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The Dubious Status of the Rolling Contract Formation Theory

John E. Murray Jr.

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# The Dubious Status of the Rolling Contract Formation Theory

*John E. Murray, Jr.*

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I. INTRODUCTION

In the waning years of the twentieth century, an influential court announced a radical change in contract formation theory. 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. Suggestions that subsequent cases have installed the rolling theory as the prevailing view are, at the least, premature. The case law progeny reveals pervasive confusion and inconsistent results. Beyond holdings rejecting the theory, opinions that distinguish their facts leave substantial questions as to its potential application unanswered. Without any reference to the theory, contrary holdings make it difficult to discern its current status in a given jurisdiction. The underlying purpose of the theory is the “efficacy” of form contracting, but even that alleged benefit is questionable. Commentators generally agree that the theory ignores statutory language and precedent.

The majority of jurisdictions have not had the opportunity to decide the fate of the rolling theory. It is important to pursue a definitive analysis to facilitate future decisions concerning its application or rejection. Part I revisits the theory, its origins, and con-
troversial analyses. Part II examines the often confusing and ambiguous case law progeny of the theory to demonstrate the fallacy that it constitutes a prevailing view. Part III suggests an economic dimension different from the economic justification for the theory. Part IV places the theory within the generic, underlying, and perpetual problem of the effect courts should afford to unread, standardized boilerplate terms. Part V reviews possible solutions, Part VI focuses upon a workable solution, and Part VII concludes with a recommendation concerning the future of the rolling theory.

II. THE ROLLING CONTRACT THEORY—CONCEPT, ORIGINS, STATUTORY CONSTRUCTION, AND PRECEDENT

A. Contract Terms Revealed Before or After Delivery of Goods—The "Rolling Formation" Concept

Under traditional contract theory, where a buyer has an opportunity to review a vendor's standardized terms before contracting and chooses to ignore them, absent fraud, duress, or unconscionability, the terms will be enforced under the proverbial "duty to read" rule. Where the vendor's terms become available only after the purchase of the product ("terms later") and include additional terms that had not been previously negotiated or discussed, courts may treat such later terms as totally inoperative. In a contract for the sale of goods governed by the Uniform Commercial Code ("UCC"), additional terms in a post-purchase confirmation of the contract that materially alter the original terms are inoperative.

Under the rolling theory, however, where the terms are delivered with the goods inside the box, such additional, post-purchase terms are operative, and section 2-207 of the UCC is deemed "irrelevant" for reasons that contradict statutory language and precedent. The effect is to postpone the formation of the contract until the buyer has an opportunity to review the terms and decide whether such terms are acceptable. A timely objection to the additional terms rejects them and allows a refund of any

5. RESTATEMENT (SECOND) OF CONTRACTS § 23 cmt. b (1981). The failure to read terms to which a party apparently assents does not affect their operative effect. Id. One is bound by the appearance of mutual assent, even if it was unintended. Id.
6. See infra text accompanying notes 72-78.
8. See infra Part I.C.
9. See infra Part I.C.
amount already paid. If, however, the buyer does not object within the period specified in the seller’s terms, the terms become part of the contract through the buyer’s silence. This is the final “layer” in contract formation, regardless of any conscious assent to the later terms.

B. Origins—ProCD, Inc. v. Zeidenberg and Later Terms

The generally accepted analysis of contract formation in self-service transactions views the store as the seller making the offer and the buyer as the offeree who accepts the offer by taking possession of the product. The custom of allowing the customer to return the product to the shelf creates an implied power of termination in the customer. This analysis is justified under the offer and acceptance section of the UCC. In a leading case, bottles containing soda exploded in the buyer’s hand as the bottles were removed from the shelf. The acceptance of the store’s offer to sell occurred when the buyer took possession of the bottles. At that moment, a contract for sale was formed, meeting a threshold requirement of the implied warranty of merchantability, which requires a contract for sale to exist. Had the contract not been formed until the buyer paid for the goods at the checkout station, the implied warranty of merchantability would not have attached when the injury occurred. In another case, the buyer took candy from a display and bit into it, and foreign matter in the candy caused injury. Again, a contract was formed when the buyer took possession of the product, and the implied warranty of merchantability attached at the moment of formation.

In ProCD, Inc. v. Zeidenberg, a buyer of software took a box containing the discs from a shelf of a self-service store, paid the price, and left the store with his purchase. Inside the box, a “user

10. See infra Part I.C.
11. See infra Part I.C.
12. See infra Part I.C.
17. Id. at 873.
18. Id. See U.C.C. § 2-314(1) (requiring that a contract for sale exist between a buyer and a seller who is a merchant with respect to goods of the kind sold in the store in order for a warranty of merchantability to be implied).
21. 86 F.3d 1447, 1450 (7th Cir. 1996).
guide” included license terms that stated restrictions limiting the use of the software to non-commercial purposes, and program screens warned that use is limited to a single user for individual or personal use. An inconspicuous notice was printed on the outside stating that there were license terms inside the package. Ignoring the inside terms that were also splashed on the computer screen when he ran the program, the buyer copied the subject matter of the discs, which was millions of telephone numbers from telephone directories that could not be copyrighted, and established his own corporation in competition with the producer of the software.

The district court found that a contract was formed when the buyer took the goods from the shelf pursuant to the general formation section of the UCC, section 2-204, which permits a contract to be formed in any reasonable manner. The court also found a valid contract pursuant to the more specific offer and acceptance section, 2-206, recognizing that any reasonable manner of acceptance may be employed to form a contract, unless the offer unambiguously requires a particular manner of acceptance. Treating the buyer as a consumer rather than as a merchant, the court concluded that the buyer could not be bound by post-purchase terms inside the box without expressly assenting to them under UCC section 2-207(2). An alternate analysis treating the additional terms as an offer for a subsequent modification contract under section 2-209 would also require the buyer’s express assent, which never occurred.

The district court relied on a Third Circuit case, Step-Saver Data Systems, Inc. v. Wyse Technology, where a buyer telephoned offers for software, which the seller accepted. The buyer followed

22. ProCD, 86 F.3d at 1450.
24. ProCD, 86 F.3d at 1450.
25. Id. at 1449-50.
27. Id. at 651-52.
28. Id. at 655.
29. Id. The district court cited the leading case in support of that analysis, Barker v. Allied Supermarket. ProCD, 908 F. Supp. at 651-52 (citing Barker v. Allied Supermarket, 586 P.2d 870, 872 (Okla. 1979)). Even if the offer was not accepted until the buyer paid for the goods (a view supported by an English case, Pharm. Soc’y of Gr. Brit. v. Boots Cash Chemists (S.) Ltd., (1953) 1 Q.B. 401, 403-04, perhaps to avoid criminal prosecutions), the contract was certainly formed no later than the time of payment at the checkout station.
30. 939 F.2d 91 (3d Cir. 1991).
31. Step-Saver, 939 F.2d at 95-96.
this oral agreement with a purchase order.\textsuperscript{32} The seller then shipped software with an invoice repeating the terms the parties had discussed.\textsuperscript{33} The product, however, arrived in a package on which license terms that the parties had not discussed were printed ("box-top license").\textsuperscript{34} The terms stated that the buyer had only purchased "a personal, non-transferable license to use the program," that all express and implied warranties were disclaimed, and that the sole remedy was the replacement of defective discs.\textsuperscript{35} 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.\textsuperscript{36}

The seller argued that the contract was not formed until the buyer received the product, saw the license terms, and opened the package.\textsuperscript{37} The Third Circuit, however, concluded that the contract had been formed prior to the sending of the package and that the terms printed on the package constituted additional terms in confirmation of the previously formed contract.\textsuperscript{38} Under UCC section 2-207(1), a contract had been formed notwithstanding such additional terms in the confirmation (box top license).\textsuperscript{39} The disclaimer of warranties and limitation of remedies were additional terms that did not become part of the contract since they were deemed to be material alterations of the contract under section 2-207(2)(b).\textsuperscript{40}

