the terms inside the box that were also splashed on the computer screen. By retaining the product without

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The application of §2-207 to a single confirmation containing different or additional terms was recognized in an early prominent judicial construction of the section, *Dorton v. Collins & Aikman Corp.*, 453 F. 2d 1161 (6<sup>th</sup> Cir. 1972), a case cited with approval in *Northrop Corp. v. Litronic Indus.*, 29 F. 3d 1173, 1177 (7<sup>th</sup> Cir. 1994).

<sup>28</sup> See Section III(7), *infra*.

<sup>29</sup> Critical analyses of judicial or scholarly views typically consider arguments and rationales on either side of the issue. Here, however, the Seventh Circuit’s view is a fiat for which commentators can find no basis whatsoever. They conclude that the court is simply “wrong” in this regard. For example, “When Judge Easterbrook in *ProCD* states that Section 2-207 does not apply to transactions that involve only one document, he is plainly wrong,” James J. White, *Default Rules in Sales and the Myth of Contracting Out*, 48 *Loy. L. Rev.* 53, 81 (2002); “Easterbrook was plainly wrong about Section 2-207’s applicability,” Robert A. Hillman, *Rolling Contracts*, 71 *Fordham L. Rev.* 743, 752 (2002); See, however, Marc. L. Roark, *Limitation of Sales Warranties as an Alternative to Intellectual Property Rights: An Empirical Analysis of iPhone Warranties’ Deterrent Impact on Consumers*, 2010 *Duke Law & Tech. Rev.* 18 at note 62 (2010) characterizing Judge Easterbrook’s statement as “a little cavalier.”

<sup>30</sup> 89 F. 3d at 1452.

objection to the terms within the time allowed for objection, his silence manifested acceptance. If, as the court suggested, the district judge was not wrong in recognizing a contract when Matthew paid and left the store with the product, why does the Seventh Circuit insist that it will only recognize a postponed acceptance? The court answers that ProCD proposed this “different way” of accepting its offer<sup>31</sup> thereby mandating a unique manner of acceptance.

The Uniform Commercial Code continues the fundamental precept that the offeror is the master of the offer, but it qualifies that precept. While the district court was careful to include not only the general formation section of the UCC in its analysis (§2-204(1)) but the more specific UCC section on “Offer and Acceptance in Contract Formation” (§2-206(1)), the Seventh Circuit studiously avoids any mention of the more specific section. The opening phrase of the omitted section undermines the court’s analysis:

Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances.<sup>32</sup>

Section 2-206 made an important change in the common law of contract formation that was later incorporated in the Second Restatement of Contracts. Unlike their predecessors, the underlying assumption in both the Code and Second Restatement is that the typical offer is indifferent as to how the offeree chooses to accept it, either by promising or performing, unless the offeror demands a particular manner of acceptance. Under the UCC, §2-206, unless the offeror *unambiguously* demands a particular manner of acceptance, the offeree may accept in any reasonable manner.<sup>33</sup> By suggesting that the district court’s analysis was not wrong, but there are other ways in which a contract may be formed, the court appears to be pursuing the new contract formation analysis under the UCC. Such a superficial view of the court’s analysis however is misleading.

While ignoring §2-206 and relying exclusively on §2-204, the court is not recognizing just any reasonable manner of acceptance of the offer forming a contract when a buyer takes the goods from the shelf, pays for the goods and leaves the store. It insists that, where terms are not available until the buyer discovers them inside the box, the vendor is unambiguously demanding *only* the manner of acceptance permitted under the rolling theory.

The test of whether a vendor *unambiguously* required a particular manner of acceptance is whether a buyer-offeree should have clearly understood that only one manner of acceptance would form a contract . Thus, to be faithful to §2-206, the court would have to conclude that a

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<sup>31</sup> *Id.*

<sup>32</sup> §2-206.

<sup>33</sup> This fundamental change from the First Restatement of Contract is analyzed in John E. Murray, Jr., *Contract: A New Design for the Agreement Process*, 53 Cornell L. Rev. 785 (1968).

buyer of any product in a self-service store unambiguously understood that the only manner in which this offer could be accepted was by the hitherto nonexistent manner of acceptance prescribed by the court where the buyer is bound by the terms that become visible only after they are discovered inside the box, unless he objects to them within the prescribed time. The court does not even attempt to justify that characterization since the typical buyer would assume a contract has been formed no later than when he paid for the product.

It should not be necessary to remind such a sophisticated court that statutory interpretation requires all relevant sections of a statute to be applied. Moreover, as between §2-204 and 2-206, one of the most fundamental rules of statutory or contract interpretation requires the specific to control the general. To achieve its desired result, however, the court has to ignore §2-206.

### ***III. Confirming and Extending the Theory—Hill v. Gateway 2000, Inc.***

While the *ProCD* opinion raised eyebrows, it stopped short of sounding alarms. After all, the court was confronted with an unsympathetic defendant who took the work product of the plaintiff. Theorists could find solace in the court's quotable phrase, "notice on the outside, terms on the inside," and view this incorporation phrase on the outside of the *ProCD* package as sufficient to alert a buyer such as Matthew Zeidenberg to detailed license terms inside. A candidate for a Ph.D. in computer science may also have familiarity with similar shrinkwrap license terms. Thus, the case could be viewed as a justifiable aberration from traditional contract theory. Any such notion was emasculated, however, upon the issuance of the opinion in *Hill v. Gateway 2000, Inc.*<sup>34</sup>

The court's crisp statement of the facts and issue in this case cannot be improved:

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?<sup>35</sup>

The Hills kept the computer for more than 30 days before claiming it was defective. Gateway responded by seeking to enforce an arbitration clause that appeared as one of the terms inside the box. The district court refused to compel arbitration because it viewed the record as insufficient to find a valid arbitration clause between the parties or that the Hills had been given adequate notice of such a clause.

***(1) Duty to Read.*** On appeal, the Seventh Circuit rejected the Hills' request to limit the

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<sup>34</sup>105 F. 3d 1147 (7<sup>th</sup> Cir. 1997), *cert. den.*, 522 U. S. 808 (1997).

<sup>35</sup> *Id.* at 1148.

*ProCD* precedent to contracts for software since “*ProCD* is about the law of contract, not the law of software.”<sup>36</sup> It restated the “duty to read” proverb: people who accept an offer assume the risk of unread terms that may prove unwelcome. Restating the “duty to read” to determine the enforceability of terms not available to be read at the time a reasonable party may assume the contract has been formed, however, is troublesome. The court simply concluded that Gateway shipped the computer “with the same sort of accept-or-return offer *ProCD* made to users of its software.”<sup>37</sup> It is important to understand why, without any explanation, the court concludes that Gateway was the offeror.

(2) ***Identifying the Offeror.*** In *ProCD*, the court had focused on the vendor as the offeror, the master of the offer, who allegedly limited the manner in which the power of acceptance had to be exercised by the buyer. The rolling theory requires the vendor to be the offeror to assure the enforcement of the vendor’s terms. By allowing its product to be placed on a shelf of a self-service retail store, the *ProCD* software was offered for sale. The vendor was the offeror in that case. Patrons of such stores are offerees with a power of acceptance. Where, however, a buyer telephones an order for a computer and provides a credit card number to the order-taker, the buyer is the offeror creating a power of acceptance in the vendor.

As several courts have noted,<sup>38</sup> there is not a scintilla of doubt that the Hills were the offerors, but it was essential for the court to characterize Gateway as the offeror to assure the application of the theory the court created from whole cloth. If Gateway was not the offeror, the theory crumbles. The court offers no explanation because there is no explanation.

(3) ***The Essential Rationale.*** It is important to recite the essential rationale for the rolling theory in the court’s own words:

If the staff at the other end of the phone for direct-sales operations such as Gateway’s had to read the four-page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten potential buyers. Other would hang up in rage over the waste of their time. And oral recitation would not avoid customers’ assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.<sup>39</sup>

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<sup>36</sup>105 F. 3d at 1149.

<sup>37</sup> *Id*

<sup>38</sup> See the discussion of the subsequent case law in part IV, *infra*.

<sup>39</sup>  
105 F. 3d at 1149..

The avoidance of “costly and ineffectual steps” (transaction costs) is the singular rationale for creating a costly and ineffectual new theory that postpones contract formation. In the context of these facts, there is, another way to avoid such transaction costs that will also avoid the exacerbated transaction costs of the new theory.

Suppose the Gateway order-taker had said, “When you receive your computer, it is very important to read Gateway’s standard contract terms you will find inside the container. If you do not agree with the contract terms, you may object within 30 days and return everything in the box for a full refund. Do you understand?” An affirmative response from the buyer would clearly create a duty to object to later terms or be bound by them. Such a vendor’s statement can be made in fifteen seconds. It has become common for a buyer to be informed that the call may be recorded and monitored for extra contractual reasons. Such a statement would be part of the record. A recent case from the Seventh Circuit, itself, provides an analogous application.

