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## Not What, but When is an Offer – Rehabilitating the Rolling Contract

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### Recommended Citation

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# CONNECTICUT LAW REVIEW

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VOLUME 46

NOVEMBER 2013

NUMBER 1

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## Article

### Not What, but When Is an Offer: Rehabilitating the Rolling Contract

COLIN P. MARKS

*A number of courts have held that a contract is formed when deferred terms found inside the package are reviewed by the buyer and accepted by some act—usually use of the good. This “rolling” contract approach has been widely criticized by commentators as an abomination of contract law that ignores a true application of the U.C.C., as well as the spirit of that code. However, the approach is not without its allure, as it permits contracts to be formed in an efficient manner that may very well appeal to consumers. Yet too strict of an adherence to the approach threatens to impose terms upon parties that they never expected or agreed upon; but conversely, too strict of an adherence to traditional concepts of offer and acceptance threatens to displace terms that were contemplated and not objectionable. Though existing contract law does a good job of defining contract offer, the trickier issue is identifying when the offer is actually made. If parties to a contract know that there is more to the contract than simply the price and the good, then it should come as no surprise that more terms are to come, or that a more detailed offer will be forthcoming. Thus, in some scenarios, it is perfectly reasonable to assume that the contract has not been formed in-store, but rather a deferred offer will come later. Thus rolling contract theory can be explained under a legal realism approach, as influenced by relational contract theory; however, this is not to say that all contracts are now subject to the rolling contract approach. This Article describes how legal realism and relational contract theory can be used to explain the rolling contract approach and makes suggestions for how relational contract theory can be used to aid courts in determining which contracts involve a rolling or deferred offer.*

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# Not What, but When Is an Offer: Rehabilitating the Rolling Contract

COLIN P. MARKS\*

## I. INTRODUCTION

A man walks into a bar and grill. No, this is not the beginning of a joke (though you may find the end of the hypothetical comical). This is the beginning of a contract. The man browses the bar's menu and decides to purchase the club sandwich. As he is in a hurry, he gets it to go. He pays cash for the sandwich, which is handed to him in a bag. When he finally settles down to eat the sandwich, he discovers that the cellophane covering the sandwich has a seal that states:

This sandwich is sold as-is. Any and all disputes arising out of the purchase of this sandwich are subject to binding arbitration. By eating this sandwich, you agree to the terms of this agreement. If you do not agree to the terms, you must return the sandwich to the seller within twenty-four hours of sale, and you will receive a full refund.

The man muses briefly over the implications of this statement and then, overcome with hunger, eats the sandwich. If the man gets sick from food poisoning, is he bound by the terms of this agreement?

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\* Professor of Law, St. Mary's University School of Law. This paper was one of three articles specially selected in a call for papers for presentation at the 2013 Federalist Society/Templeton Fund Colloquium on Freedom of Contract. This Article benefited from feedback received at the Colloquium, and I would like to thank all of the participants for their comments. In particular, I would like to thank participants Daniel Barnhizer of Michigan State University College of Law, Vincent Buccola of the University of Chicago Law School, Jason Johnston and George Geis of the University of Virginia School of Law, Andrew Kull of Boston University School of Law, Cassandra Robertson of Case Western Reserve University School of Law, David Snyder of American University Washington College of Law, and Andrew Schwartz of the University of Colorado Law School. This Article also benefited from feedback received at a presentation at the University of Missouri School of Law. I would like to thank my colleagues, Mark Cochran, Amy Kastely, Ramona Lampley, and Angela Walch, for their feedback on this Article at various stages. I would also like to thank David A. Friedman, Assistant Professor of Law, Willamette University College of Law, for his feedback on a draft of this Article and Dr. John E. Murray, Jr., Chancellor of the University and Professor of Law, Duquesne University, for discussing this topic and his work on the topic of rolling contracts with me. I would like to thank and acknowledge the hard work and contributions of my research assistants, Anthony Rene DeLaO, Jennifer Fields, Sanjeev Kumar, Dena Richardson, and Isaac Ta, in researching and writing this Article. I would also like to thank my wife Jill, daughter Savannah, and son George for their love and support.

The hypothetical is clearly fantasy,<sup>1</sup> but it raises, albeit in a different context, a very typical contract problem. To what degree are “rolling” or “layered” contracts binding? Many courts have held that, with regard to the sale of goods, a contract is not formed in the store or over the phone, but at some later point.<sup>2</sup> The typical scenario involves a good, such as a

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<sup>1</sup> Indeed, it is an intentional hyperbole. As Professor Richard Epstein has noted, “It is not as though the green grocer is determined to contract out of a warranty of merchantable quality.” Richard A. Epstein, *ProCD v. Zeidenberg: Do Doctrine and Function Mix?*, in *CONTRACTS STORIES* 94, 109 (Douglas G. Baird ed., 2007). The hypothetical does serve a useful purpose in this Article, however, as it draws out the distinction between as-if-discrete contracts and more complex contracts that contemplate an ongoing relationship. Furthermore, the hypothetical may not be as far-fetched as it seems. In a blog post on Contracts Prof Blog, a sign from a Texas burger franchise’s door is displayed which reads:

Arbitration Notice

By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation. No suit or action may be filed in any state or federal court. Any arbitration shall be governed by the FEDERAL ARBITRATION ACT, and administered by the American Mediation Association.