C. ProCD, Inc. v. Zeidenberg in the Seventh Circuit

On ProCD's appeal, the Court of Appeals for the Seventh Circuit attempted to distinguish the \textit{Step-Saver} case in confronting the challenge of determining the enforceability of terms not previously

\begin{thebibliography}{9}
\bibitem{32} Id. at 96.
\bibitem{33} Id.
\bibitem{34} Id.
\bibitem{35} Id. at 96-97.
\bibitem{36} \textit{Step-Saver}, 939 F.2d at 97.
\bibitem{37} Id.
\bibitem{38} Id. at 100, 105-06.
\bibitem{39} Id. at 103.
\bibitem{40} Id. at 105-06.
\end{thebibliography}
disclosed, which are delivered with the product. Though it stated the basic proposition that “[o]ne cannot agree to hidden terms,” it quickly added that an inconspicuous, small-print statement on the outside of the ProCD package could be said to have incorporated the terms inside. Requiring sellers to include microscopic print of all terms on the outside of a package would be impractical. Though the notice was inconspicuous, the court concluded that “[n]otice 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.”

Had the court rested its holding on this notice, albeit inconspicuous, the decision would have barely raised eyebrows. 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 under these facts as sufficient to alert a buyer to detailed license terms inside, albeit winking at the inconspicuousness of the notice. Such a holding could have been viewed as only a justifiable aberration from traditional contract theory. The court, however, pursued a much broader analysis for its holding and, just months later, would even reject any requirement of any notice on the outside of a package.

The court insisted that there was nothing unusual in “terms later” transactions, such as insurance policies or airline tickets, containing terms that the buyer had an opportunity to see only after the purchase, but it failed to note that these illustrations involved regulated industries requiring oversight of such terms.

41. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996). The court also described “shrinkwrap” licenses, where the terms are printed on the tight plastic or cellophane covering the delivered product. ProCD, 86 F.3d at 1449. Some vendors, but not ProCD, would claim that the license terms become effective when the plastic is torn from the package. Id.
42. ProCD, 86 F.3d at 1450.
43. Id. at 1451.
44. Id. (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981)) (extolling the efficiencies of standardized agreements).
45. See id. at 1450.
47. ProCD, 86 F.3d at 1450.
Judge Easterbrook claimed that delayed disclosure is a long-standing, accepted contract practice, citing insurance and airline tickets as examples. But these are exam-
The court relied primarily on the United States Supreme Court decision in *Carnival Cruise Lines v. Shute*,\(^4\) which upheld a forum selection clause that was part of the printed boilerplate on a cruise line ticket.\(^5\) The court failed, however, to note the express “boundaries” of that decision, where Justice Blackmun, writing for the majority, stated that “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 provision.”\(^6\) Unlike the case before the Seventh Circuit, the only question in *Shute* was whether such a forum selection clause was required to be the product of negotiation, and not simply whether the respondents were aware of the clause before the contract was formed.\(^7\) This error, however, was insignificant compared to the Seventh Circuit’s assertions concerning UCC section 2-207.

The Seventh Circuit’s startling holding appeared in its attempt to distinguish the *Step-Saver* case on which the District Court had relied.\(^8\) Since there were two forms and a box-top license confirmation with additional terms in *Step-Saver*, the court stated that “[o]ur case has only one form; UCC § 2-207 is irrelevant.”\(^9\) Thus, with no further analysis or any mention of precedent, the court simply announced the stark conclusion that section 2-207 applies only where there are two forms.\(^10\) It was presented as fiat in the teeth of the statute, which recognizes that “[a] definite and seasonable expression of acceptanc[e] or a written confirmation sent within a reasonable time operates as an acceptance...”\(^11\) A confirmation is not a traditional acceptance of an offer, but section 2-

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\(^5\) *Shute*, 499 U.S. at 493-95.

\(^6\) *Id.* at 590.

\(^7\) U.C.C. § 2-207(1) (2003) (emphasis added). Although it is common to refer to section 2-207 as the section dealing with the “battle of the forms,” that popular reference is misleading.
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 section 2-207. Beyond the statutory language that refers to "a" single confirmation, a comment in the UCC 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." Thus, the first illustration of a situation giving rise to section 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.

The comments do not require "battling" confirmations. The first comment refers to "a confirmation" and 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.

In *Advance Concrete Forms, Inc. v. McCann Construction Specialties, Inc.*, 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 representa-

57. Id. § 2-207 cmt. 1.
58. Id. (emphasis added).
60. U.C.C. § 2-207 cmt. 1.
61. Advance Concrete Forms, Inc. v. McCann Constr. Specialties, 916 F.2d 412, 413 (7th Cir. 1990).
Advance sent invoices to McCann within seven days of each purchase.\textsuperscript{62} The typical invoice contained a provision requiring payment within thirty days and a finance charge of one and one half percent interest each month for payments after thirty days—an "[a]nnual percentage rate of 18%."\textsuperscript{64} McCann claimed it never negotiated or agreed to such an interest rate.\textsuperscript{65} The Seventh Circuit affirmed the trial court’s holding that the invoice constituted a confirmation of the contract which contained an additional term subject to UCC section 2-207(2)(b); the court then had to determine whether the finance charge term materially altered the previously formed contract.\textsuperscript{66}

The court explained that delivery occurred through common carriers and that "[a]dvance’s usual billing procedure was to send an invoice to McCann within seven days of McCann’s purchases."\textsuperscript{67} The invoice was not packaged with the product.\textsuperscript{68} It was sent separately, after the goods were shipped.\textsuperscript{69} Nonetheless, the Seventh Circuit held that section 2-207 applies where the transaction involves only one form,\textsuperscript{70} a holding that is diametrically opposed to the holding on this issue in \textit{ProCD}, which requires two forms for any application of section 2-207.\textsuperscript{71}

In \textit{Rocheux International, Inc. v. US. Merchants Financial Group, Inc.}, the \textit{Advance} opinion is included in the court’s 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 section 2-207.\textsuperscript{72} The \textit{Rocheux} court first reviewed cases holding that section 2-207 does not apply where an invoice is sent \textit{after} the goods have been shipped,\textsuperscript{73} but

\begin{footnoteset}
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62. \textit{Advance}, 916 F.2d at 413.
63. \textit{Id.}
64. \textit{Id.}
65. \textit{Id.} at 414.
66. \textit{Id.} at 416-17 (citing U.C.C. § 2-207 cmt. 5 (2003)). Pursuant to official comment 5 of section 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 previous oral contract. \textit{Id.} at 415-16. Thus, it became part of the contract. \textit{Id.} at 416.
67. \textit{Advance}, 916 F.2d at 413.
68. \textit{Id.}
69. \textit{Id.}
70. \textit{Id.} at 416-17.
\end{footnoteset}
the effect of such holdings is 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 section 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, section 2-207(2) would apply to test whether the additional term materially altered the prior oral agreement.

The Rocheux court compared those cases with others representing what it deemed to be the majority view, and cited a Fifth Circuit Court of Appeals opinion, which held that an invoice included with the shipment contained an additional term that would have to be tested under section 2-207. The court then cited the Seventh Circuit's Advance opinion interpreting Wisconsin law in holding that a single document (invoice) sent after the goods were shipped would require the application of section 2-207. The court did not compare that holding with ProCD which, again, dismisses such an application of section 2-207.