In *Spivey v. Adaptive Mktg. LLC*,<sup>40</sup> Spivey called a phone number to order a product. The telemarketer made an offer for a membership in an club whose members were entitled to discounts from various vendors. The membership was free for 30 days. If Spivey did not object within 30 days, he would then be billed at \$8 per month for continuation of the membership. Spivey replied “Okay” to this offer. When he did not cancel the membership within 30 days, the monthly billing began. A record of the conversation identified the buyer’s voice. The 7<sup>th</sup> Circuit affirmed the summary judgment for the vendor in holding that Spivey agreed to be bound by the terms of an agreement unless he objected within 30 days. Spivey’s agreement created a duty to speak which is different from imposing a duty to object to terms inside the box with no prior opportunity to be aware of such a duty.

The fifteen second statement above avoids the transaction cost evils to which Judge Easterbrook refers while assuring adequate notice of contract terms that will be delivered with the product. It avoids mischaracterizing the offeree as the offeror. If the Hills were correctly viewed as offerors creating a power of acceptance in Gateway, and the order-taker simply took the Hills’ credit card number and either expressly or impliedly manifested acceptance of the Hills’ offer, Gateway should have been seen as having accepted the offer, forming a contract without Gateway’s terms. Even if the response to the Hills’ offer left doubt as to whether the order-taker accepted or had the authority to accept the offer, acceptance of the Hills’ offer would unequivocally occur no later than the time the computer was shipped.<sup>41</sup>

If, however, the Hills were properly characterized as offerors and the order-taker had read the fifteen second statement above, notifying them that the computer was being sold under Gateway’s

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<sup>40</sup> 622 F. 3d 816 (7<sup>th</sup> Cir. 2010).

<sup>41</sup> The buyer’s offer could be accepted by either a prompt promise to ship or the prompt shipment of the computer. UCC §2-206(1)(b).

terms, such a response would be a clear counter offer. The Hills completion of the telephone transaction after hearing that notice would bind the Hills to a contract under which their duty would be conditional on their satisfaction with the terms to be delivered with the computer. Such a process would not only avoid the transaction costs of droning through pages of boilerplate; it would also avoid the much more expensive transaction costs of litigation that continues under the rolling theory because the defects in the theory have produced pervasive confusion and a consequent split of authority..

An analogous situation occurs involving “clickwrap” versus “browsewrap” licenses in the installation of computer programs. Where license terms appear on the computer screen and require the installer to click an “I agree” button to activate the installation of a program, the user is bound by the license terms, regardless of whether he bothers to read them. If, however, the only reference is to the existence of license terms on a submerged screen that may be observed only by scrolling to it, “it is not sufficient to place consumers on inquiry or constructive notice of those terms.”<sup>42</sup>

**(4) Absence of Notice–Consumers v. Merchants.** The Hills argued that the *ProCD* holding was based on the notice on the outside of the package–“notice on the outside; terms on the inside”–which could incorporate later terms. There was no notice of any kind on the outside of the delivered Gateway box. The court, however, dismissed this distinction on the footing that notice on the outside of the box displayed in a store allows a buyer to decide whether to assume the risk of terms inside. The delivered Gateway box, however, was just a “shipping carton” and the notice on the box, “fragile,” is “functional” to alert shipping handlers rather than would-be purchasers. It is difficult to characterize the court’s response beyond the phrase, “non-responsive.” Is the court negating any requirement of notice on any container, either on a store shelf or delivered by a carrier, or would notice only be required on the package in the store while it would not be required on the delivered package? If notice on a container is required in any situation, is an inconspicuous notice like the notice on the ProCD package sufficient?

The court insisted that “the Hills knew before they ordered the computer that the carton would contain *some* important terms and they did not seek to discover these in advance.”<sup>43</sup> It is important to consider how the court determined that the Hills should have known about *some* terms: “Gateway ads state that they come with limited warranties and support.”<sup>44</sup>

Assuming the Hills had seen and read such ads, beyond the fact that the “terms” are so vague as to be unenforceable, advertisements are generally not operative as offers. At least, they were not operative as offers prior to this case. Moreover, does a statement about “limited warranties” or

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<sup>42</sup> *Specht v. Netscape Communications Corp.*, 306 F. 3d 17, 32 (2d Cir.2001), opinion by then Judge Sotomayor whose opinion distinguished the *ProCD* and *Hill* cases.

<sup>43</sup> 105 F. 3d at 1150.

<sup>44</sup> *Id.*

“lifetime support” provide any notice of arbitration? If the Hills wanted to know what was meant by “limited warranty and lifetime support,” how would they learn the Gateway meaning? The court suggests that the ad should induce buyers such as the Hills to ask the vendor what its ad meant, or they could pursue public sources such as computer magazines and web sites of vendors that *may* contain such information. At this point, one gets the distinct impression that the court is not concerned about mounting transaction costs for the buyer in a relatively simple transaction. A conspicuous notice on the Gateway carton would have at least provided some notice to buyers such as the Hills that there were terms inside the box.

The Hills also argued that the *ProCD* analysis should not apply to their transaction since Matthew Zeidenberg and ProCD were “merchants” while the Hills were certainly not merchants and non-merchants are treated differently under §2-207.<sup>45</sup> The court was annoyed by this argument which it characterized as paying “scant attention” to the holding in *ProCD* that §2-207 is irrelevant. Clarifying any confusion on this point in its *ProCD* opinion, the court emphasized that the rolling contract analysis applies to “merchants and consumers alike.”<sup>46</sup> It also stated that Matthew Zeidenberg was not a merchant since he bought the ProCD software at a retail store, “an uncommon place to acquire inventory.” Nothing in the UCC section defining “merchant,” however, suggests this test.<sup>47</sup> It is certainly possible for a merchant to purchase something for its business in a retail store.

**(5) Pursuit of the Express Warranty—The “Irrelevancy” of §2-209** The court suggests the possibility of a cogent argument for enforcing Gateway’s terms when it notes that “The Hills have invoked Gateway’s warranty and are not satisfied with its response, so they are not well positioned to say that Gateway’s obligations were fulfilled when the motor carrier unloaded the box.”<sup>48</sup> The first part of this sentence could support an argument that invoking Gateway’s express warranty that was part of the terms inside the box evidences the Hills’ agreement to a modification under §2-209 that binds the Hills to Gateway’s terms including the arbitration agreement. The court, however, is not pursuing this possibility. Subjecting the additional terms inside the box to a § 2-209 modification would undermine the rolling theory since it necessarily would require a finding that the Hills and Gateway had made a prior contract that could be later modified. To assure the application of the rolling theory, §2-209 must be deemed as “irrelevant” as §2-207. Moreover, there is no basis for the court’s reference to contract formation occurring when the carrier “unloaded the box.” The contract was either formed during the telephone discussion between the Hills and the order take or no later than Gateway’s shipment of the computer accompanied by the terms in side the box. Since the court also ignores §2-206, however, it fails to consider the statutory requirement that such “shipment” constituted acceptance.

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<sup>45</sup> See the discussion in the text preceding note 14, *supra*.

<sup>46</sup> 105 F. 3d at 1150.

<sup>47</sup> *Id.*

<sup>48</sup> 105 F. 3d at 1149.

**(6) Silence as Acceptance.** The rolling theory imposes a duty to speak on the buyer to avoid being bound by the vendor's terms inside the box within the time stated by the vendor. Such a view is diametrically opposed to the generally accepted view that the receipt of an offer does not impose a duty to speak on the offeree.<sup>49</sup> Indeed, the general rule is that silence does not constitute acceptance except in three situations, none of which easily fit the rolling contract scenario.

The first exception has the buyer accepting the benefits of offered services with an opportunity to reject them, knowing that the supplier expects to be paid.<sup>50</sup> This exception, however, is designed to deal with services already performed and knowingly accepted without any prior contract. Upon delivery of goods pursuant to a buyer's offer, a reasonable buyer would assume a contract had already been formed. The second exception is particularly important under the rolling theory. Where an offeror states that acceptance may be manifested by action or inaction, the offeree is said to have accepted such an offer only if the offeree intends to accept by remaining silent and inactive.<sup>51</sup> An offeree's silence in response to such an offer is ambiguous and will only be viewed as an acceptance when confirmed by the offeree. Under the rolling theory, however, such silence and inaction constitute acceptance in the face of the offeree's denial of an intention to accept by silence. The third exception allows silence to operate as an acceptance resulting from a course of dealing between the parties and would have no application to buyers such as the Hills.<sup>52</sup>

**(7) Ignoring Precedent.** The rolling contract theory ignores precedent in the 7<sup>th</sup> Circuit and other jurisdictions. In *Advance Concrete Forms, Inc. v. McCann Constr. Specialties, Inc.*,<sup>53</sup> McCann was the largest distributor of Advance products in the Chicago area with purchases amounting to \$700,000 annually. The purchases were typically initiated by phone calls or orders taken in person by an Advance representative visiting McCann. Advance sent invoices to McCann within seven days of each purchase. The typical invoice contained a provision requiring payment within 30 days and a finance charge of one and one half percent interest each month for payments after 30 days—an "annual percentage rate of 18%." McCann claimed it never negotiated or agreed to such an interest rate. The 7<sup>th</sup> Circuit affirmed the trial court's holding that the invoice constituted a confirmation of the contract which contained an additional term subject to UCC §2-207(2)(b) that required the court to determine whether the finance charge term materially altered the previously formed contract.<sup>54</sup>

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<sup>49</sup> Restatement (2d) of Contracts, §69, comment a.