Arbitration Notice

Kprofs2013, *The Gates of Hell[ish Mandatory Arbitration]?*, *CONTRACTS PROF BLOG* (Jan. 11, 2011), [http://lawprofessors.typepad.com/contractsprof\\_blog/2011/01/the-gates-of-hellish-mandatory-arbitration.html](http://lawprofessors.typepad.com/contractsprof_blog/2011/01/the-gates-of-hellish-mandatory-arbitration.html) (many thanks to Dan Barnhizer for reminding me of this link). Some online merchants also seem to try to disclaim warranties with clauses that, to my knowledge, have not yet appeared in stores. See, e.g., *Terms & Conditions*, TARGET.COM, [http://www.target.com/spot/terms-conditions#!nk=fnav\\_t\\_spc\\_2\\_4](http://www.target.com/spot/terms-conditions#!nk=fnav_t_spc_2_4) (last visited Aug. 29, 2013) (excluding all warranties, express or implied, for all merchandise offered on its website); *Walmart.com Terms of Use*, WALMART.COM, [http://help.walmart.com/app/answers/detail/a\\_id/8](http://help.walmart.com/app/answers/detail/a_id/8) (last visited Aug. 29, 2013) (same).

<sup>2</sup> See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428 (2d Cir. 2004) (noting that a consumer manifests assent to terms included in the shrinkwrap encasing a product not at the point of purchase, but instead through later actions); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (“[A] vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general ‘send me the product,’ but after the customer has had a chance to inspect both the item and the terms.”); *ProCD, Inc. v. Zeidenberg (ProCD II)*, 86 F.3d 1447, 1452 (7th Cir. 1996) (recognizing that the vendor has the power to propose a contract where the buyer accepts by use of the good after rendering payment for it, provided that there is an opportunity to read the extended terms); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (recognizing that where a consumer had notice of an end user license agreement (“EULA”) and an opportunity to return the software if he did not agree to the terms, the EULA was not invalid simply because the consumer received it after purchasing software and opening the package); *Falbe v. Dell, Inc.*, No. 04-C-1425, 2004 WL 1588243, at \*4 (N.D. Ill. July 14, 2004) (deciding that a computer purchaser manifested assent to terms and conditions inside the box by keeping the computer for more than thirty days); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (“‘Money now, terms later’ is a practical way to form contracts.”); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 250 (N.Y. App. Div. 1998) (“That contract . . . was formed and acceptance was manifested not when the order was placed but only with the retention of the merchandise beyond the 30 days specified in the Agreement enclosed in the shipment of merchandise.”); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1068 (R.I. 2009) (“[T]he modern trend seems to favor placing the power of acceptance in the hands of the buyer after he or she receives goods containing a standard form

computer, that is purchased in-store with no mention of additional terms or conditions.<sup>3</sup> When the buyer gets home and opens the packaging, additional terms and conditions, such as arbitration clauses, forum selection clauses, limitations on liability, and the like, are discovered.<sup>4</sup> A number of courts, starting with the now infamous case of *ProCD, Inc. v. Zeidenberg (ProCD II)*,<sup>5</sup> have held that, rather than the contract for the sale being completed in-store (or over the phone), these later terms are what constitute the offer, which the buyer accepts by some act—usually use of the good (or declining to return it).<sup>6</sup> This approach, which has been called the rolling contract, has been widely criticized by commentators as an abomination of contract law that ignores a true application of the Uniform Commercial Code (U.C.C.) as well as the spirit of that code.<sup>7</sup> Despite the

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statement of additional terms and conditions, provided the buyer retains the power to ‘accept or return’ the product.”).

<sup>3</sup> See, e.g., *Adams v. Dell Computer Corp.*, No. CIV A C-06-089, 2006 WL 2670969, at \*1, \*4 (S.D. Tex. Sept. 18, 2006) (finding that terms delivered with a Dell computer formed a valid “right-of-return contract,” binding the customer to an arbitration clause even after Dell agreed to pick up the computer and issue the customer a refund); cf. *Hill*, 105 F.3d at 1148 (involving the purchase of a computer over the telephone); *Fiser v. Dell Computer Corp.*, 165 P.3d 328, 334 (N.M. Ct. App. 2007) (holding that—where a consumer purchased a computer from a website with links to terms and conditions, received two emails containing warnings to review terms and conditions, and received written terms inside the computer box—“keeping the computer after receiving the written terms and conditions constitutes acceptance of the terms”), *rev’d on other grounds*, 188 P.3d 1215 (N.M. 2008).

<sup>4</sup> See, e.g., *Sherr v. Dell, Inc.*, No. 05 CV 10097(GBD), 2006 WL 2109436, at \*2 (S.D.N.Y. July 27, 2006) (“In order to avoid ineffectual, costly steps, it is not practical to expect salespeople to read legal documents to customers before ringing up sales. Due to this reality, some clauses received even after the initial transactions are enforceable.” (citation omitted)); *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907, 911 (N.D. Ill. 2002) (finding that a customer accepted terms, including limitations of liability, by breaking a shrinkwrap seal that enclosed a CD-ROM and by clicking “yes” to accept all of the terms prior to installation of the software); *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 587 (N.Y. App. Div. 2002) (“[T]he defendant offered a contract that the plaintiff accepted by using the software after having an opportunity to read the license at leisure. As a result, the plaintiff’s claims are barred by the clear disclaimers, waivers of liability, and limitations of remedies contained in the EULA.”).