Apart from the rolling theory, the extant case law holds, in determining whether the single document containing additional terms arrives with or after the goods, that either section 2-207(2)(b) applies to determine whether the additional term is material or that section 2-207 does not apply, thereby precluding any additional term, material or immaterial, from becoming part of the contract. Without explanation or any reference to precedent, the Seventh Circuit's rolling theory rejects both views. It concludes that section 2-207 does not apply, but, absent a timely objection from the buyer, the contract includes the additional terms regardless of their material effect on parties' prior understanding.

74. Id.
75. Id.
77. Rocheux, 741 F. Supp. 2d at 678 (citing Permian Petroleum Co. v. Petroleos Mexicanos, 934 F.2d 635, 654 (5th Cir. 1991)).
78. Id. at 678. The court also cited other cases supporting the view that section 2-207 applied where the writing was delivered after the goods were shipped: McJunkin, Corp. v. Mechs., Inc., 888 F.2d 481, 487 (6th Cir. 1989) (applying Ohio's Uniform Commercial Code); Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1122-24 (5th Cir. 1985) (applying Mississippi's Uniform Commercial Code); Sudenga Indus. v. Fulton Performance Products, Inc., 894 F. Supp. 1235, 1237-38 (N.D. Iowa 1995) (applying Iowa's Uniform Commercial Code); Herzog Oil Field Serv. v. Otto Torpedo Co., 570 A.2d 549, 550-51 (Pa. Super. 1990) (applying Pennsylvania's Uniform Commercial Code). Id. at 678.
79. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451-52 (7th Cir. 1996).
application of section 2-207 to cases involving a single confirmation previously had been clearly recognized in the Seventh Circuit and elsewhere.

The ukase that section 2-207 does not apply where only one form contains different or additional terms has been universally criticized. Since commentators find absolutely no redeeming virtue in this assertion, they are relegated to the only apt and unequivocal characterization: that its “wrong.”

D. Avoiding Relevant U.C.C. Contract Formation Concepts

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 that “the UCC permits contracts to be formed in other ways.” Here, the court appears to view the U.C.C. as a smorgasbord of sections from which a court may choose one section to support its desired result, while ignoring others. It relies exclusively on the general contract formation section, section 2-204(1), which states that “[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.” It treats this general language as allowing it to create a new formation theory: “[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.

Under the new theory, the contract was not formed when the buyer took the box from the shelf, or even when he paid the price

80. 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, “[w]hen 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). Also, Robert A. Hillman stated that “Easterbrook was plainly wrong about Section 2-207’s applicability.” Robert A. Hillman, Rolling Contracts, 71 FORDHAM L. REV. 743, 752 (2002). But see 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 L. & TECH. REV. 18, 35 n.62 (2010) (characterizing Judge Easterbrook’s statement as “a little cavalier”).

81. ProCD, 86 F.3d at 1452.

82. Id. (citing U.C.C. § 2-204(1) (2003)).

83. Id.
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 objection to the terms within the time allowed by the seller for objection, his silence was said to manifest acceptance of the offer, forming the contract for the first time. If, as the court suggested, the district judge was not wrong in recognizing a contract when the buyer 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, thereby mandating a unique manner of acceptance. The court’s analysis exposes a major flaw.

The U.C.C. 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 U.C.C. in its analysis (section 2-204(1)), but also the more specific U.C.C. section on “Offer and Acceptance in Contract Formation” (section 2-206(1)), the Seventh Circuit studiously avoids any mention of the more specific section. Recognition would have been fatal to its new theory, since the opening phrase of the omitted section undermines the court’s analysis. It states that “[u]nless 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.”

Section 2-206 made an important change in the common law of contract formation that was later incorporated in the Restatement (Second) of Contracts. Unlike their predecessors, the underlying assumption in both the U.C.C. and the Restatement Second is that the typical offer is indifferent as to how the offeree chooses to accept it: either by promising or performing, unless the offeror de-

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84. See id.
85. See id.
86. ProCD, 86 F.3d at 1452.
87. Id.
88. Id.
91. U.C.C. § 2-206.
mands a particular manner of acceptance.\textsuperscript{93} Under section 2-206, unless the offeror \textit{unambiguously} demands a particular manner of acceptance, the offeree may accept in any reasonable manner.\textsuperscript{94} By suggesting that the district court’s analysis was not wrong, but that there are other ways in which a contract may be formed,\textsuperscript{95} the court is suggesting that any reasonable manner of acceptance would be effective, including the district court’s analysis or its own analysis that formation did not occur until later. The different analyses, however, produce diametrically opposite results.

Moreover, the court has eliminated the possibility of “any reasonable manner of acceptance” by its holding that the seller in this case was unambiguously demanding a particular manner of acceptance, i.e., a postponed acceptance available only after the buyer possessed the product without objection, for the time stated in the hidden terms. Where an offer unambiguously requires only a single manner of acceptance, section 2-206 mandates that exclusive manner of acceptance.\textsuperscript{96} The Seventh Circuit must avoid any mention of section 2-206, because the test of whether a vendor \textit{unambiguously} requires a particular manner of acceptance is whether a reasonable buyer-offeree should have clearly understood that only one manner of acceptance would form a contract.\textsuperscript{97} Thus, to be faithful to section 2-206, the court would have had to conclude that a buyer of any product in a self-service store unambiguously understood that the only manner in which \textit{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. 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 and left the store with it. It was necessary to avoid any reference to section 2-206 because that would have undermined its new contract formation theory. Either this highly sophisticated court did not understand the contract formation sections of the U.C.C., or it chose to ignore them. The former explanation taxes credulity.

\textsuperscript{93} \textit{Id.} § 30(2) cmt. d.
\textsuperscript{94} U.C.C. § 2-206. This fundamental change from the \textit{RESTATEMENT (FIRST) OF CONTRACTS} is analyzed in John E. Murray, Jr., \textit{Contracts: A New Design for the Agreement Process}, 53 \textit{CORNELL L. REV.} 785 (1968).
\textsuperscript{95} \textit{ProCD}, 86 F.3d at 1452.
\textsuperscript{96} U.C.C. § 2-206.
\textsuperscript{97} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 30(2) cmt. b, d.

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? 98

The Hills kept the computer for more than thirty days before claiming it was defective. 99 Gateway responded by seeking to enforce an arbitration clause that appeared as one of the terms inside the box. 100 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. 101

On appeal, the Seventh Circuit rejected the Hills’ request to limit the ProCD precedent to contracts for software since “ProCD is about the law of contract, not the law of software.” 102 It restated the “duty to read” proverb: people who accept an offer assume the risk of unread terms that may prove unwelcome. 103 Restating the “duty to read” to determine the enforceability of terms not available to be read at the time a reasonable party assumes the contract has been formed, however, is not particularly persuasive. 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.” 104 It is important to understand why, without any explanation, the court concluded that Gateway was the offeror.

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99. Hill, 105 F.3d at 1148.
100. Id.
101. Id.
102. Id. at 1149.
103. Id. at 1148 (citing Carr v. CIGNA Sec., Inc., 95 F.3d 544, 547 (7th Cir. 1996); Chi. Pac. Corp. v. Can. Life Assurance Co., 850 F.2d 334, 337-38 (7th Cir. 1988)).
104. Hill, 105 F.3d at 1149.
F. 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, 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 for characterizing the vendor as the offeror, because there is no explanation.

G. The Essential Rationale

It is important to recite the court’s 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. Others 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.

105. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
106. ProCD, 86 F.3d at 1449-50.
107. See discussion infra Part II.
Competent adults are bound by such documents, read or unread.\textsuperscript{108}

The avoidance of "costly and ineffectual steps"\textsuperscript{109} (transaction costs) is the singular rationale for creating a costly and ineffectual new theory that postpones contract formation. In the context of these facts, however, 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 thirty days and return everything in the box for a full refund." Such a vendor's statement can be made in no more than 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.\textsuperscript{110}

The fifteen second statement above avoids the transaction cost evils to which the court 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

\textsuperscript{108} Hill, 105 F.3d at 1149.
\textsuperscript{109} Id.
\textsuperscript{110} A recent case from the Seventh Circuit, itself, provides an analogous application. In Spivey v. Adaptive Mktg. LLC, Spivey called a phone number to order a product. 622 F.3d 816, 817 (7th Cir. 2010). The telemarketer made an offer for a membership in a club whose members were entitled to discounts from various vendors. Id. The membership was free for thirty days. Id. If Spivey did not object within thirty days, he would then be billed at $8 per month for continuation of the membership. Id. at 817-18. Spivey replied "[o]kay" to this offer. Id. at 818. When he did not cancel the membership within thirty days, the monthly billing began. Spivey, 622 F.3d at 818. A record of the conversation identified the buyer's voice. Id. at 817-20. The Seventh Circuit affirmed the summary judgment for the vendor in holding that Spivey agreed to be bound by the terms of the agreement unless he objected within thirty days. See id. at 822. Spivey's agreement created a duty to speak, which is different from imposing a duty to object to terms inside a box with no prior opportunity to be aware of such a duty.
Hills’ offer would unequivocally occur no later than the time the computer was shipped.\textsuperscript{111}

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 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 subject to a condition precedent of 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”\textsuperscript{112} versus “browsewrap”\textsuperscript{113} 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.\textsuperscript{114} 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.”\textsuperscript{115}

\textbf{H. 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.\textsuperscript{116} There was no notice of any kind on the outside of the delivered Gateway box.\textsuperscript{117} The court, however, dismissed this distinction on the footing that notice on the outside of the box displayed in a store allows

\begin{itemize}
\item \textsuperscript{111} The buyer’s offer could be accepted by either a prompt promise to ship or the prompt shipment of the computer. U.C.C. § 2-206(1)(b) (2003).
\item \textsuperscript{112} See, e.g., Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 21-22, 22 n.4 (2d Cir. 2001) (discussing “clickwrap”).
\item \textsuperscript{113} See, e.g., Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429-30 (2d Cir. 2004) (discussing “browsewrap”).
\item \textsuperscript{114} Specht, 306 F.3d at 22 n.4, 31.
\item \textsuperscript{115} Id. at 32 (opinion written by then Judge Sotomayor, who distinguished the ProCD and Hill cases).
\item \textsuperscript{116} Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148-49 (7th Cir. 1997).
\item \textsuperscript{117} Hill, 105 F.3d at 1150.
\end{itemize}
a buyer to decide whether to assume the risk of terms inside.\textsuperscript{118} 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.\textsuperscript{119} 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.”\textsuperscript{120} 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.”\textsuperscript{121}

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 “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.

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 section 2-207.\textsuperscript{122} The court was annoyed by this argument, which it characterized as paying “scant attention” to the holding in ProCD that section 2-
207 is irrelevant.\textsuperscript{123} Clarifying any confusion on this point in its ProCD opinion, the court emphasized that the rolling contract analysis applies to “merchants and consumers alike.”\textsuperscript{124} 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.”\textsuperscript{125} Nothing in the U.C.C. section defining “merchant,” however, suggests this test.\textsuperscript{126} It is certainly possible for a merchant to purchase something for its business in a retail store.

I. Pursuit of the Express Warranty—The “Irrelevancy” of Section 2-209

The court suggests the possibility of a cogent argument for enforcing Gateway’s terms when it notes that “[t]he 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.”\textsuperscript{127} 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 section 2-209 that binds the Hills to Gateway’s terms, including the arbitration agreement. The court, however, avoided this possibility. Subjecting the additional terms inside the box to a section 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, section 2-209 must be deemed as “irrelevant” as section 2-207.

Confusion abounds in the court’s analysis. 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-taker or no later than Gateway’s shipment of the computer accompanied by the terms inside the box.\textsuperscript{128} Since the court also ignores section 2-

\begin{itemize}
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} \textit{Hill}, 105 F.3d at 1149.
\item \textsuperscript{128} U.C.C. section 2-206(1)(b) recognizes shipment as a reasonable manner of acceptance, unless the buyer unambiguously requires a promissory acceptance.
\end{itemize}
206, however, it fails to consider the statutory requirement that such “shipment” constituted acceptance.

J. Silence as Acceptance

The rolling theory imposes a duty on the buyer to speak within the time stated by the vendor or be bound by the vendor’s terms inside the box. 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. 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 involves a party accepting the benefits of offered services with an opportunity to reject them, knowing that the supplier expects to be paid. 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. An offeree’s silence in response to such an offer is equivocal and will only be viewed as an acceptance when confirmed by the offeree. Under the rolling theory, however, such silence and inaction would constitute acceptance in the face of the offeree’s subsequent 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 who have no course of dealing with the vendor.

129. Restatement (Second) of Contracts § 69 cmt. a (1981).
130. Id. § 69(1).
131. Id. § 69(1)(a).
132. Id. § 69(1)(b).
133. Id. § 69 cmt. (c).
134. Restatement (Second) of Contracts § 69(1)(c). For a further exploration of silence as an acceptance of “terms later,” see James J. White, Autistic Contracts, 45 Wayne L. Rev. 1693, 1706-10 (2000).
K. Failing to Recognize the “Sale on Approval”—Risk of Loss

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.” The buyer need not justify his decision if he chooses to reject the terms. The court's requirement of a buyer's subjective approval immediately suggests another U.C.C. category that is completely ignored by the Seventh Circuit: the potential contract emanating from a “sale on approval.”

U.C.C. section 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.” Risk of loss rests on the seller until the buyer accepts the goods. Quaere: 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; the rolling contract buyer, however, 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 or fails to discover them within the time prescribed in the terms. If the buyer was not bound by any duty, his promise is illusory and the vendor's promise is unenforceable. If, however, the buyer has an initial duty to take receipt 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 thirty days of receipt.” Under the agreement, “retention of the computer beyond the thirty-day period of free trial equates to an acceptance of Gateway's proposed terms and conditions.” Thus,

137. *Id.* § 2-326 cmt. 1.
138. *Id.* § 2-326 cmt. 3.
the customer is not limited to objecting to Gateway's terms to return the computer, but the terms suggest that the customer has agreed to pay for the computer and accept Gateway's terms, or return it within thirty 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 section 2-207(2).

L. 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 Hill opinion emphasizes that the rolling theory applies to merchants and non-merchants alike). The goods are shipped with rolling contract terms inside: disclaimers of implied warranties, an exclusive repair and replacement remedy, an arbitration clause, and 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 thirty days. The rolling theory would treat the vendor as the offeror. In the absence of two “battling” forms, section 2-207 would not apply under the rolling theory. Within thirty 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, “[i]f you object to these terms within the next thirty 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 accep-

141. Id. at *5.
143. See supra Part I.J.
tance. If, however, prior to delivery the buyer was bound to ei-
ther 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 lat-
er contract formation.

Though Judge Easterbrook’s opinions for the Seventh Circuit of-
ten inspire well-deserved accolades, as the foregoing analysis sug-
gests, ProCD and Hill confirm an earlier assessment of “a swash-
buckling tour de force that dangerously misinterprets legislation
and precedent.” 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.

III. THE CASE LAW UNDER THE ROLLING CONTRACT THEORY

A. The Unexplained Conclusion in New York

One of the earliest adoptions of the rolling theory occurred in
Brower v. Gateway 2000, Inc., 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 inside the box with the computers.
The trial judge rejected the plaintiffs’ claim that the arbitration
clause was a material alteration of their pre-existing agreement under
section 2-207.