<sup>50</sup> §69(1)(a).

<sup>51</sup> §69(1)(b).

<sup>52</sup> For a further exploration of silence as an acceptance of "terms later," see James J. White, *Autistic Contracts*, 45 Wayne L. Rev. 1693, 1706-1710 (2000).

<sup>53</sup> 916 F. 2d 412 (7<sup>th</sup> Cir. 1990).

<sup>54</sup> Pursuant to comment 5 of §2-207 which contains illustrations of terms that are not material alterations, the court concluded that such a finance charge provision did not materially alter the

The court explained that delivery occurred through common carriers and “Advance’s usual billing procedure was to send an invoice to McCann within seven days of McCann’s purchases.”<sup>55</sup> The invoice was not packaged with the product. It was sent separately, after the goods were shipped. Otherwise, the facts are indistinguishable from *Hill v. Gateway, 2000*. The distinction has no bearing on the Seventh Circuit holding in this opinion that §2-207 applies where the transaction involved only one form, a holding that is diametrically opposed to the holdings on this issue in *ProCD* and *Hill* requiring two forms for any application of §2-207.

A recent case includes the *Advance* opinion in its discussion of a “considerable” split of authority as to whether a document arriving after or with the delivery of goods qualifies as a “written confirmation” under §2-207. In *Rocheux Int’l of N. J., Inc. v. U. S. Merchants Fin. Group, Inc.*,<sup>56</sup> the court first reviewed cases holding that §2-207 does not apply where an invoice is sent *after* the goods have been shipped,<sup>57</sup> but the effect of such holdings was totally different from the rolling contract effect. These courts held that they would not consider whether an additional term could become part of the contract under §2-207 because the contract was already formed before the additional terms were received. Thus, any additional term must be inoperative. In one of these cases, the court noted that, had the billing form containing the additional term been sent *with* the goods, §2-207(2) would apply to test whether the additional term materially altered the prior oral agreement.<sup>58</sup>

The *Rocheux* court compared these cases with others representing what it deemed to be the majority view. A 5<sup>th</sup> Circuit case held that an invoice included with the shipment contained an additional term that would have to be tested under §2-207.<sup>59</sup> It then cited the 7<sup>th</sup> Circuit’s *Advance Concrete* opinion interpreting Wisconsin law in holding that a single document (invoice) sent after the goods were shipped would require the application of §2-207.<sup>60</sup> The court did not

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previous oral contract. Thus, it became part of the contract.

<sup>55</sup> 916 F. 2d at 413.

<sup>56</sup> 2010 U. S. Dist. LEXIS 104445 at \*72 (D. N. J. 2010).

<sup>57</sup> *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F. 2d 1064, 1075-76, (5<sup>th</sup> Cir. 1984); *Wheaton Glass v. Pharmax, Inc.*, 548 F. Supp. 1242, 1244 (D. N. J. 1982).

<sup>58</sup> *Wheaton Glass*, 548 F. Supp. at 1244-45.

<sup>59</sup> *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F. 2d 635, 654 (5<sup>th</sup> Cir. 1991).

<sup>60</sup> The court cited other cases supporting the view that §2-207 applied where the writing was delivered after the goods were shipped: *McJunkin, Inc. v. Mech., Inc.*, 888 F. 2d 481, 487 (6<sup>th</sup> Cir. 1989) (Ohio UCC); *Mid-South Packers, Inc. Shoney’s, Inc.*, 761 F. 2d 1117, 1122-24 (5<sup>th</sup> Cir. 1985) (Miss. UCC); *Sudenga Indus.v. Fulton Performance Products, Inc.*, 894 F. Supp. 1235, 1237-38 (N. D. Iowa 1995) (Iowa UCC); *Herzog Oil Field Service v. Otto Torpedo Co.*,

compare that holding with *ProCD v. Zeidenberg* or *Hill v. Gateway, 2000, Inc.* which, again, dismisses such an application of §2-207.

Apart from the rolling theory, whether the single document containing additional terms arrives with or after the goods, the extant case law holds that either §2-207(2)(b) applies to determine whether the additional term is material or §2-207 does not apply, thereby precluding any additional term, material or immaterial, from becoming part of the contract. The 7<sup>th</sup> Circuit's rolling theory, however, would take a third position: §2-207 does not apply, but the contract includes the additional term regardless of its material effect on parties prior understanding. By totally ignoring precedent, including its own, the court undermines any notion of the principal judicial function of law settlement, without which transaction costs are heavily magnified.

**(8) Failing to Recognize the “Sale on Approval.”** The rolling contract theory is based on the buyer's right to reject the seller's terms, thereby precluding the formation of a contract. In *ProCD* the Seventh Circuit stated that the theory allows the buyer to reject if he finds the license terms “unsatisfactory.”<sup>61</sup> If no contract is formed until the buyer has an opportunity to review the additional terms and decide whether to reject them, the agreement is subject to the buyer's personal satisfaction. The buyer need not justify his decision if he chooses to reject the terms. His subjective approval immediately suggests another UCC category that is completely ignored by the Seventh Circuit, the potential contract emanating from a “sale on approval.”

UCC §2-326 recognizes a “sale on approval” as a “sale on satisfaction” where “[t]he goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them.”<sup>62</sup> Risk of loss rests on the seller until the buyer accepts the goods.<sup>63</sup> Quare: would this risk allocation apply under the rolling theory? The difference between a traditional sale on approval and the “rolling contract” is the buyer's awareness that his approval is essential to form the contract while the rolling contract buyer is totally unaware that his agreement is subject to his unfettered decision to accept or reject the seller's terms until he discovers such terms inside the box containing the goods. If the buyer is not bound by any duty, his promise is illusory and the vendor's promise is unenforceable. If, however, the buyer has an initial duty take delivery of the goods with the enclosed terms and either reject the terms within the prescribed time or accept the terms expressly or by silence, a contract requiring the performance of one of these alternatives was necessarily formed before the buyer was aware of the terms inside the box.

The Gateway terms and conditions inside the box are described as allowing the customer to return the computer to Gateway for any reason for a full refund (less shipping charges) within 30 days of

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570 A. 2d 549, 550-51 (Pa. Super. 1990) (Pa. UCC).

<sup>61</sup> 86 F. 3d 1447, 1452-1453.

<sup>62</sup> UCC §2-316, comment 1.

<sup>63</sup> UCC §2-316, comment 3.

receipt. The agreement also states that retention of the computer beyond the thirty-day period of free trial equates to an acceptance of Gateway's proposed terms and conditions.<sup>64</sup> Thus, the customer is not limited to objecting to Gateway's terms to return the computer, but the terms clearly suggest that the customer has agreed to pay for the computer and accept Gateway's terms or return it within 30 days and pay shipping charges. Such a contractual duty to perform one of the alternatives could only result from a contract formed prior to the delivery of the computer. The court denies that any formation occurred at an earlier time. Recognizing an earlier formation time would invoke the precedent discussed above: either the additional terms inside the box would be totally inoperative or they would be subject to the material alteration test under §2-207(2).

**(9) An Antidote--The Counter Offer Theorem.** Another unresolved issue is illustrated by a simple example. In a jurisdiction that has embraced the rolling contract theory, a merchant places a telephone order for goods. The goods are shipped with rolling contract terms inside--disclaimers of implied warranties, an exclusive repair and replacement remedy, an arbitration clause and, perhaps a choice of law and choice of forum clause. The terms expressly allow rejection and refund of any purchase price paid if an objection to the terms occurs within 30 days. The rolling theory would treat the vendor as the offeror. In the absence of two "battling" forms, §2-207 would not apply. Within 30 days, the buyer notifies the vendor that the buyer is quite willing to pay the agreed price for the goods which it will retain while expressly rejecting any of the seller's additional terms inside the box. The buyer's notice ends with the statement, "If you object to these terms within the next 30 days, please refund the price paid and we will promptly return the goods. Absent such an express notification, your silence will indicate your acceptance."

Since the rolling theory insists that no contract is formed on the vendor's terms until the buyer does not object to the enclosed terms within the prescribed period, the buyer must be able to make such a counter offer. Indeed, the buyer's counter offer indicating silence as acceptance does not suffer like the original offer since the vendor initially proposed the manner of a silent acceptance.<sup>65</sup> If, however, prior to deliver the buyer was bound to either accept the goods with the vendor's terms or object to the terms and return the goods, a counter offer would not be possible, but neither would the rolling contract theory's insistence on a later contract formation.

**(10) A tour de force..** Though Judge Frank Easterbrook's opinions for the Seventh Circuit Court of appeals often inspire well-deserved accolades, as the foregoing analysis suggests, *ProCD v. Zeidenberg* and *Hill v. Gateway 2000, Inc.* confirm an earlier assessment of "a swashbuckling

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<sup>64</sup> *Westendorf v. Gateway 2000, Inc.*, 2000 Del. Ch. LEXIS 54 (Del. 2000)

<sup>65</sup> In a much simpler setting, a pest control service sent an offer containing a boilerplate arbitration provision to a homeowners to renew the service. The homeowners replied with a letter accompanying their payment that rejected the vendor's arbitration provision. The court held that the vendor's acceptance of the payment accepted the homeowner's counteroffer to eliminate the arbitration clause. *Cook's Pest Control v. Rebar*, 852 So. 2d 730 (Ala. 2002).

tour de force that dangerously misinterprets legislation and precedent.”<sup>66</sup> In an effort to solve the perennial problem of the effect to be accorded unread post-purchase boilerplate terms, the Seventh Circuit establishes a clearly excessive analytical price.