<sup>5</sup> 86 F.3d 1447 (7th Cir. 1996).

<sup>6</sup> See, e.g., *Ariz. Cartridge Remfrs. Ass’n v. Lexmark Int’l, Inc.*, 421 F.3d 981, 987–88 (9th Cir. 2005) (concluding that because ink cartridge purchasers had notice of restrictions on use and a chance to reject such restrictions “before opening the clearly marked cartridge container,” the consumer accepted the terms by opening the cartridge box); *ProCD II*, 86 F.3d at 1451 (“Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike.”); *M.A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803, 809 (Wash. Ct. App. 1999) (“Does failure in such a case to elicit the customer’s express assent to the license terms before a purchase order is issued make a contract ‘unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance?’ We conclude that it does not and hold that the terms of the present license agreement are part of the contract as formed between the parties.” (citation omitted) (quoting *ProCD II*, 86 F.3d at 1452)), *aff’d en banc*, 998 P.2d 305 (Wash. 2000).

<sup>7</sup> See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 n.9 (D. Kan. 2000) (citing a lengthy list of critical commentary regarding rolling contract theory); see also Roger C. Bern, “*Terms Later*”

criticism, however, the rolling contract theory seems to have taken hold in a number of jurisdictions.<sup>8</sup> The approach is not without its allure, as it permits contracts to be formed in an efficient manner that may very well appeal to consumers and merchants alike. However, too strict of an adherence to the approach threatens to impose terms upon parties that they never expected or agreed upon. But the opposite is also true—too strict of an adherence to traditional roles of offer and acceptance threatens to

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*Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, Judge Easterbrook *Notwithstanding*, 12 J.L. & POL'Y 641, 642–43 (2004) (“*ProCD II*” and its initial progeny, *Hill v. Gateway 2000, Inc.*, however, have been deservedly and widely criticized, variously described as a ‘swashbuckling tour de force that dangerously misinterprets legislation and precedent,’ a ‘real howler’ that is ‘dead wrong’ on its interpretation of section 2-207 of the UCC, a decision that ‘flies in the face of UCC policy and precedent,’ a ‘detour from traditional U.C.C. analysis’ ‘contrary to public policy,’ with analysis that ‘gets an ‘F’ as a law exam.’” (footnotes omitted)).

<sup>8</sup> See *Higgs v. Auto. Warranty Corp. of Am.*, 134 Fed. App'x. 828, 831 (6th Cir. 2005) (“The ‘accept-or-return’ mechanism to contract formation has been enforced by courts, including in contexts involving the sale of products and services by mail and telephone, software licensing and sales, mobile telephone service agreements, satellite television agreements, credit card agreements, and bank account agreements.”); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 430 (2d Cir. 2004) (recognizing rolling contract theory, but also recognizing its limits, as “a party must be given some opportunity to reject or assent to proposed terms and conditions prior to forming a contract”); *ProCD II*, 86 F.3d at 1452 (initiating the formal recognition of rolling contracts); *RealPage, Inc. v. EPS, Inc.*, 560 F. Supp. 2d 539, 547 (E.D. Tex. 2007) (recognizing the holding in *ProCD II*, but distinguishing it based on the indefiniteness of certain clickwrap license agreements); *Sherr*, 2006 WL 2109436, at \*2 (recognizing that “[a]pprove-or-return contracts have been found to be enforceable in consumer transactions,” and thus “some clauses received even after the initial transactions are enforceable”); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (finding the rationale in *ProCD II* “compelling”); *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 704 (S.D. Ill. 2005) (“By using her phone rather than canceling immediately, or no later than thirty days after her activation date, Chandler accepted the offered services and the terms and conditions under which they were offered. She had a clear mechanism and reasonable opportunity to reject them.”); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) (“The nature of the business in which DirecTV engages is similar to that of the customers in *Gateway* and *Carnival*. Practical business realities make it unrealistic to expect DirecTV, or any television programming service provider for that matter, to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service.”); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (“[T]he Court agrees with those cases embracing the theory of *ProCD*.”); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1071 (R.I. 2009) (“[W]e are satisfied that the *ProCD* line of cases is better reasoned and more consistent with contemporary consumer transactions.”); *Moore*, 293 A.D.2d at 587 (determining that the use of software after having an opportunity to read extended terms, rather than the sale of the software in store, marked the formation of a contract); *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 n.8 (Tex. 2005) (determining that pharmacies that continued to use a provider network after having an opportunity to read the terms of an associated agreement effectively accepted the terms); *M.A. Mortenson Co.*, 970 P.2d at 809 (finding that the installation and use of software manifested assent to terms of a license); see also *Stenzel v. Dell, Inc.*, 870 A.2d 133, 140 (Me. 2005) (applying Texas law to enforce an agreement, which included an arbitration clause, because the customers accepted delivery of the computer without returning it as outlined in the agreement). But see John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 36 (2012) (“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.”).

displace terms that were contemplated and not objectionable to the consumer. Both approaches, therefore, implicate freedom of contract. Thus, rather than relegating the rolling contract approach to a dark corner of contract law in favor of a more traditional approach, this Article proposes that the rolling contract should be rehabilitated.<sup>9</sup>