144. In a much simpler setting, a pest control service sent an offer containing a boiler-
plate arbitration provision to homeowners to renew the service. Cook’s Pest Control v.
Rebar, 852 So. 2d 730, 733 (Ala. 2002). The homeowners replied with a letter accompany-
ing their payment that rejected the vendor’s arbitration provision. Cook’s Pest Control, 852
So. 2d at 733. The court held that the vendor’s acceptance of the payment accepted the
homeowner’s counteroffer to eliminate the arbitration clause. Id. at 738.

145. John E. Murray, Jr., Contract Theories and the Rise of Neoformalism, 71 FORDHAM


147. Brower, 676 N.Y.S.2d at 571. Arbitration provisions are intended to protect the
corporation rather than dictate the forum, as one commentator recently explained:

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 Re-

148. Brower, 676 N.Y.S.2d at 571. The court, however, concluded that the arbitration
clause was substantively unconscionable under U.C.C. section 2-302. Id. at 575.
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 thirty day period specified in the agreement."  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."  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.  This holding cannot be distinguished from 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 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 is hardly compelling authority.

B.  Confusion Abounds in Washington

M.A. Mortenson Co., Inc. v. Timberline Software Corp. is invariably cited as support for the "majority" view due to the Supreme Court of Washington's adoption of the rolling theory over a spirited dissent joined by another member of that court.  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.\textsuperscript{157} The delivered software discs were covered by a “shrinkwrap” license that included a limitation of remedies clause excluding consequential damages.\textsuperscript{158} Defects in the software resulted in a $1.95 million error in a construction bid.\textsuperscript{159} The trial and intermediate appellate courts held that the limitation of liability clause was enforceable.\textsuperscript{160}

On appeal, the buyer argued that the signed purchase order formed the contract and did not include the limitation clause.\textsuperscript{161} 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.\textsuperscript{162} 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 section 2-207.\textsuperscript{163} The plaintiff relied on the Step-Saver analysis,\textsuperscript{164} which the court distinguished.\textsuperscript{165} 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 U.C.C. section 2-204 (recognizing a contract formed in any manner),\textsuperscript{166} upon which ProCD so heavily relied without mentioning section 2-206 or other relevant concerns.

The majority opinion, however, was based on its unique analysis of section 2-207, which begins with a curious definition of “merchant” in U.C.C. Article 2.\textsuperscript{167} The court held that the contract was not between “merchants,” because the buyer, a building contractor, did not deal in software, and the U.C.C. definition of “merchant” requires a party who deals in goods of that kind.\textsuperscript{168} This statement, however, confuses the meaning of U.C.C. section 2-104, which recognizes a narrow definition of “merchant” when applied

\begin{itemize}
  \item \textsuperscript{157} Id. at 308.
  \item \textsuperscript{158} Mortenson, 998 P.2d at 308-09.
  \item \textsuperscript{159} Id. at 309.
  \item \textsuperscript{160} Id. at 310.
  \item \textsuperscript{161} Mortenson, 998 P.2d at 310.
  \item \textsuperscript{162} Id. at 311.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} See supra text accompanying notes 30-40.
  \item \textsuperscript{165} Mortenson, 998 P.2d at 311-13. The Mortenson 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. Id. at 312 (citing Step-Saver Data Sys., Inc. v Wyse Tech., 939 F.2d 91, 201 (3d Cir. 1991)). Moreover, the Step-Saver buyer twice refused to sign the disputed license agreement. Id.
  \item \textsuperscript{166} Id. at 313.
  \item \textsuperscript{167} Id. at 312 n.9.
  \item \textsuperscript{168} Id.
\end{itemize}
to a seller of goods who must regularly sell goods of the kind involved in the transaction in order to be charged with making an implied warranty of merchantability under U.C.C. section 2-314(1).\textsuperscript{169} Section 2-104, however, also recognizes a broad definition of "merchant" that applies to virtually anyone in business for purposes of section 2-207.\textsuperscript{170} The buyer (Mortenson) should, therefore, have been recognized as a "merchant" (a party in business), purchasing a product for use in that business.

Having concluded that Mortenson was not a merchant, the court compounds the error in its startling view that section 2-207 "does not specify when additional terms become part of a contract involving a non-merchant."\textsuperscript{171} As noted earlier, the first sentence of section 2-207(2) deals with additional terms in a contract involving at least one non-merchant.\textsuperscript{172} Additional terms are mere proposals to which the other party would have to expressly assent if the terms were to become part of the contract.\textsuperscript{173} If the majority had been correct in characterizing Mortenson as a non-merchant, the vendor's additional terms would have been mere proposals to which Mortenson never agreed. The court's misconstruction, however, precluded any possibility of a section 2-207 application to these facts.\textsuperscript{174}

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.,\textsuperscript{175} Tacoma purchased paint products from

\begin{itemize}
\item \textsuperscript{169} U.C.C. § 2-104 cmt. 2 (2003). Comment 2 states that "in Section 2-314 on the warranty of merchantability, such warranty is implied only 'if the seller is a merchant with respect to goods of that kind.'" \textit{Id.}
\item \textsuperscript{170} \textit{Id.} Comment 2 to section 2-104 states that for purposes of section 2-207, as well as other specific sections, "almost every person in business would, therefore, be deemed to be a 'merchant' ..." \textit{Id.} See Precision Printing Co. v. Unisource Worldwide, Inc., 993 F. Supp. 338, 355 n.14 (W.D. Pa. 1998).
\item \textsuperscript{171} \textit{Mortenson}, 998 P.2d at 312 n.9.
\item \textsuperscript{172} U.C.C. section 2-207(2) states that "[t]he additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: ..." \textit{Id.}
\item \textsuperscript{174} The dissent treated the additional terms as a proposal to modify an existing contract under U.C.C. section 2-209, a section ignored by the majority and other courts using the rolling theory. \textit{Mortenson}, 998 P.2d at 320 (Sanders, J., dissenting). The use of that section would require an acceptance of the proposed modification, which would not occur through mere silence. \textit{Id.}
\item \textsuperscript{175} 174 P.3d 721 (Wash. Ct. App. 2008).
\end{itemize}
Rudd for several years by placing the orders by phone. Rudd would ship the paint, followed by an invoice including a 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 Mortenson analysis since the parties in the instant case were both merchants (as if they were not in Mortenson). 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 section 2-207. This is consistent with comment 2 to section 2-207, which treats an additional term after a contract is formed "as a proposal for an added term . . . ." Instead of simply concluding that the proposals were not accepted, the court characterized Rudd's additional terms as material alterations of the contract. It 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 section 2-207, which it characterized as the "defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair." 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 section 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

176. Tacoma, 174 P.3d at 722.
177. Id.
178. Id.
179. Id. at 724.
180. Id.
181. Tacoma, 174 P.3d at 724.
183. Tacoma, 174 P.3d at 724.
185. Id. at 724.
186. U.C.C. § 2-207 cmt. 7.
should become part of the contract. Section 2-207(3) was not designed to deal with this situation. Nonetheless, because Rudd's additional terms did not match previous terms, the court concluded that they were not operative under section 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. Though Washington is listed as one of the jurisdictions adopting the rolling theory, it is euphemistic to suggest that confusion abounds in this jurisdiction concerning the possible application of the theory.

C. Kansas Concludes Otherwise

In Wachter Management Co. v. Dexter & Chaney, Inc., after detailed negotiations, Dexter & Chaney, Inc. ("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 "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 Mortenson case, which was seen as upholding shrinkwrap licenses.