#### *IV The Case Law Under the Rolling Contract Theory*

(1). *The Unexplained Conclusion in New York.* One of the earliest adoptions of the rolling theory occurred in *Brower v. Gateway, 2000*,<sup>67</sup> a class action alleging various breaches. Gateway moved to dismiss the action on the basis of an arbitration clause that appeared as part of its standard terms and conditions delivered with the computers.<sup>68</sup> The trial judge rejected the plaintiffs’ claim that the arbitration clause was a material alteration of their pre-existing agreement under §2-207.

The appellate division cited the *ProCD* and *Hill* opinions in holding that the contract was not formed with the plaintiff’s placement of the telephone order or the delivery of the goods. “Instead, an enforceable contract was formed only with the consumer’s decision to retain the merchandise beyond the 30-day period specified in the agreement.”<sup>69</sup> Section 2-207 was said not to apply. The court provides no explanation for this holding, but distinguishes the case from an earlier case “where the parties did in fact have a pre-existing oral agreement.”<sup>70</sup> The earlier case held that where an oral agreement is accompanied by the vendor’s draft sales contract that included an arbitration clause, the buyer is not bound by such a term.<sup>71</sup> Such a “distinguished” holding is not consistent with the rolling theory. Moreover, the *Brower* opinion is totally devoid of any explanation for its conclusion that no pre-existing oral agreement existed in the case before the

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<sup>66</sup> John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 *Fordham L. Rev.* 869, 905 (2002).

<sup>67</sup> 676 N. Y. S. 2d 569 (1998). The court, however, concluded that the arbitration clause was substantively unconscionable under UCC §2-302.

<sup>68</sup> “An arbitration clause is included in the contract to insulate the corporation from the punishing effects of class actions and not as a serious choice of alternative forum. As Judge Posner of the U.S. Court of Appeals for the Seventh Circuit colorfully noted, ‘[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$ 30.’ Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 *Am. Bus. L. J.* 361, 361 (2010).

<sup>69</sup> *Id.* At 250-51.

<sup>70</sup> *Id.* at 251.

<sup>71</sup> *S&T Sportswear Corp. v. Drake Fabrics*, 593 N. Y. S. 2d 799 (1993). The opinion merely states that there was an oral agreement which did not include an arbitration provision and the buyer did not sign the vendor’s draft sales contract.

court. Why no contract existed between the computer buyers and Gateway when the computers were ordered or, at the latest, when they were shipped is not discussed. The court simply accepts the rolling theory as fiat.

While the *Brower* case is always cited as the New York authority adopting the rolling theory, it from an intermediate appellate court that is hardly compelling authority. It has been cited and distinguished,<sup>72</sup> but it has also been criticized.<sup>73</sup>

**(2) Confusion Abounds in Washington.** *M. A. Mortenson Company, Inc. v. Timberline Software Corporation* is invariably cited as support for the “majority” view through the Supreme Court of Washington’s adoption of the rolling theory over a spirited dissent joined by another member of that court.<sup>74</sup> A construction contractor ordered software used for bidding analysis on construction projects. A representative of the software developer signed the contractor’s purchase order containing the contractor’s desired terms. The delivered software discs were covered by a shrinkwrap license that included a limitation of remedies clause excluding consequential damages. Defects in the software resulted in a \$1.95 million error in a construction bid. The trial and intermediate appellate courts held that the limitation of liability clause was enforceable.

On appeal, the buyer argued that the signed purchase order formed the contract and did not include the limitation clause. The majority of the Supreme Court held that the purchase order terms were incomplete and the parties did not intend that writing to constitute their integrated contract. The buyer then claimed that the vendor’s license terms were material alterations of the parties’ agreement that did not become part of their contract under §2-207. The plaintiff relied on the *Step-Saver* analysis<sup>75</sup> which the court distinguished.<sup>76</sup> Finding no Washington case law dealing with the formation question in this case, the court found the reasoning in *ProCD*, *Hill*, and *Brower*, to be persuasive pursuant to the general language in UCC §2-204 recognizing a contract formed in any manner upon which *ProCD* so heavily relied without mentioning §2-206 or other relevant concerns.

The majority opinion, however, was based on its unique analysis of §2-207 which begins with a

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<sup>72</sup> See, e. g., *Register.com, Inc. v. Verio*, 356 F. 3d 393, 428 (2d Cir. 2004) citing *Brower*, *ProCD* and *Hill*, but also noting opposing authorities.

<sup>73</sup> See *Licitra v. Gateway, Inc.*, 734 N. Y. S. 2d 389, 393 *et. seq.* (2001).

<sup>74</sup> *M. A. Mortensen Co. v. Timberline Software Corp.*, 140 Wn. 2d 568, 998 P. 2d 305 (2000).

<sup>75</sup> See the text at note 11, *supra*.

<sup>76</sup> The court noted that the buyer in *Step-Saver* was not an end-user of the product, but a value-added retailer who claimed the license did not apply to it at all. Moreover, the buyer twice refused to sign the disputed license agreement.

curious definition of “merchant” in UCC Article 2.<sup>77</sup> The court held that the contract was not between “merchants” because the buyer, a building contractor, did not deal in software and the UCC definition of “merchant” requires a party who deals in goods of that kind. The statement confuses the meaning of UCC §2-104 that recognizes a narrow definition of “merchant” when applied to a *seller* of goods who must regularly sell goods of the kind involved in the transaction to be charged with making an implied warranty of merchantability under §2-314(1). §2-104, however, recognizes the broad definition of “merchant” that applies to virtually anyone in business with respect to §2-207.<sup>78</sup> The buyer (Morton) should have been recognized as a “merchant” (a party in business) purchasing a product for use in that business.

Having concluded that Morton was not a merchant, the court compounds the error in its startling view that §2-207 “does not specify when additional terms become part of a contract involving a nonmerchant.”<sup>79</sup> As noted earlier,<sup>80</sup> the first sentence of §2-207(2) deals with additional terms in a contract involving at least one nonmerchant. Additional terms are mere proposals to which the other party would have to expressly assent if they were to become part of the contract.<sup>81</sup> If the majority had been correct in characterizing Mortensen as a nonmerchant, the vendor’s additional terms would have been mere proposals to which Mortensen never agreed. The court’s misconstruction, however, precluded any possibility of a §2-207 application to these facts.<sup>82</sup>

In light of this precedent, it is anything but remarkable that subsequent opinions in the State of Washington have manifested considerable confusion in relation to the rolling theory. In *Tacoma Fixture Co. v. Rudd Co., Inc.*,<sup>83</sup> Tacoma purchased paint products from Rudd for several years by placing the orders by phone. Rudd would ship the paint followed by an invoice including a

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<sup>77</sup> 998 P. 2d 305, 312, note 9.

<sup>78</sup> §2-104, comment 2 states that, for purposes of §2-207 as well as other specific sections, “almost every person in business would, therefore, be deemed to be a ‘merchant’ . . . .” See *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338, 355, note 14 (W. D. Pa. 1998).

<sup>79</sup> *Id.*

<sup>80</sup> See the text at note 21 *et. seq.*, *supra*.

<sup>81</sup> The State of Washington version of §2-207 does not differ from the original version. Rev. Code Wash. (ARCW) §62A. 2-207.

<sup>82</sup> The dissent treated the additional terms as a proposal to modify an existing contract under UCC § 2-209, a section ignored by the majority and other courts using the rolling theory. The use of that section would require an acceptance of the proposed modification, which would not occur through mere silence.

<sup>83</sup> 174 P. 3d 721 (Ct. App. Wash. 2008).

disclaimer of implied warranties and a term waiving any claim against Rudd if notification of the claim did not occur within ten days of delivery. When Tacoma made a claim for breach of warranty, Rudd defended on the basis of its invoice terms. The court distinguished the *Mortensen* analysis since the parties in the instant case were both merchants (as if they were not in *Mortensen*). It found that the parties had already made a contract when Rudd sent its invoices *after* shipping the goods. It viewed Rudd's additional terms as "proposals for addition to the contract" under §2-207. This is consistent with comment 2 to §2-207 which treats an additional term after a contract is formed "as a proposal for an added term. . . ." <sup>82</sup>

Instead of simply concluding that the proposals were not accepted, the court characterized Rudd's additional terms as material alterations of the contract. This holding would also have been sufficient to conclude that the additional terms were not part of the contract. The court, however, proceeded to demonstrate considerable difficulty with §2-207 which it characterized as the "defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair." <sup>83</sup>

Compounding its misanalysis, it held that, while the parties never agreed to Rudd's additional terms, they conducted themselves in a manner indicating their intention to form a contract, thus requiring the application of §2-207(3). That section, however, applies only where the parties have failed to make a contract in any fashion but proceed to conduct themselves as if they had made a contract. Here, the court recognized that the parties had clearly made a contract and the only issue was whether Rudd's terms that were supplied after the contract was made should become part of the contract. Section 2-207(3) was not designed to deal with this situation. Nonetheless, since Rudd's additional terms did not match previous terms, the court concluded that they were not operative under §2-207(3), certainly a novel analysis but one that ended this tortuous journey. In passing, however, the court also noted an earlier Washington case where an invoice containing a warranty disclaimer was included in the package of the delivered goods and the court rejected the disclaimer. <sup>84</sup>

Though Washington is listed as one of jurisdictions adopting the rolling theory, it euphemistic to suggest that confusion abounds in this jurisdiction concerning the possible application of the theory.