But before discussing the rehabilitation of rolling contracts, a basic question must be addressed. It has been noted that whether consumers receive the terms of a contract before or after they receive the goods is irrelevant because they do not read them in either case.<sup>10</sup> Therefore, why should it matter when the terms are received if no one is going to read them anyway? The answer can perhaps be best framed as a further question—if it is true that these terms are never read, what is the point in sending them at all? Why not simply save the time and money of printing off terms or even having to host such terms on a website? The answer is assent.<sup>11</sup> It is a basic premise of contract law that you cannot be bound by contract terms of which you are unaware (though you may be bound by terms which you are put on notice of, and had an opportunity to review<sup>12</sup>—thus resulting in “blanket assent”).<sup>13</sup> This strikes at the very heart of the

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<sup>9</sup> Rehabilitate means to restore the good name or to “restore . . . to a condition of health or useful and constructive activity.” *Rehabilitate*, M-W.COM, <http://www.merriam-webster.com/dictionary/rehabilitate> (last visited June 29, 2013). Given that many have abhorred the rolling contract approach from its inception, perhaps “habilitate” is a more accurate description. See *Habilitate*, M-W.COM, <http://www.merriam-webster.com/dictionary/habilitate> (last visited June 29, 2013) (defining *habilitate* as “to make fit or capable (as for functioning in society)”).

<sup>10</sup> Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 682; see also Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 671 (2011) (“[S]ome direct as well as indirect evidence suggests that almost no consumers read boilerplate, even when it is fully and conspicuously disclosed.”).

<sup>11</sup> See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.1 (6th ed. 2009) (“Usually, an essential prerequisite to the formation of a contract is an agreement—a mutual manifestation of assent to the same terms.”); Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1345 (2011) (“Both assent and consideration are essential to contract formation.”).

<sup>12</sup> See 17 C.J.S. *Contracts* § 36 (2013) (“An essential prerequisite to the creation of a contract is a manifestation of mutual assent which must be gathered from the words or acts of the parties, and the secret intention of one who so acts as to appear to assent is of no consequence. A manifestation of mutual assent is an essential prerequisite to the creation of a contract. The apparent mutual assent, essential to the formation of a contract, must be gathered from the language employed by the parties, or manifested by their words or acts, and it may be manifested wholly or partly by written or spoken words or by other acts or conduct.” (footnotes omitted)); Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1811 (2000) (noting that timely disclosure is required as a matter of general contract law).

<sup>13</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (1981) (“Standardized agreements are commonly prepared by one party. The customer assents to a few terms, typically inserted in blanks on the printed form, and gives blanket assent to the type of transaction embodied in the standard form.”); see also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (defining “blanket assent” as “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”); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 750 (2002) (“Llewellyn’s conception of



rolling contract problem.<sup>14</sup> To what degree does rolling contract theory align with our conceptions of classical assent as viewed under the constructs of the offer and acceptance model?

This Article seeks to address the question and explain the rolling contract theory, though the source of the explanation may be somewhat unexpected. Existing contract law does a good job of defining contract offers.<sup>15</sup> The trickier issue, particularly when a transaction involves an initial oral component, is identifying when the offer is actually made.<sup>16</sup> In other words, to go back to our man in the bar—when is it fair to say that he made the offer in the bar (which was accepted when the bar took his money), and when is it fair to say that the bar interaction was nothing more than a preliminary event to the actual offer (which was the writing affixed to the sandwich)? While many scholars have argued vehemently against the latter approach,<sup>17</sup> in light of what courts are doing, it appears the more rational course is to now explain when this approach may or may not be acceptable. When should the offer be at the point of contact (in-store), and when should it be on a rolling basis? Legal realism, which was a foundational principle driving the drafting of the Restatement (Second) of Contracts, as well as the U.C.C., may offer some insights about how to approach the rolling contract theory.<sup>18</sup> But so may a more recent approach to contract law—the relational contract approach.<sup>19</sup> Relational contract theory, which essentially treats contracts as ongoing relationships rather than isolated events, provides a useful way of making this determination.<sup>20</sup>

Legal realism, also called neo-classicism, abandons contract law as a rigid set of rules in favor of a softer approach that tries to understand how

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‘blanket assent’ is better read to mean only that, despite failing to read form contracts, users comprehend the existence of standard terms and agree to bind themselves to them, *provided the terms are not unreasonable*.”).

<sup>14</sup> See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 250 (2002) (“[T]he essential issue raised by modern consumer contracts is one of assent.”).

<sup>15</sup> See U.C.C. § 1-103(b) (2011) (incorporating the common law to supplement U.C.C. provisions, and thereby following the common law definition of “offer”); RESTATEMENT (SECOND) OF CONTRACTS § 24 (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”).

<sup>16</sup> See Eric A. Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1184–89 (2010) (discussing the nature of the offer under Judge Easterbrook’s analysis in *ProCD II*).

<sup>17</sup> See Bern, *supra* note 7, at 642 (addressing the widespread criticism of rolling contracts among legal scholars).

<sup>18</sup> See John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 870, 879–82 (2002) (delving into legal realism and its influence behind the U.C.C. and Restatement (Second) of Contracts).

<sup>19</sup> See *id.* at 877–78 (explaining relational contract theory).