Problems with the software induced Wachter to file suit in Kansas, and DCI moved to dismiss on the basis of the choice of law/venue provision. Wachter countered that these 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 Mortenson factually similar. It disagreed with the majority analysis in Mortenson, based on ProCD and Hill, and adhered to the “traditional contract principles” of the dissenting judges in Mortenson. The court held that DCI and Wachter had negotiated the terms, and the DCI offer to sell had been accepted by Wachter. The court further held that the license terms accompanying the software were proposals to modify the contract under U.C.C. section 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 that “[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” include 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). Assumming a contract would not be formed until that time,

195. Id. at 750.
196. Wachter, 144 P.3d at 750.
197. Id. at 751.
198. Id. at 754-55.
199. Id. at 755 (citing M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 316 (Wash. 2000) (Sanders, J., dissenting)).
200. Id.
201. Wachter, 144 P.3d at 755.
202. Id. at 755-56 (Luckert, J., dissenting).
203. Id. at 756.
204. Id. at 749 (majority opinion).
205. Id. at 756. (Luckert, J., dissenting).
206. Wachter, 144 P.3d at 756 (Luckert, J., dissenting).
however, is counterintuitive. Essentially, the dissent simply admits it was persuaded by the result in ProCD and Hill, 207 which it would apply regardless of severe analytical hurdles.

D. Following the “Eminent” Seventh Circuit

Writing for the Rhode Island Supreme Court in DeFontes v. Dell, Inc., 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.” 208 Applying Texas law, the court recognized that if the contract was formed “at the moment Dell’s sales agents processed the customer’s credit card payment and agreed to ship the goods, as plaintiffs argue,” any later additional terms would be viewed as part of a confirmation under section 2-207, or as offers to modify under section 2-209. 209 The court proceeded to herald the 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.” 210 Accepting this analysis without question, the opinion quotes the Seventh Circuit’s essential rationale for the rolling contract theory that “practical considerations” required a new theory, as discussed above. 211

While expressly adopting the “layered” theory, the court emphasized that “the burden falls squarely on the seller to show that the buyer has accepted the seller’s terms after delivery.” 212 The plaintiffs had three opportunities to review the seller’s terms. 213 A hyperlink on the seller’s website was deemed insufficient since it was inconspicuously located at the bottom of the webpage. 214 The seller’s terms, however, also appeared in an acknowledgment sent to buyers when they placed their orders, though the evidence was not clear as to whether these acknowledgments were received before the goods were delivered. 215 The same terms and conditions

207. Id. at 757.
208. 984 A.2d 1061, 1068 (R.I. 2009) (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996)).
209. DeFontes, 984 A.2d at 1067-68.
210. Id. at 1068 (citing ProCD, 86 F.3d at 1452).
211. Id. at 1069 (quoting ProCD, 86 F.3d at 1452).
212. Id. at 1071.
213. Id. at 1063.
214. DeFontes, 984 A.2d at 1063.
215. Id. at 1063-64, 1064 n.4.
were also included inside the box with the goods. While the Supreme Court of Rhode Island viewed these notices as clearly sufficient to apprise the buyers that they would be bound to these terms, it did not advise them of the period beyond which they would be bound by their silence. Because the terms did not make it reasonably apparent that the buyers could reject the terms simply by returning the goods, the court affirmed the decision below that held that an arbitration agreement in the seller's terms was not enforceable.

E. The Theory Rejected

In Klocek v. Gateway, Inc., William Klocek brought individual and class action claims against Gateway, which demanded arbitration under its standard terms and conditions delivered inside the box with 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 that neither had resolved the issue of whether terms received with 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 above, the court noted Arizona Retail Systems, Inc. v. Software Link, Inc., which held that license terms shipped with software were not part of the agreement. It compared these cases with ProCD and Hill, as well as Mortenson from Washington State.

Gateway urged the court to follow Hill, but the court found considerable criticism of Hill among "legal commentators. While other courts followed the Seventh Circuit, the instant court was

216. Id. at 1064.
217. Id. at 1071.
218. Id. at 1073.
221. Id. at 1337-38.
222. See discussion supra Part I.B.
225. Id.
226. Id. at 1338, 1339 n.9.
not persuaded that Kansas or Missouri courts would do the same.\footnote{228} It viewed the holding in ProCD and Hill, that section 2-207 was irrelevant because the transactions involved only one form, as not supported by any authority in those cases and contrary to the statute as enacted in Kansas or Missouri.\footnote{229} The court also noted that the Seventh Circuit failed to explain in Hill how the vendor became the offeror, stating that “[i]n typical consumer transactions, the purchaser is the offeror and the vendor is the offeree.”\footnote{230} Gateway produced no evidence to change that characterization in the instant case.\footnote{231} 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.\footnote{232} Since the plaintiff was not a merchant, under section 2-207, any additional term would be a mere proposal that could be binding only if the plaintiff assented to it.\footnote{233} The court thus denied Gateway’s motion to dismiss.\footnote{234}

F. Oklahoma Is Not Persuaded

In Rogers v. Dell Computer Corp.,\footnote{235} the Supreme Court of Oklahoma confronted an insufficient record.\footnote{236} 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 computer, with the invoice, or both.\footnote{237} After reviewing the progeny of ProCD and Hill, the court considered when the contracts were formed.\footnote{238} It looked to U.C.C. section 2-206(1), which, the court stated, generally answers that question.\footnote{239} 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.\footnote{230} If, at the time the order was placed, the language and circumstances indicated that

\footnotesize{\begin{itemize}
  \item [228.] Id. at 1339.
  \item [229.] Klocek, 104 F. Supp. 2d at 1339.
  \item [230.] Id. at 1340.
  \item [231.] Id.
  \item [232.] Id. at 1340, 1340 n.11 (citing U.C.C. § 2-206(b) (2003)).
  \item [233.] Id. at 1341 (citing KAN. STAT. ANN. § 84-2-207 cmt. 2 (1966)).
  \item [234.] Klocek, 104 F. Supp. 2d at 1341.
  \item [235.] 138 P.3d 826 (Okla. 2005).
  \item [236.] Rogers, 138 P.3d at 834.
  \item [237.] Id. at 829.
  \item [238.] Id. at 831-32.
  \item [239.] Id. at 832.
  \item [240.] Id.
\end{itemize}}
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, however, the contract was formed at the time the orders were placed, the arbitration provision would not be a term of the contract.

In considering what the terms of the contract between the parties would be, the court turned to section 2-207, noting that the arbitration provision would be a mere proposal to a non-merchant under section 2-207(2), and that it would not be part of the contract absent the buyer’s assent. Because the facts in the record were not sufficient to permit the application of the proper analysis, the court remanded the case. The court’s analysis, however, clearly rejected the rolling theory.