**(3) Kansas Concludes Otherwise.** In *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, <sup>85</sup> after detailed negotiations, in 2003 DCI issued a written offer to supply software to Wachter that contained clear terms and was accompanied by a cover letter stating that the DCI proposal

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<sup>82</sup> UCC §2-207, comment 2.

<sup>83</sup> 174 P. 3d at 723, quoting *Reaction Moulding Techs, Inc. v. Gen. Elec. Co.*, 585 F. Supp. 1097, 1104 (E. D. Pa. 1984).

<sup>84</sup> *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 625 P. 2d 171 (Ct. App. Wash. 1981).

<sup>85</sup> 282 Kan.365, 144 P. 3d 747 (2006).

“includes modules and licenses.” Wachter’s agent signed the proposal. The software arrived, accompanied by a “shrinkwrap” agreement that included a choice of law/ venue provision providing that the agreement would be governed by the law of the state of Washington and any disputes would be resolved by state courts in King County, Washington. Such a forum-shopping provision appearing in a software supplier’s form is not surprising in light of the decision issued three years earlier by the Washington Supreme Court in the *Mortensen* case which was seen as upholding shrinkwrap licenses.

Problems with the software induced Wachter’s action in Kansas that DCI moved to dismiss on the basis of the choice of law/ venue provision. Wachter claimed that the additional terms were unenforceable. The district court denied DCI’s motion. On appeal, a majority of the Kansas Supreme Court found that the contract was formed when Wachter’s agent signed the DCI offer. After distinguishing *ProCD* and *Hill*, the court found *Mortensen* factually similar. It disagreed with the majority analysis in *Mortensen* based on *ProCD* and *Hill* and adhered to the “traditional contract principles” of the dissenting judges in *Mortensen*. The court held that DCI and Wachter had negotiated the terms and the DCI offer to sell had been accepted by Wachter. The license terms accompanying the software were proposals to modify the contract under UCC §2-209 which were not accepted by Wachter.

A dissent joined by two other justices focused on the cover letter sent with the DCI offer stating, “[t]he proposal includes modules and licenses.” It concluded that, by signing the proposal, Wachter accepted the licenses. The dissent does not explain how the terms “modules” or “licenses” includes a choice of law/ venue provision for the entire contract. Moreover, unlike the consumer telephone transaction where it would be unreasonable for the order-taker to read boilerplate terms, this contract involved merchants who had negotiated this transaction in detail before the written proposal was submitted. It would not be unreasonable to include the license terms at that time, particularly if provisions such as the choice of law/ venue clause were important to the offeror

Alternatively, the dissent suggests that the reference to “licenses” in the proposal manifested the offeror’s intention that a layered contract would exist that would not be formed until Wachter agreed to the license terms (whatever they may have been). Assuming a contract would not be formed until that time, however, is counterintuitive. Essentially, the dissent simply admits it was persuaded by the result in *ProCD* and *Hill*, which it would apply regardless of severe analytical hurdles.

**(4) Following the “Eminent” Seventh Circuit.** Writing for the Rhode Island Supreme Court in *DeFontes v. Dell*, Chief Justice Williams recognized that “[t]he eminent Judge Frank Easterbrook has authored what are widely considered to be the two leading cases on so-called ‘shrinkwrap’ agreements”<sup>86</sup>-- hardly a comforting thought for the plaintiffs who claimed that they were not bound by the agreement accompanying the delivery of the goods. Applying Texas law,

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<sup>86</sup> 984 A. 2d 1061, 1068 (R. I. 2009).

the court recognized that if the contract was formed at the moment Dell's agents processed the customer's credit card payment and agreed to ship the goods as the plaintiffs argued, any later additional terms would be viewed part of a confirmation under §2-207, or offers to modify under §2-209.

The court proceeds to herald the eminent Easterbrook analysis that "challenged the traditional understanding of offer and acceptance" and "held that U. C. C. 2-207 was inapplicable in cases involving only one form" which made "the 'battle-of-the-forms' provision irrelevant."<sup>87</sup> The court simply accepts this analysis without question or analysis and ends by quoting the Seventh Circuit's essential rationale for the rolling contract theory that "practical considerations" required a new theory as quoted earlier.<sup>88</sup>

While holding that the terms accompanying the goods in this case did not sufficiently alert the buyers that they could reject the terms by returning the goods, the court otherwise approved the rolling theory as the "modern trend" that "seems to favor placing the power of acceptance in the hands of the buyer after he or she receives goods containing a standard form statement of additional terms and conditions, provided the buyer retains the power to 'accept or return' the product."<sup>89</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> See the quotation from *ProCD* preceding note 39, *supra*.

<sup>89</sup> 984 A. 2d at 1068. In note 13 at 1070, the court suggests, "It appears that the drafters of the Uniform Commercial Code were themselves flummoxed by this issue. Amended U.C.C. § 2-207, which, although not adopted, could provide some insight into any evolving consensus among commercial law scholars and practitioners, states in Official Comment 5, '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*, 939 F.2d 91 (3d Cir. 1991) and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (original 2-207 governs) or the contrary reasoning of *Hill v. Gateway* 2000, 105 F.3d 1147 (7th Cir. 1997) (original 2-207 inapplicable). Amended §2-207, Comment 5 (2003).'"

The notion that the drafters were "flummoxed" is superficial. The 1999 rejection of a genuine draft "revision" of Article 2 after a decade of work induced an effort to create a modest "amended" version. The new committee was well aware of the irreconcilable differences concerning the enforcement of shrinkwrap license terms and the rolling theory. The rolling theory had been adopted in the highly controversial Uniform Computer Information Transaction Act (UCITA) that was enacted only in Maryland and Virginia and was often stated as a reason for the failure to enact UCITA elsewhere. If the drafters of the amended Article 2 had taken either position on the rolling theory, enactment would have appeared impossible. In the process of creating any uniform law, "enactability" is a critical factor. For an analysis of UCITA, see Roger C. Bern, "Terms Later" Contracting" *Bad Economics, Bad Morals and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J. L. & Pol'y 641, 773 *et. seq.* (2004).

**(4) Rejecting the Eminent Seventh Circuit** The “eminence” of the Seventh Circuit was insufficient to convince Judge Kathryn Vratil in *Klocek v. Gateway, Inc.* that the rolling theory is sound.<sup>90</sup> William Klocek brought individual and class action claims against Gateway which demanded arbitration under its standard terms and conditions inside the box containing the computer. The terms stated that the buyer accepted them by retaining the computer beyond five days after delivery.

Noting that the law of Kansas or Missouri probably applied but neither had resolved the issue of whether terms received with the goods become part of the parties’ agreement, the court found a split of authority in other jurisdictions. In addition to the *Step-Saver* case discussed earlier,<sup>91</sup> the court noted *Arizona Retail Systems, Inc. v. Software Link, Inc.*,<sup>92</sup> holding that license terms shipped with the software were not part of the agreement. It compared these cases with *ProCD* and *Hill* as well as *Mortensen* in Washington State.

Gateway urged the court to follow *Hill*, but the court found considerable criticism of *Hill* among “legal commentators.”<sup>93</sup> While other courts followed the Seventh Circuit,<sup>94</sup> the instant court was not persuaded that Kansas or Missouri courts would do the same. It viewed the determination in *ProCD* and *Hill* that §2-207 was irrelevant because the transactions involved only one form was not supported by any authority in those cases and was contrary to the statute as enacted in Kansas or Missouri. The court also noted that the Seventh Circuit failed to explain in *Hill* how the vendor became the offeror. “In typical consumer transactions, the purchaser is the offeror and the vendor is the offeree.”<sup>95</sup> Gateway produced no evidence to change that characterization in the instant case. The buyer was the offeror and Gateway accepted the offer by agreeing to ship the goods or, at the latest, when it shipped the computer.<sup>96</sup> Since the plaintiff was not a merchant, under §2-207, any additional term would be a mere proposal that could be binding only if the plaintiff assented to it. The court denied Gateway’s motion to dismiss.

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<sup>90</sup> 104 F. Supp. 2d 1332 (D. Kan. 2000).

<sup>91</sup> See the discussion in *II(2)*, *supra*.

<sup>92</sup> 831 F. Supp. 759 (D. Ariz.1993)

<sup>93</sup> 104 F. Supp. 2d at 1339, note 9.

<sup>94</sup>

Here, the court cites *Rinaldi v. Iomega Corp.*, 1999 Del. Super. LEXIS 563; *Westendorf v. Gateway 2000, Inc.*, 2000 Del.Ch. LEXIS 54; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (discussed above); *Levy v. Gateway 2000, Inc.*, 1997 WL 823611.