<sup>20</sup> See *id.* at 877 (“Instead of the discrete or static transaction underlying classical contract theory, [Professor Ian] Macneil recognized contract relationships that extend far beyond the original offer and acceptance and insisted that contract rights and duties should be determined within the overall context of continuing relationships.”).

contracts work in the real world.<sup>21</sup> Legal realism is at the heart of provisions such as U.C.C. section 2-207's battle of the forms, which departed from the common law's mirror image rule approach to offers and counter-offers.<sup>22</sup> However, the rules set forth in the U.C.C. and Restatement do a poor job of providing guidance as to the question posed in the previous paragraph. Relational contract theory has its roots in the writings of Ian Macneil,<sup>23</sup> who believed most contracts were rarely, if ever, fully thought-out and expressed representations of the parties' obligations.<sup>24</sup> It would therefore seem to be a logical extension of both legal realism and relational contract theory that certain situations exist where the parties expect that a contract has not been fully formed in the store and that further terms, i.e., the formal "offer," will come later.<sup>25</sup> It is this very flexibility that helps explain the rolling contract, which should perhaps more accurately be described as a deferred offer.<sup>26</sup> If parties to a contract know that there is more to the contract than simply the price and the good, then it should come as no surprise that more terms are to follow or that a more detailed offer will be forthcoming.<sup>27</sup> In some scenarios, it is perfectly reasonable to assume that the contract has not been formed in-store, but rather a deferred offer will come later.<sup>28</sup> Thus, rolling contract theory can be explained under a legal realism approach, as influenced by a relational approach; however, this is not to say that all contracts are now subject to the rolling contract theory. As this Article explains, some contracts really are formed at the point of contact under a relational

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<sup>21</sup> See *id.* at 886 ("[Neoclassicists] recognize existing rules as neither rigid nor fixed, but pliable and sometimes entirely outmoded. Unlike other theorists, however, they suggest productive changes in contract law ranging from modifications to new doctrinal paradigms constituting workable solutions that courts can understand and use.").

<sup>22</sup> See U.C.C. § 2-207 (2011) ("A definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."); see also Murray, *supra* note 18, at 902–05 (providing background information regarding the drafting of section 2-207).

<sup>23</sup> See Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 877 (2000) (clarifying and expanding his nearly forty years worth of work regarding relational contracts).

<sup>24</sup> See *id.* at 878 (defining contracts as "exchange relations" rather than "specific transactions, specific agreements, specific promises, specific exchanges, and the like").

<sup>25</sup> See Murray, *supra* note 18, at 877 ("While neoclassicists see relational concepts as desirable elaborations of neoclassical theory, relationists see neoclassical theory as a subset of an 'overarching relational legal approach.'" (quoting Macneil, *supra* note 23, at 907)).

<sup>26</sup> See Posner, *supra* note 16, at 1184–89 (evaluating offers in rolling contracts).

<sup>27</sup> See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 906–08 (1992) (discussing the common sense expectations of parties).

<sup>28</sup> See Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 43–45 (2006) (analyzing the application of the reasonable expectations doctrine to rolling contracts).

contract approach.<sup>29</sup> The challenge to the courts is to determine which will be which. Thus far, courts have done a poor job of doing more than applying the rolling contract approach to any number of situations with little explanation as to why it was appropriate under the circumstances to do so.<sup>30</sup> Furthermore, even under a rolling contract approach, such contracts formed should still be susceptible to contract acceptance limitations, such as the general rule that a contract cannot be formed by silence or inaction,<sup>31</sup> as well as to defenses, such as unconscionability.<sup>32</sup> Indeed, the very fact that a contract is formed as a rolling contract—where the offer can only be rejected after the goods have been received—should trigger a higher level of scrutiny under a procedural unconscionability claim than would a simple contract of adhesion.<sup>33</sup>

Part II of this Article explains contract formation under both the U.C.C. and common law with a special emphasis on the battle of the forms provision of U.C.C. section 2-207. Part III explains how cases such as *ProCD II* and its progeny have grappled with, and in some ways misunderstood, the U.C.C. to reach the conclusion that rolling contracts exist and are valid. Part IV addresses the weaknesses in the rolling contract approach and, to a degree, rehabilitates this approach. Part V then describes how legal realism and the relational contract theory can be used to explain the rolling contract approach and makes suggestions for how this relational contract theory can be used to aid courts in determining which contracts involve a rolling or deferred offer. Part VI concludes that though rolling contracts may be appropriate in some situations, there are still limits on this approach, and it should be carefully scrutinized given the way in which the offer was delivered.

## II. CONTRACT FORMATION UNDER THE U.C.C. AND COMMON LAW

Before delving into the rolling contract approach, it is important to

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<sup>29</sup> See Macneil, *supra* note 23, at 881 (“A relational contract theory may be defined as any theory based on the following four core propositions: First, every transaction is embedded in complex relations. Second, understanding any transaction requires understanding all essential elements of its enveloping relations. Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly. Fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.” (footnotes omitted)).

<sup>30</sup> See *infra* note 152.

<sup>31</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981) (limiting the circumstances in which silence and inaction operate as an acceptance).

<sup>32</sup> See Friedman, *supra* note 28, at 35–36 (discussing unconscionability in the rolling contract context).

<sup>33</sup> See, e.g., *Lima v. Gateway, Inc.*, 886 F. Supp. 2d 1170, 1182 (C.D. Cal. 2012) (listing several factors that made an arbitration provision “procedurally unconscionable to a high degree” in a rolling contract context).

review the basics of offer and acceptance under both the common law and the U.C.C., as well as highlight how the U.C.C. departs from the common law in some key areas. This background is necessary to understand how the rolling contract departs from what some may deem a more traditional approach to contract formation. However, a basic understanding is also necessary in order to explain how the rolling contract approach can exist without contradicting existing contract rules.