G. 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. DirectTV, Inc., the defendant activated television satellite service at the request of the plaintiff in 1999. DirectTV 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, and 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 procedurally and substantively unconscionable. On appeal, a majority of the in-

241. Rogers, 138 P.3d at 832.
242. Id. at 833.
243. Id. at 832-33.
244. See id. at 833.
245. Id. at 833-34.
246. Rogers, 138 P.3d at 834. The court applied U.C.C. section 2-207, which would be inapplicable under the rolling theory.
249. Id.
250. Id.
251. Id. at 491-92.
252. Id. at 492.
254. Id.
stant court found no procedural or substantive unconscionability.\footnote{Id. at 495-501.}

In arguing that the arbitration provision was procedurally and substantively unconscionable, the plaintiff relied on a decision by the Supreme Court of Illinois, \textit{Razor v. Hyundai Motor America},\footnote{854 N.E.2d 607 (Ill. 2006).} where the plaintiff claimed consequential damages in an action against the seller of an automobile.\footnote{Razor, 854 N.E.2d at 612-13.} Addressing the issue of whether the defendant's exclusion of consequential damages was unconscionable, the \textit{Razor} court focused on one fact in the case that "tip[ped] the balance" in the plaintiff's favor.\footnote{Id. at 623.} 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.\footnote{Id.} Because the plaintiff's testimony in this regard was uncontradicted "on this record," the court concluded that a limitation of liability clause discovered after the contract is made is ineffective,\footnote{Id.} and to enforce such a clause would be unconscionable.\footnote{Id.}

The majority of the \textit{Bess} court, however, found the \textit{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 ("Act").\footnote{Id.} The dissenting opinion, on the other hand, noted that the \textit{Razor} opinion explained that the Act and the Federal Trade Commission 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.\footnote{Id. (citing Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 411 n.2 (Ill. App. Ct. 1980)).} Moreover, by the time Bess received the customer agreement containing the arbitration provision, the equipment had already been installed and

\begin{thebibliography}{99}
\item Id. at 495-501.
\item 854 N.E.2d 607 (Ill. 2006).
\item Razor, 854 N.E.2d at 612-13.
\item Id. at 623.
\item Id.
\item Id. (citing Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 411 n.2 (Ill. App. Ct. 1980)).
\item Id.
\item Bess, 885 N.E.2d at 496-97, 497 n.1 (citing Razor, 854 N.E.2d at 624). The court noted that the \textit{Razor} opinion quoted the Federal Trade Commission regulations dealing with the Magnuson-Moss Warranty Act. Id. (citing Razor, 854 N.E.2d at 624 (quoting 16 C.F.R. § 700.11(b) (2000))).
\item Id. at 504 (Stewart, J., concurring in part and dissenting in part) (citing Razor, 854 N.E.2d at 624).
\end{thebibliography}
the services were being provided.\textsuperscript{264} In dissent, Justice Stewart explained the customer's predicament as follows:

In order to cancel service at that point, \textit{after} she had taken all necessary steps to be a DirectTV subscriber, she would have had to suffer the time, effort, and expense 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.\textsuperscript{265}

In \textit{Trujillo v. Apple Computer, Inc.}, a subsequent federal district court case, the court was confronted with the necessity of choosing between \textit{Hill v. Gateway 2000, Inc.}, upon which Bess had relied, and the holding and rationale in \textit{Razor}.\textsuperscript{266} In \textit{Trujillo}, the purchaser of an iPhone claimed that the maker and service provider had misled consumers about the true cost of an iPhone, due to the limited life of the battery, which resulted in necessary battery replacements.\textsuperscript{267} The defendant moved to compel arbitration, relying on a term in the customer agreement.\textsuperscript{268} 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 \textit{Razor} in claiming that the arbitration agreement was unconscionable.\textsuperscript{269} The defendant, however, cited the \textit{Hill} case as authority for enforcing terms arriving after the purchase.\textsuperscript{270} The instant court noted that \textit{Bess v. DirectTV} had also relied upon the \textit{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.\textsuperscript{271} 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, however, the \textit{Trujillo} court concluded that it had to rely on \textit{Razor} (a contrary decision

\begin{thebibliography}{99}
\bibitem{264} Id. at 504-05.
\bibitem{265} Id. at 505 (citing Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 264 (Ill. 2006)).
\bibitem{266} 578 F. Supp. 2d 979, 992-95 (N.D. Ill. 2008).
\bibitem{267} \textit{Trujillo}, 578 F. Supp. at 980-81.
\bibitem{268} Id. at 981.
\bibitem{269} Id. at 992.
\bibitem{270} Id. at 993.
\bibitem{271} Id. at 993-94 (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997)).
\end{thebibliography}
from the highest court of the state) to the extent that it was contrary to Hill. The Trujillo court explained that:

"[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."\(^{273}\)

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

There are other cases citing ProCD and Hill that would add nothing to the discussion.\(^{274}\) 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 U.C.C. section 2-207, and failures to consider other relevant sections of U.C.C. Article 2 as well as the relationship between other cases and the theory.

**IV. 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 roll-

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273. Id. 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. Id. 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. Id. at 985. 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.
ing 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 recognize the situation-specific monopoly enjoyed by sellers as to buyers who have already purchased a product.\(^{275}\)

The power to accept or return the product is the old-fashioned marketing ploy called the "money back guarantee" that superficially suggests that 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 goods for which, at the very least, the buyer should receive 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 (the benefit of the bargain), which 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

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\(^{275}\) One commentator explained that:

In the landmark cases of *ProCD 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 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.

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.* See supra text accompanying notes 264-66.
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 U.C.C.\(^2\) This is further evidence that the price of efficiency under the rolling contract theory may be excessive.

V. THE UNDERLYING PROBLEM

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 a 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 U.C.C. automatic assurance that it will receive goods that accord with any express and all implied warranties.\(^2\) 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 any early payment plus incidental and consequential damages.\(^2\) Absent contrary agreement, dispute resolution will be pursued in a court of law where a consumer or small business may find more sympathy with a jury.\(^2\) It is not remarkable for a vendor to attempt to escape such an onslaught by the mere re-payment of the purchase price. There must, however, be some manifestation of “agreement” to achieve that end.

Where a buyer sends a written offer, such as a purchase order, a vendor’s definite expression of acceptance will form a contract.\(^2\) The vendor’s boilerplate disclaimers of warranties, exclusive repair and replacement remedy that excludes consequential damages, arbitration provision, and other anti-default clauses will not become part of the contract if they materially alter the terms of the buyer’s offer.\(^2\) Indeed, under current constructions, a buyer

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276. These remedies are provided in sections 2-712 and 2-713. U.C.C. §§ 2-712, 2-713 (2003).
277. Id. §§ 2-313 to -315.
278. Id. § 2-711. Section 2-711 lists the buyer’s remedies, followed by their individual elaboration in separate, subsequent sections. Id.
279. All of the remedies under Article 2 of the U.C.C. presume a judicial determination.
280. U.C.C. § 2-207(1).
281. Id. § 2-207(2)(b).
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.\textsuperscript{282} 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 be excised and the gaps will be filled with default terms favoring the buyer.\textsuperscript{283} 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 the application of section 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 statutory language that is required to achieve this result, the theory clearly undermines the purpose of section 2-207. Moreover, consumer buyers do not have a ready supply of purchase order forms. Thus, the rolling contract would deprive them of section 2-207 protection as a matter of course, subjecting them to the vendor's terms, regardless of the materiality of the terms. This artificial distinction alone is more than a sufficient reason for rejecting the rolling contract theory.

VI. PURSuing A SOLUTION

Should it make any difference whether the vendor's terms are provided before the contract is formed, arrive with the goods, or appear 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 severe cognitive limitation and overload regardless of when the buyer receives the boilerplate terms. Even before Karl Llewellyn created the radical section 2-207 and its companion, section 2-302, that allowed courts to deem terms unconscionable, it was an open secret that the vendor's boilerplate is non-negotiable, thereby making it rational to ignore it, even if it could be understood. Contentment, if not clarity, was found in Llwellyn's invaria-

\textsuperscript{282} If a purchase order contains express clauses replicating U.C.C. 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, these express terms will cancel any expressly conflicting terms in a vendor's form, leaving gaps to be filled by the U.C.C. default rules, which favor the buyer. A recent, comprehensive analysis of section 2-207 appears in \textit{JOHN E. MURRAY, JR., MURRAY ON CONTRACTS} § 50 (5th ed. 2011).

\textsuperscript{283} U.C.C.$\S$ 2-207(3).
bly 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.284 Professor Hillman finds the Llewellyn solution to be just fine—or at least the best we can do.285

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 are a major contributor to pervasive confusion, which has proven to be contagious. Consequently, it matters whether the theory spreads or is contained.