<sup>95</sup> 104 F. Supp. 2d at 1340.

<sup>96</sup> Here, the court cites §2-206(b). 104 F. Supp. 2d 1340, note 11.

**(5) Oklahoma Is Not Persuaded** In *Rogers v. Dell Computer Corp.*,<sup>97</sup> the Supreme Court of Oklahoma confronted an insufficient record. For purposes of discussion, however, the court assumed that the Dell “Terms and Conditions of Sale” which included an arbitration clause were received by the plaintiffs with the shipment of the computers. After reviewing *ProCD, Hill* and their progeny, the court first when the contracts were formed. It looked to UCC §2-206(1) “that generally answers that question.” Under that section, where a buyer places an order, the buyer is the offeror and the contract is formed when the vendor-offeree agrees to deliver the goods. If at the time the order was placed, the language and circumstances indicated that the contract would not be formed until the buyer received the terms and conditions and decided whether to object to them, the arbitration provision would be a term of the contract. If the contract was formed at the time the orders were placed, the arbitration provision would not be a term of the contract. The court then considered the second question, what are the terms of the contract? Here, it turned to §2-207, noting that the arbitration provision would be a mere proposal to a nonmerchant under §2-207(2) that would not be part of the contract absent the buyer’s assent. Since facts in the record were not sufficient to permit the application of the proper analysis, however, the court remanded the case. The analysis clearly rejected the rolling theory.

**(6) The Curious Situation in Illinois.** It would not be surprising to find an intermediate appellate court in Illinois influenced by the Seventh Circuit theory announced in *Hill*. In *Bess v. Direct TV, Inc.*,<sup>98</sup> the defendant activated television satellite service at the request of the plaintiff in 1999. It then sent her a customer service agreement stating that, if she did not accept the terms of the agreement she should notify the defendant immediately and service would be discontinued. The agreement contained an arbitration provision. The plaintiff did not cancel the service. The 1999 agreement was replaced by a subsequent agreement that also contained the arbitration clause. When the plaintiff brought an action over the payment of fees, the defendant moved to compel arbitration. The trial court held the arbitration provision was procedurally and substantively unconscionable. On appeal, a majority of the instant court found no procedural or substantive unconscionability.

The plaintiff, however, had relied on a decision by the Supreme Court of Illinois, *Razor v. Hyundai Motor America*,<sup>99</sup> where the plaintiff claimed consequential damages in an action against the seller of an automobile. Addressing the issue of whether the defendant’s exclusion of consequential damages was unconscionable, the *Razor* court focused on a fact in the case that “tipped the balance” in the plaintiff’s favor. The plaintiff testified that she never saw the vendor’s printed warranty containing the exclusion of consequential damages that was in the glove box of the new car until she accepted the car. Since the plaintiff’s testimony in this regard was uncontradicted, “on this record” the court concluded that a limitation of liability clause after the

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<sup>97</sup> 138 P. 3d 826 (Ok. 2005).

<sup>98</sup> 381 Ill. App. 3d 229, 885 N. E. 2d 488 (2008).

<sup>99</sup> 222 Ill. 2d 75, 854 N. E. 2d 607 (2006).

contract is made was ineffective,<sup>100</sup> and to enforce such a clause would be unconscionable.

The majority of the *Bess* court found the *Razor* case “factually distinguishable” since it dealt with a preprinted warranty that was required to be conveyed at the time of sale under the Magnuson-Moss Warranty Act<sup>101</sup> The dissenting opinion, however, noted that the *Razor* opinion, itself, explained that the Act and FTC regulations of the Act were only raised at rehearing and simply “validated” the court’s earlier analysis that treated limitations of liability arriving after the contract was formed as inoperative.<sup>102</sup> Moreover, by the time *Bess* received the customer agreement containing the arbitration provision, the equipment had already been installed and the services were being provided.

In order to cancel service at that point, *after* she had take all necessary steps to become a DirectTV subscriber, she would have had to suffer the time, effort and expense of associated with switching to another service provider. Therefore, *Bess* was deprived of a meaningful choice in determining whether to accept the arbitration provision of the Customer Agreement.<sup>103</sup>

A subsequent Federal district court was confronted with the necessity of choosing between *Hill v. Gateway 2000* upon which *Bess* had relied, and the holding and rationale in *Razor*. In *Trujillo v. Apple Computer, Inc.*,<sup>104</sup> the purchaser of an iPhone claimed that the maker and service provider had misled consumers about the true cost of battery replacements. The defendant moved to compel arbitration, a term in the customer agreement. Since the customer agreement was allegedly not provided to the plaintiff until after the purchase of the iPhone, the plaintiff relied on the holding in *Razor* in claiming the arbitration agreement was unconscionable. The defendant, however, cited the *Hill* case as authority for enforcing terms arriving after the purchase. The instant court noted that *Best v. DirectTV* had also relied upon the *Hill* analysis where the court stated that the plaintiffs could have asked the vendor to provide a copy of the agreement before receiving the computer, or they could have consulted other sources that may have provided information about the terms of the agreement. Noting it was bound to follow the Seventh Circuit’s determination of Illinois law absent an intervening and contrary decision from the highest court of the state, the instant court concluded that *Razor* was such a decision from the highest court upon which the district court had to rely to the extent that it was contrary to *Hill*.

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<sup>100</sup> The court cited *Frank’s Maintenance & Engineering, Inc. v. C. A. Roberts Co.*, 86 Ill. App. 3d 980, 991, 408 N. E. 2d 403 (1980).

<sup>101</sup> The court notes that the *Razor* opinion had quoted the FTC regulations dealing with the Magnuson-Moss Act (16 C. F. R. §700.11(b)).

<sup>102</sup> Citing *Razor*, 854 N. E. 2d at 624.

<sup>103</sup> *Bess v. DirectTV, Inc.*, 885 N. E. 2d at 505.

<sup>104</sup> 578 F. Supp. 2d 979 (N. D. Ill. 2008).

[T]he dispositive factor in that case [*Razor*] was the unavailability of the agreement [containing the exclusion of consequential damages] to the consumer until after she had purchased the product. Although it was presumably just as true in *Razor* as in *Hill* that the consumer could have asked in advance for a copy of the applicable agreement, or could have checked the website, the Illinois Supreme Court did not hint that this was at all significant as a matter of Illinois unconscionability law.<sup>105</sup>

Even in Illinois, the case law progeny suggests that the status of the rolling contract theory requires considerable clarification.

There are other cases citing *ProCD*, *Hill* that would add nothing to the discussion. The foregoing cases aptly illustrate the current applications or rejections of the rolling contract theory and related issues. The cases adopting the theory manifest little or no analysis, confusion, erroneous analyses of §2-207, and failures to consider other relevant sections of UCC Article 2 as well as the relationship between other cases and the theory.

***V A Different Economic Dimension.*** The rolling contracts theory is typically defended on the basis that it avoids the cognitive overload and attendant transaction costs that would result from attempting to have buyers instantly read and understand all of the relevant information accompanying a contract to sell a given product. By providing the buyer with the ability to read and digest these terms at the buyer's leisure with the right of objection and the return of the purchase price, the rolling theory suggests a consumer protection purpose though it is not limited to consumer transactions. After all, providing the customer with an unfettered power to accept or reject the vendor's terms, seems "eminently" fair. The theory assumes that economists should be pleased since nasty transaction costs of providing the customer with *ex ante* terms without sufficient time to read or understand have been avoided. It is, however, important to consider a statement of another economic dimension concerning the theory that rings even more true:

In the landmark cases of *Pro CD v Zeidenberg* and *Hill v Gateway*, the Seventh Circuit upheld form terms included inside the packaging of computer software and hardware respectively on the grounds that the buyers, who could not access the terms until after purchasing the merchandise, could have returned it to the sellers if they did not wish to accept the adhesive terms. After the purchase, however, the buyers had already invested in the particular products, and returning them would have required expending additional time and effort. Although the sellers were not monopolists at the time of sale, they enjoyed a

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<sup>105</sup> 578 F. Supp. 2d at 994. Summary judgment for the defendant was granted in a subsequent proceeding where the plaintiff withdrew his original substantive complaint that the defendant hid facts concerning the battery life of the iPhone. The court noted that his claims were untenable since a label affixed to the box of the iPhone disclosed the limited recharge cycles of the battery, 581 F. Supp. 2d 985 (2008). This resolution did not attempt to address the question of the status of the rolling theory under *Hill* in light of the holding and rationale in *Razor*.

situation-specific monopoly vis-a-vis customers who had already purchased their merchandise. Of course, they could not have taken advantage of this by charging a higher price, because the price term had already been agreed upon (and paid). Unable to renegotiate price, the sellers had an incentive to try to capture benefits of their monopoly position by providing low-quality terms.<sup>106</sup>

The power to accept or return the product is also the old fashioned marketing ploy called the “money back guarantee” that superficially suggests nothing could be more fair. Beyond the fact that the refund comes without interest that could have been earned, it is often forgotten that the right to return protects only the restitution interest. The buyer is returning the goods for which the very least it should receive is a return of the purchase price to avoid manifest unjust enrichment of the vendor. Again, however, a reasonable buyer might assume a contract existed before the goods and the terms were delivered. If such a contract had been recognized, the buyer would not only have a contract without adhesive terms; for any breach by the vendor, the buyer would be entitled to the expectation interest, i. e., the benefit of the bargain, an interest that is ignored whenever a vendor “generously” agrees to return the purchase price.