#### A. *Offer and Acceptance Under the U.C.C. and Common Law*

The Restatement defines an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”<sup>34</sup> The U.C.C., which applies only to the sale of goods, does not contain a definition of “offer,” but by virtue of section 1-103 it incorporates the common law to supplement its provisions.<sup>35</sup> Thus, an offer is defined similarly under both the common law and the U.C.C. The U.C.C. also defines “acceptance” in terms very similar to the Restatement.<sup>36</sup> Section 2-206 provides: “Unless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”<sup>37</sup> The Restatement provides: “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”<sup>38</sup> Furthermore, as to contract formation in general, the U.C.C. articulates a broad conception of when and how a contract may be formed under section 2-204, which states:

- (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

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<sup>34</sup> RESTATEMENT (SECOND) OF CONTRACTS § 24.

<sup>35</sup> See U.C.C. § 1-103(b) (2011) (“Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.” (alteration in original)).

<sup>36</sup> Compare *id.* § 2-206 (defining “acceptance” in terms of a sale of goods), with RESTATEMENT (SECOND) OF CONTRACTS § 50 (defining “acceptance” as an assent to terms made by the offeree).

<sup>37</sup> U.C.C. § 2-206(1)(a).

<sup>38</sup> RESTATEMENT (SECOND) OF CONTRACTS § 50(1). Section 50 also states: “Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.” *Id.* § 50(2).

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.<sup>39</sup>

This last provision reflects the strong influence of the legal realism movement on the drafting of the U.C.C. and encourages a less rigid approach to contract formation.

One area that has caused some confusion regarding offers involves advertisements. For instance, when a consumer walks into a store and sees a price listed on a hammer, is the price an offer or merely a solicitation? The U.C.C. provides no guidance on this issue, but the Restatement provides that “[a] manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”<sup>40</sup> Corbin has added:

It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, a catalog or circular or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. Usually, neither the advertiser nor the reader of the notice understands that the reader is empowered to close the deal without further expression by the advertiser. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.<sup>41</sup>

It appears that the presumption is that an advertisement, or listed price in-store or in a catalog, is not an offer but a solicitation.<sup>42</sup> The offer must therefore come later—either when the consumer tenders cash, which could mean the offer is accepted when the money is accepted, or the offer could occur when the sales clerk announces the price, which could mean it is accepted when the money is tendered.<sup>43</sup> The offer and acceptance could

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<sup>39</sup> U.C.C. § 2-204.

<sup>40</sup> RESTATEMENT (SECOND) OF CONTRACTS § 26.

<sup>41</sup> 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 2.4 (Joseph M. Perillo ed., Mathew Bender & Co. rev. ed. 2013), available at LEXIS.

<sup>42</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (“Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell.”); CORBIN, *supra* note 41, § 2.4 (stating that it is “not customary” to make an offer through an advertisement).

<sup>43</sup> See U.C.C. § 2-204(1) (“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a

occur in some other manner as well, but it is probably safe to say that once the consumer leaves with the hammer, a contract has been formed.<sup>44</sup>

The U.C.C. breaks from the common law in one important aspect under section 2-206 with regard to orders for prompt shipment of goods. If an offer asks for the prompt or current shipment of goods, the offeree may accept by tendering conforming *or nonconforming* goods.<sup>45</sup> This breaks from the common law, which would view the tender of nonconforming goods as a counter-offer that could be accepted or rejected by the original offeror.<sup>46</sup> The effect of section 2-206 is that a seller tendering nonconforming goods has accepted the offer and breached all in the same action.<sup>47</sup> Section 2-206 provides that to avoid this result, the seller must seasonably notify that the shipment of the nonconforming goods is meant as an accommodation.<sup>48</sup> If the seller does so, the shipment will, in fact, be a counter-offer.<sup>49</sup>

### B. *The “Battle of the Forms” and Confirmations*

Though section 2-206 provides a break from the common law, section 2-207 provides perhaps one of the greatest examples of how the U.C.C. altered the results of common law offer and acceptance.<sup>50</sup> Section 2-207,

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contract.”); RESTATEMENT (SECOND) OF CONTRACTS § 24 (defining an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it”). The tendering of cash or the announcement of the price could both qualify as an offer under this standard. Determining what qualifies as the offer depends on what is reasonable under the circumstances, which of course can lead to incongruous results in cases. See PERILLO, *supra* note 11, § 2.6(g) (“[T]he test is whether a reasonable person in the position of the plaintiff would conclude that the defendant had made a commitment. Under such a test, it is not surprising to find that there are often differences of opinion as to the correct result in a concrete case.”).

<sup>44</sup> See U.C.C. § 2-204(2) (“An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.”).

<sup>45</sup> See *id.* § 2-206(1)(b) (“[A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.”).

<sup>46</sup> See 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.21, at 315 (3d ed. 2004) (“An attempt to add to or change the terms of the offer turns the offeree’s response from an acceptance into a counteroffer and a rejection of the offer.”).

<sup>47</sup> See U.C.C. § 2-206 cmt. 4 (“Such a non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach.”).

<sup>48</sup> See *id.* § 2-206(1)(b) (“[S]uch a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.”).