A current legislative solution is impracticable. The debacle resulting from the attempts to revise Article 2 of the U.C.C. in the 1990's, or even to agree on the enactment of modest amendments in the early 21st 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.286 The absence of a comprehensive legislative so-

284. Llewellyn stated that:
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.
286. The amended version of Article 2 of the U.C.C., proposed in 2003, has been officially withdrawn after its failure to be enacted in any jurisdiction. Comment 5 to the amended version of section 2-207 stated that:
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 Klociek 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).
This modest "amended" version was induced by a rejection of a genuine "revision" of Article 2 in 1999 after a decade of work. The new committee was well aware of the irreconcilable differences concerning the enforcement of shrinkwrap license terms and the rolling theory. 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. The rolling theory had been adopted in the highly controversial Uniform Computer Information Transaction Act ("UCITA"), which was enacted only in Maryland and Virginia and was often stated as a reason for the failure of any other states to enact UCITA. For an analysis of UCITA, see Roger C. Bern, "Terms Later" Con-
olution, however, should not preclude an interim judicial solution to the current uncertainty and meta-confusion which is destined to grow unless it is contained.

VII. A WORKABLE SOLUTION—IDENTIFYING “CONTRACT TERMS”

Invisible terms have always been anathema. Neither is the notion of being bound by invisible terms sufficiently accommodated by an obligation to object to them within the time prescribed by their author after they are revealed for the first time. While Llewellyn’s “blanket assent” to standardized terms is an economic necessity, it has not totally eliminated the requirement of mutual assent in the 21st century. Thus, for example, “[t]he 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.”

Notwithstanding a half-century’s recognition of the presence of mass marketing of goods and services necessitating the use of standardized boilerplate terms that are rarely read or understood, the case law has yet to discover a generally accepted solution. The “rolling” theory is controversial and confusing. As seen earlier, even where a court praises the theory, it insists upon an emphatically clear notice of post-purchase terms and the right of the buyer to reject them. While ProCD should not be expected to cover the containers of its packages of discs with contract terms, why was the notice on the outside of the box (stating that terms were inside the box) inconspicuous? A telephone order-taker for a product such as a computer typically has a script that may suggest any number of marketing possibilities beyond the simple taking of the order for the computer. If Gateway desired an accept-or-return contract by insisting on its terms inside the box, a statement requiring no more than fifteen seconds could assure a conspicuous notification of terms placed inside the box. The buyer could fur-


287. “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. Cutler, 97 A.2d at 236-38.

288. Specht v. Netscape Commc’ns 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.”).

289. See supra text accompanying notes 209-19.
ther be reminded of such terms inside the box by a similarly brief but conspicuous statement on the outside of the delivered box. There is neither unreasonable surprise nor oppression in binding a buyer to conscionable terms arriving inside a box, if the buyer has been sufficiently alerted to expect such terms, the buyer has ample time to digest them, and they may be rejected within a reasonable time.

If the vendor’s terms will only arrive with the goods, it is not enough and will not assure a buyer a reasonable opportunity to review them if the seller simply inserts the terms inside the box, as in *Hill v. Gateway*. Professor Stephen Friedman recommends what he calls a “template notice,” which would “require sellers to do more than merely give notice that unspecified additional terms will 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. Even attempting to summarize disclaimers of warranties, remedy limitations, arbitration, and other vendor’s terms during a telephone call, however, would encounter the same obstacles *Hill* was designed to prevent.

Determinations of whether summaries were adequate are predictable litigation issues. While litigation issues may still arise, they are likely to be minimized by requiring a conspicuous notice of “contract terms.” It is feasible for courts to determine whether a notice of forthcoming “contract terms” is 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. 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.” Such a notice 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

291. Id.
292. In the case upon which the Seventh Circuit relied heavily as support for its new theory, *Carnival Cruise Lines v. Shute*, the face of the cruise line ticket contained the following alert: “SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3.” 499 U. S. 585, 587. See supra text accompanying notes 49-52.
for a full refund of the purchase price. The terms inside the package should also be conspicuously labeled “contract terms.”

Any reticence to use the word “contract” to identify terms creates a suspicion of obfuscation. Similarly, 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 who may read only that portion that deals with a particular problem of installation or use. Fundamental contract law continues to preclude operative effect to terms in documents that a reasonable party would not understand as including contract terms. There is no justification for enclosing contract terms under such a caption. Rather, they should be found in a printed statement conspicuously labeled as “contract terms,” which is 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 terms inside the box. If a conspicuous statement alerts the buyer to “contract terms” inside the box where the terms are again 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. Pursuant to a conspicuous notice, if the buyer is not satisfied, notice of objection is

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293. “Conspicuous” is defined in U.C.C. § 1-201(10). A statement such as “IMPORTANT TERMS GOVERNING THE CONTRACT BETWEEN THE [COMPANY NAME] AND THE PURCHASER ARE ENCLOSED” would be sufficient.


295. Indeed, an arbitration provision in a pamphlet captioned “User’s Guide” should be deemed procedurally unconscionable, per se.

296. 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 section 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 id. § 224, cmt. e.
given and the product is returned for a full refund. Under this analysis, section 2-207 would have no application unless there was either no statement on the package or the statement was inconspicuous.

The "contract terms" inside the box must state clearly 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. 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, 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, 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 conditioned on the buyer’s satisfaction with the vendor’s terms that arrive with the goods. As noted earlier, a similar scenario has already been illustrated and approved in a recent Seventh Circuit case.

This analysis is consistent with the enforceability of standard terms in the American Law Institute Principles of Software Contracts, which state that: "to ensure enforcement of their standard form, software transferors should disclose terms on their website prior to a transaction and should give reasonable notice and access to the terms upon initiation of the transfer, whether initiation is by telephone, Internet or selection in a store." It is also consis-

297. The Rhode Island Supreme Court was particularly insistent on this requirement in DeFontes v. Dell, Inc. 984 A.2d 1061, 1071-73 (R.I. 2009).
298. See supra text accompanying notes 109-10.
299. See supra note 110; Spivey v. Adaptive Mktg. LLC, 622 F.3d 816, 817, 821 (7th Cir. 2010).
300. PRINCIPALS OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (2010).
tent with an Internet vendor insisting that the buyer must manifest agreement to the vendor’s terms since the buyer should not be bound by “browsewrap” clauses. 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, section 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? The disclosure requirements of consumer protection legislation have not yielded the kind of consumer understanding and warranty competition that was predicted. Enhancement of warranty competition in the sale of goods must be attributed essentially to market forces, where announcements of a superior warranty are critical to market entry. If products contained conspicuous notices of “contract terms” and the terms inside the box were also conspicuous and understandable, some additional reading and study of “contract terms” may occur, but a much more important effect is probable. In addition to alerting buyers to assure a reasonable opportunity to learn of the terms, vendors may be more inclined to ascertain that their “contract terms” are competitive in the market, which is a much more important safeguard against unfair boilerplate terms than the rolling theory provides.

VIII. CONCLUSION

To assure a buyer a reasonable opportunity to become aware of a vendor’s otherwise invisible terms, the confusion, doubt, and controversy attending the rolling contract theory clearly requires its rejection. The theory is not only unnecessary to assure efficiency; at a minimum, its failure to alert the buyer to expect later contract terms undermines the buyer's 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. It is systemically incapable of providing reasonably clear and effective guidelines. An effective response to the question of the operative effect of boilerplate terms that accompany the goods or appear only after the goods have been received should not require a discussion of several theories. The irrationality and at-

301. Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 35 (2d Cir. 2001)
tendant confusion of the rolling theory will continue to preclude its effective assimilation. A confusing legal reaction to the felt needs of society has no redeeming virtue.