Having gone to the trouble and costs of agreeing to purchase a product, receiving the goods, opening the package and reading the terms, the buyer must notify the seller of its objection to the terms, repackage the goods and return them. This must be accomplished within the period set by the vendor. In exchange, the buyer receives a return of the purchase price less shipping charges. If the buyer can purchase a substitute product only at a higher cost, the rolling theory provides no “cover” or other expectation interest remedy under the UCC.<sup>107</sup> This is further evidence that the price of efficiency under the rolling contract theory may be excessive.

## ***VI The Underlying Problem—Commentators***

The “terms later” rolling contract theory is a species of the underlying frustration of determining the operative effect to be accorded standard terms and conditions in the vendor’s boilerplate. Vendors load their boilerplate with defenses against default rules. Absent any mention of warranties, remedies, or dispute resolution in a contract for the sale of goods, the buyer is supplied with the UCC automatic assurance that it will receive goods that accord with any express and all implied warranties.<sup>108</sup> Should the vendor breach the contract, the buyer has an arsenal of remedial weapons to assure the protection of its expectation interest as well as a right to recover incidental and consequential damages.<sup>109</sup> Absent contrary agreement, dispute resolution will be pursued in a

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<sup>106</sup> Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi. L. Rev. 1203, 1265 (2003). This analysis is similar to the concerns raised by the dissent in *Bess v. DirectTV, Inc.* quoted at note 103, *supra*.

<sup>107</sup> UCC §§2-712, 2-713.

<sup>108</sup> UCC §§2-313, 2-314 and 2-315.

court of law.

Where a buyer sends a written offer such as a purchase order, a vendor's definite expression of acceptance will form a contract. The vendor's boilerplate disclaimers of warranties, exclusive repair and replacement remedy that excludes consequential damages, arbitration clause and other anti-default clauses will not become part of the contract if they materially alter the terms of the buyer's offer.<sup>110</sup> Indeed, under current constructions a buyer could create a purchase order form that assures victory in the "battle of the forms" regardless of whether the buyer's form is construed as an offer or as an acceptance.<sup>111</sup> Even if the exchanged forms do not create a contract but the parties proceed to perform as if they had a contract, any non-matching terms in the exchanged forms will also be excised and the gaps filled with default terms favoring the buyer.<sup>112</sup> If, however, the merchant buyer made the offer by phone or in person and the only form in the transaction is the vendor's form with additional terms, the rolling theory would eliminate §2-207. Absent a buyer's later objection, the vendor's terms would become part of the contract without any inquiry into whether the additional terms materially altered the terms of the original agreement.

Beyond the total misconstruction of §2-207 that is required to achieve this result, the theory clearly undermines the purpose of §2-207. Moreover, consumer buyers do not have a ready supply of purchase order forms. Thus, the rolling contract would deprive them of §2-207 protection as a matter of course, subjecting them to the vendor's terms, regardless of their materiality. This artificial distinction, alone, is a more than a sufficient reason for rejecting the rolling contract theory. Yet, even commentators who emphatically denounce the Seventh Circuit's §2-207 ukase may not be particularly troubled by the effects of the theory.

Though concluding that Judge Easterbrook was "plainly wrong" about the applicability of §2-207 and stating that §2-206(b) should have governed the contract formation concept in *Hill v. Gateway*, Professor Robert Hillman concludes, "But so what?"<sup>113</sup> Even if the contract was said to

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<sup>109</sup> UCC §2-711 lists the buyer's remedies, followed by their individual elaboration in separate subsequent sections.

<sup>110</sup> §2-207(2)(b).

<sup>111</sup> If a purchase order contains express clauses replicating UCC default terms such as implied warranties, remedies and dispute resolution as well as other terms such as choice of law and choice of venue terms, under the "knockout" rule, such express terms will cancel any expressly conflicting terms in a vendor's form leaving gaps to be filled by the UCC default rules which favor the buyer. A recent comprehensive analysis of §2-207 appears in John E. Murray, Jr., *Murray on Contracts*, §50 (5<sup>th</sup> ed. 2011).

<sup>112</sup> §2-207(3).

<sup>113</sup> Robert A. Hillman, *Rolling Contracts*, 71 *Fordham L. Rev.* 743, 753 (2002).

be formed when the Hills ordered the computer by phone, Hillman believes that the Hills' retention of the computer beyond 30 days and their pursuit of express warranty protection under Gateway's terms would be sufficient to constitute a modification under §2-209 that needs no consideration to be enforceable.

As suggested earlier, however, the court does not make that argument, but Hillman is not troubled by the court's incredible analysis since he characterizes arguments over the time of formation as a "dead-end debate" and suggests that critics of the rolling theory would more fruitfully spend their time urging lawmakers to "beef up" the protection of the unconscionability doctrine and §211(3) of the Restatement (Second) of Contracts.<sup>114</sup>

Professor James White devotes considerable effort to efficiency analysis though he recognizes that many of the examples illustrate contracts that "exist mostly in professors' minds."<sup>115</sup> He would like to see the default rules of the Uniform Commercial Code revisited, particularly the rule allowing the recovery of consequential damages, but he recognizes that such a legislative aspiration is currently unrealistic. While reviewing arguments concerning efficiency, White pretends no "bright line" solutions, but he would insist that an offeree should "not be bound to any contract unless the offeree has a reasonable opportunity to learn of the offeror's terms."<sup>116</sup>

### ***VII Pursuing a Solution***

Should it really make any difference whether the vendor's terms are provided before the contract is formed, or arrive with the goods, or in a separate mailing shortly after the goods are delivered? Is the buyer more likely to read and understand the vendor's terms depending upon when they become available? There is cognitive overload regardless of when the buyer receives the boilerplate terms.

Before Karl Lewellyn and associates created the radical §2-207 and its companion, §2-302, that allowed courts to deem terms unconscionable, it was an open secret that the vendor's boilerplate

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<sup>114</sup> *Id.* At 757. Section 211 of the Restatement (Second) of Contracts clings to the usual rule that a party is bound by standardized terms in a document he signs or to which he otherwise manifests assent, subject to §211(3) which relieves a party from a standardized term where the other party (typically the vendor) has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term. An analysis is found in John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 Cornell L. Rev. 735 (1982). Except for cases involving insurance policies, §211(3) has found precious little support. Efforts to "beef up" unconscionability have manifested no success. In a failed revision of Article 2, a draft modifying §2-302 adding a new subsection similar to Restatement (Second) §211(3) was severely criticized.

<sup>115</sup> James J. White, *Autistic Contracts*, 45 Wayne L. Rev. 1693, 1715 (2000).

<sup>116</sup> *Id.* at 1721.

is non-negotiable, thereby making it rational to ignore it.<sup>117</sup> Contentment, if not clarity, has been found in Llewellyn's invariably quoted recognition that genuine assent to boilerplate terms does not occur. Such terms become part of the contract through a presumed assent—a “blanket assent”—to “decent” (conscionable) terms.<sup>118</sup> Professor Hillman finds the Llewellyn solution to be just fine—or at least, the best we can do.<sup>119</sup>

Similar contentment, however, cannot be found under the rolling theory. It should be a truism that pervasive confusion in the law of contract formation and related issues is an evil to be avoided, and the current application, rejection or efforts to distinguish the rolling contract theory is a major contributor to pervasive confusion which has proven to be contagious. Consequently, it does matter whether the theory spreads or is contained.

At present, a legislative solution is impracticable. The debacle resulting from the attempts to revise Article 2 of the Uniform Commercial Code in the 1990's or even to agree on the enactment of modest amendments in the early 21<sup>st</sup> century augur the necessity of sufficient time to heal those wounds before a new revision is attempted. Indeed, the pusillanimous treatment of the split of authority over rolling contract theory in the unenacted amendments testified to the need for additional time.<sup>120</sup> The absence of a comprehensive legislative solution, however, should not preclude an interim judicial solution to the current uncertainty and hyper confusion which is destined to grow unless it is contained.

### ***VIII A Workable Solution***

As the underlying basis for an interim, workable solution, it should not be difficult to find widespread agreement with the concept that Professor White identifies as his *sine qua non*, i. e., the buyer must have a reasonable opportunity to learn of the vendor's terms, even if he chooses

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<sup>117</sup> “Instead of consciously considered terms, the fine print clauses, often called “boilerplate,” contain legal language in fine print that disinvites reasonable parties from reading them. Consumers or merchants are convinced that they would not understand such clauses even if they took the time to read them. Moreover, they recognize that they are typically nonnegotiable for any buyer with inferior bargaining power.” John E. Murray, Jr., *Murray on Contracts*, §49 (5<sup>th</sup> ed. 2011).

<sup>118</sup> “Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.” Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (1960).

<sup>119</sup> Hillman, note 113, *supra*, at 746-752.