<sup>49</sup> See *id.* § 2-206 cmt. 4 (explaining that notification to the buyer that the non-conforming goods are offered merely as an accommodation avoids such notification or shipment of the non-conforming goods from being the acceptance).

<sup>50</sup> See Colin P. Marks, *The Limits of Limiting Liability in the Battle of the Forms: U.C.C. Section 2-207 and the “Material Alteration” Inquiry*, 33 PEPP. L. REV. 501, 510 (2006) (noting that, under U.C.C. section 2-207, “the rigid common law ‘mirror image rule’ has given way to a more realistic approach to contract formation”); John E. Murray, Jr., *The Definitive “Battle of the Forms”: Chaos*

also known as the “Battle of the Forms” provision, applies in two situations. The first situation occurs when there is an oral or written offer and an acceptance that varies the terms of the offer.<sup>51</sup> Under the common law, the purported acceptance, which varies the terms of the offer, would be deemed a counter-offer.<sup>52</sup> This was known as the “mirror-image” rule, meaning that an acceptance must mirror the offer or result in a counter-offer.<sup>53</sup> However, because in real life, buyers and sellers frequently exchanged forms with boilerplate terms that no one read, to apply the common law would mean that the party that sent the last form would have the contract on his or her terms.<sup>54</sup> The drafters of the U.C.C., heavily influenced by the legal realism movement, saw this as an absurdity.<sup>55</sup> Therefore, to avoid application of this “last shot” doctrine whereby the last form won, the U.C.C. permits an acceptance that varies or adds terms to the offer to still act as an acceptance so long as the acceptance is “definite and seasonable.”<sup>56</sup>

Section 2-207(2) then addresses what to do with the additional terms.<sup>57</sup> The general rule is that they are proposals for addition to the contract, and as between non-merchants, or as between a merchant and a non-merchant, section 2-207(2) leaves it at that.<sup>58</sup> This scant line has generally been accepted to mean that these additional terms become a part of the contract

*Revisited*, 20 J.L. & COM. 1, 2–3 (2000) (noting that U.C.C. section 2-207 was designed to break from the common law to end the injustice created from the “mirror-image” rule and “last shot” doctrine).

<sup>51</sup> U.C.C. § 2-207.

<sup>52</sup> See *Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 208 (5th Cir. 1998) (“Under this ‘mirror image’ rule, a modification of an offer qualifies as a rejection and counteroffer only if the modification is ‘material.’”).

<sup>53</sup> See Murray, *supra* note 50, at 2 (“The common law ‘mirror-image’ rule requires the acceptance to match the terms of the offer. Where a response to an offer contains different or additional terms in boilerplate clauses, the mirror-image rule insists that the response must be a ‘conditional acceptance,’ i.e., a counteroffer, even though it reasonably appears to be a definite expression of acceptance.”).

<sup>54</sup> See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991) (“If the offeror proceeded with the contract despite the differing terms of the supposed acceptance, he would, by his performance, constructively accept the terms of the ‘counteroffer,’ and be bound by its terms. As a result of these rules, the terms of the party who sent the last form, typically the seller, would become the terms of the parties’ [sic] contract.”).

<sup>55</sup> See Murray, *supra* note 50, at 3 (“The seller, however, ships the goods which the buyer accepts, thereby unwittingly accepting the seller’s terms in the counteroffer that had been fired as the ‘last shot’ in the battle. Though the buyer is unfairly surprised to learn that the contract contains the seller’s terms, this is the result ordained under the ‘last shot’ principle. Section 2-207 was designed to remedy this injustice.”).

<sup>56</sup> See U.C.C. § 2-207(1) (“A definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.”).

<sup>57</sup> See *id.* § 2-207(2) (addressing what becomes of the additional terms in the contract formed under section 2-207(1)).

<sup>58</sup> See *id.* (“The additional terms are to be construed as proposals for addition to the contract.”).

only if the offeror expressly consents to the terms.<sup>59</sup> However, as between merchants, the rule is that the additional terms become a part of the contract unless one of three conditions are met: “(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”<sup>60</sup>

Though section 2-207 addresses how to treat additional terms under section 2-207(2), a method of how to deal with terms that vary the terms of the offer is nowhere to be found.<sup>61</sup> With regard to situations that involve a non-merchant, the general rule apparently still applies, and such variations will become a part of the contract only if the offeror expressly assents to them.<sup>62</sup> With regard to transactions between merchants, the rules get trickier with a number of jurisdictions adopting a “knock-out” rule, whereby the conflicting terms are each removed and the court fills the gaps made by the knocked-out terms.<sup>63</sup>

If an offeree wishes to avoid application of section 2-207(2), he or she may make the acceptance expressly conditional on the terms of the acceptance.<sup>64</sup> An acceptance that does so is not an acceptance under section 2-207(1); however, the acceptance does not qualify as a true counter-offer either.<sup>65</sup> Instead, by operation of section 2-207(3), the court must look to whether the parties carried on as if there was a contract.<sup>66</sup> If so, then a contract is formed, but only on the terms which match up

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<sup>59</sup> See Murray, *supra* note 50, at 7–8 (addressing the effect of section 2-207 in merchant and non-merchant situations).

<sup>60</sup> U.C.C. § 2-207(2).

<sup>61</sup> See *id.* § 2-207 (failing to address what becomes of different terms in the contract formed under 2-207(1)).