<sup>120</sup> See note 89, *supra*.

not to take advantage of that opportunity. Invisible terms have always been anathema.<sup>121</sup> Neither is the notion of being bound by invisible terms sufficiently accommodated by being obliged to object to them within the time prescribed by their author after they are revealed for the first time. While the “blanket assent” to standardized terms is an economic necessity, it has not totally eliminated the requirement of mutual assent in the 21<sup>st</sup> century. “The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force.”<sup>122</sup>

The party against whom standard terms are designed to operate must be sufficiently alerted to expect subsequent contract terms to assure a reasonable opportunity to become aware of them. If the vendor’s terms will only arrive *with* the goods, it is not enough to simply insert the terms inside the box as in *ProCD* to assure a reasonable opportunity to review them. *The buyer must be alerted to expect later “contract” terms.*<sup>123</sup>

In a self-service transaction, the box containing the goods should include a *conspicuous* notice that the product is being sold on the basis of “contract terms” inside the package.<sup>124</sup> Such a notice

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“One of the most hateful acts of the ill-famed tyrant, Caligula, was that of having the laws placed on pillars so high that the people could not read them.” *Cutler Corp. v. Latshaw*, 97 A. 2d 234, 237 (Pa. 1953). The fine print provision that was deliberately placed on the reverse of a sheet to hide it was a confession of judgment clause, a “drastic” provision, that the court found to be inoperative.

<sup>122</sup> *Specht v. Netscape Communs. Corp.*, 150 F. Supp. 2d 585, 596 (S. D. N. Y. 2001). *Aff’d*, 306 F. 3d 17, 29 (2d Cir. 2002): “Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.”

<sup>123</sup> Professor Stephen Friedman recommends what he calls a “template notice” that would require sellers to do more than give notice that unspecified additional terms would be forthcoming. The template would be a summary of the vendor’s vital terms to be disclosed before or during the buyer’s offer to purchase with the full text disclosed later. Stephen E. Friedman, *Improving the Rolling Contract*, 56 Am. U. L. Rev. 1 (2006). Even attempting to summarize disclaimers of warranties, remedy limitations, arbitration and other vendor’s terms during a telephone call would encounter the same difficulties that the rolling theory was designed to prevent. Determinations of whether summaries were adequate are predictable litigation issues. It is feasible for courts to determine whether a notice of forthcoming “contract terms” was conspicuous on the outside of a box or in the language of an order taker, just as it is feasible for a court to determine whether the “contract terms” inside the box were conspicuously presented. There is no reason not to bind a buyer to conscionable terms inside the box that the buyer has ample time to digest if the buyer has been sufficiently alerted to expect such terms.

<sup>124</sup> In the case upon which the Seventh Circuit relied so heavily as support for its new theory, *Carnival Cruise Lines v. Shute*, note 18, *supra*, on the face of the cruise line ticket, the following

should state that the buyer should read “the important contract terms inside this package. If you are not satisfied with these contract terms, return the product for a full refund of the purchase price.”<sup>125</sup> The contract terms inside the package should not be found in a “user’s guide” or “instruction” booklet. Such a title misleads the user who may avoid reading any portion of it, or only that portion that deals with a particular problem of installation or use. Fundamental contract law precludes operative effect to terms in documents that a reasonable party would not understand as including contract terms.<sup>126</sup> There is no justification for enclosing contract terms under such a caption.<sup>127</sup> Rather, they should be found in a printed statement conspicuously labeled as “contract terms,” their true identity.

Current offer and acceptance analysis finds a contract when the offeree buyer takes the goods from the shelf though the buyer is provided with a power of termination if she chooses to return the goods. There is no need to torture the reasonable understanding of the buyer by changing the time of formation with respect to the terms inside the box. If a conspicuous statement alerts the buyer to terms inside the box where the terms are clearly identified as “contract terms,” the analysis should recognize a contract formed when the buyer took the product from the shelf and paid for it. The buyer’s duty under the formed contract, however, is conditional on the buyer’s satisfaction with the vendor’s terms inside the box. Such a condition is an event ( the buyer’s satisfaction) that must occur to activate the buyer’s existing duty under the contract that was formed when the buyer took the box from the shelf and paid the required price.<sup>128</sup> If the buyer is not satisfied, notice of objection is given and the product is returned for a full refund. Section 2-207 would have no application unless there was either no statement on the package or the statement was inconspicuous.

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alert appeared: “SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES  
**IMPORTANT!** PLEASE READ CONTRACT.-- ON LAST PAGES 1, 2, 3.” 499 U. S. At 587.

<sup>125</sup> “Conspicuous” is defined in UCC §1-201(10). A statement such as “IMPORTANT TERMS GOVERNING THE CONTRACT BETWEEN THE [COMPANY name] AND THE PURCHASER ARE ENCLOSED” would be sufficient.

<sup>126</sup> See, e. g., *Magliozzi v. P&T Service Co., Inc.*, 614 N. E. 2d 690 (Mass.Ct. App. 1993). Restatement (Second) of Contracts, §211, comment d and illustration 3 where an “invoice” contained contract terms. The illustration concludes that the terms were not part of the contract.

<sup>127</sup> Indeed, an arbitration provision in a pamphlet captioned “User’s Guide” should be deemed procedurally unconscionable, *per se*.

<sup>128</sup> Restatement (Second) of Contracts, §224. This characterizes the condition as precedent. Where the buyer has already paid for the product, however, it may be argued that the buyer’s dissatisfaction with the later revealed terms constitutes an “Event that Terminates a Duty” under §230. The Second Restatement no longer refers to such an event as a “condition subsequent” since it prefers to relegate the term “condition” to conditions precedent. See §224, comment e.

The “contract terms” inside the box would be required to clearly state that the buyer will be bound by the terms unless the buyer objects to them within a prescribed time, properly notifies the vendor of such objection and returns the contents of the box to the vendor for a prompt refund<sup>129</sup> The buyer must be allowed sufficient time to make that decision. When the time for exercising that decision is exhausted, the condition to the buyer’s duty expires and the duty becomes absolute. The vendor’s terms are terms of the contract. Like boilerplate terms provided before the contract was formed, the terms inside the box would continue to be subject to claims of unconscionability.

Where goods are ordered by phone or in person, the buyer should be recognized as the offeror. A clear statement by the order taker concerning contract terms that will be delivered with the goods such as the fifteen second statement suggested earlier<sup>130</sup> constitutes a counter offer and assures the buyer a reasonable opportunity to learn of the vendor’s terms. The statement would be recorded as phone statements are currently recorded for marketing reasons with notice to the caller. The buyer would be properly characterized as an offeror, and the order-taker’s statement would constitute a counter offer. The buyer’s assent to the counter offer forms a contract under which the buyer’s duty is again conditioned on the buyer’s satisfaction with the vendor’s terms arriving with the goods. As noted earlier, a similar scenario has already been illustrated and approved in a recent Seventh Circuit case.<sup>131</sup>

This analysis is also consistent with the common practice of ordering goods through the Internet where the vendor insists that the buyer must click the “I agree” button to manifest agreement to the vendor’s terms. The vendor’s insistence on agreement to its terms is a counter offer that the buyer must accept to download software or to assure shipment of an ordered product. Again, § 2-207 would have no application since the buyer would accept the vendor’s counter offer to form the contract.

Would these modifications effect a major change in the behavior of buyers with respect to reading or attempting to understand boilerplate terms? It would be naively optimistic to expect such an effect. Some additional reading and study of these terms by buyers may occur, but a much more important effect is not naive. Vendors may be more inclined to ascertain that their “contract terms” are competitive in the market which is a more important safeguard against unfair boilerplate terms.

## ***IX Conclusion***

To assure a reasonable opportunity to become aware of a vendor’s otherwise invisible terms, the

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<sup>129</sup> The Rhode Island Supreme Court was particularly insistent on this requirement in *DeFontes v. Dell*, at the text preceding note 89, *supra*.

<sup>130</sup> See the text after note 38, *supra*.

<sup>131</sup> See *Spivey* note 39, *supra*.

confusion, doubt and controversy attending the rolling contract theory clearly requires its rejection. The theory is not only totally unnecessary to assure efficiency; at a minimum, its failure to alert the buyer to expect later contract terms affects the buyer's reasonable opportunity to become aware of such terms. There is no need to continue the deliberate misconstructions of statutes or precedent that the theory requires. Nor is it simply a matter of the number of major flaws in the theory as announced and pursued in the Seventh Circuit. It is systemically incapable of providing reasonably clear and effective guidelines. A theory predicated on misreading or ignoring relevant statutes is inherently defective. It is destined to create confusion if not chaos. A creative extension of contract law theory is always welcome, but a theory that insists on characterizing an offeree as an offeror and avoiding statutory prescriptions is not simply mistaken. Its irrationality and attendant confusion will continue to preclude its effective assimilation.<sup>132</sup>

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<sup>132</sup> Professor Eric Posner compares the rolling theory as an extension of contract theory with Judge Cardozo's implication of a promise by Otis F. Wood to use reasonable efforts to extend Lady Duff-Gordon's name to myriad products in the famous case of *Wood v. Lucy Lady-Duff Gordon*, 118 N. E. 214 (1917). Note 3, *supra*. The inaptness of the comparison is boggling.