<sup>62</sup> See Murray, *supra* note 50, at 7–8 (discussing how section 2-207 applies to both merchants and non-merchants).

<sup>63</sup> See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984) (“The . . . preferable approach, which is commonly called the ‘knock-out’ rule, is that the conflicting terms cancel one another. Under this view the offeree’s form is treated only as an acceptance of the terms in the offeror’s form which did not conflict. The ultimate contract, then, includes those non-conflicting terms and any other terms supplied by the U.C.C., including terms incorporated by course of performance (§ 2-208), course of dealing (§ 1-205), usage of trade (§ 1-205), and other ‘gap fillers’ or ‘off-the-rack’ terms (e.g., implied warranty of fitness for particular purpose, § 2-315).”).

<sup>64</sup> See U.C.C. § 2-207(1) (“A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, *unless acceptance is expressly made conditional on assent to the additional or different terms.*” (emphasis added)).

<sup>65</sup> See *id.* § 2-207(3) (addressing the effect of both parties’ conduct, which recognizes a contract though a contract was not truly formed).

<sup>66</sup> See *id.* (“Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.”).



between the offer and acceptance.<sup>67</sup> Thus, additional and different terms in the purported acceptance would again fall away, and the court would be left to gap-fill.<sup>68</sup>

The above description lays out the first situation that section 2-207 was intended to address—an offer with an acceptance that varies or adds to the non-core terms (or the traditional “battle of the forms”). The section also rather awkwardly addresses a second situation: confirmations.<sup>69</sup> Section 2-207(1) by its terms applies to a “definite and seasonable expression of acceptance *or a written confirmation.*”<sup>70</sup> Thus, if a contract is formed orally, either over the phone or in person, and one of the parties later sends a written confirmation, any additional or varied terms in the writing will be subject to section 2-207.<sup>71</sup> As to a transaction that involves non-merchants, the same result should apply as above.<sup>72</sup> The additional and different terms are simply proposals, which can be ignored by the other party, and they do not become a part of the contract unless both parties expressly assent to them.<sup>73</sup> As between merchants, again the nature of the terms will be an issue with additional terms being subject to section 2-207(2)(a)–(c).<sup>74</sup>

### C. Application of the “Battle of the Forms” to a Typical In-Store Transaction

With these basics in mind, let us return to the sandwich hypothetical from the introduction. When the man walks into the bar and sees the menu, most courts would agree that the menu is a solicitation rather than an offer.<sup>75</sup> When the man places his order, this is most likely the offer, which the bar accepts either when it takes his money or at the very least

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<sup>67</sup> See *id.* (“In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.”).

<sup>68</sup> See *id.* (stating that “supplementary terms” from other U.C.C. provisions may be incorporated into the contract).

<sup>69</sup> *Id.* § 2-207(1).

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> See *id.* § 2-207(2) (“The additional terms are to be construed as proposals for addition to the contract.”); see also Murray, *supra* note 50, at 22 (providing a written confirmation hypothetical).

<sup>72</sup> See U.C.C. § 2-207(2) (establishing that additional terms in written confirmations will “be construed as proposals for addition to the contract” involving non-merchants).

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* (asserting that additional terms do not become part of a contract between merchants if: “(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received”).

<sup>75</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981) (“A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”); CORBIN, *supra* note 41, § 2.4 (“[A]dvvertisements that describe goods for sale at a given price are not reasonably to be understood as offers.”).

gives him the sandwich, as either would appear to be a reasonable mode of acceptance under the circumstances.<sup>76</sup> Under this formulation, the parties have a contract; so when the buyer gets back home or to his office and sees additional terms, it would appear that this is a confirmation.<sup>77</sup> By application of sections 2-207(1) and (2), if the buyer is a non-merchant, he can ignore these terms and eat his sandwich without concern for whether the act of opening or eating the sandwich will somehow bind him to these additional terms.<sup>78</sup>

Alternatively, our man in the bar could have had a delivery menu, and rather than travel in person to the bar, he could have called his order in for delivery. Again, the menu would not act as the offer but a solicitation. The call ordering the sandwich would be the offer, which the store could accept either orally or by charging his card, or under section 2-206(1)(b) by promptly shipping the sandwich.<sup>79</sup> At the latest, once the goods are shipped, the contract is formed, and again the additional terms would simply serve as a confirmation subject to section 2-207(2).<sup>80</sup>

The above basically describes how many thought contract formation under the U.C.C. would treat in-store and over-the-phone transactions. It should be noted, however, that if the contract is in fact formed over the phone or in the store, the common law would not vary greatly from the above approach in situations involving non-merchants. In situation one, the modification could not be unilaterally imposed upon the other party once a contract was formed and would additionally need to have consideration to support it (which is not required under the U.C.C.).<sup>81</sup> Similarly, if a contract was formed over the phone, then the later terms would simply be proposed modifications.

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<sup>76</sup> See U.C.C. §§ 1-103(b), 2-206 (incorporating common law to supplement the U.C.C. provisions and defining an offer and acceptance in the formation of a contract); RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 50 (defining an “offer” and “acceptance,” respectively).

<sup>77</sup> See U.C.C. § 2-207(2) (discussing additional terms); see also Murray, *supra* note 50, at 22 (“Section 2-207(1) treats a confirmation *as if it were an acceptance* so that any different or additional terms are subject to 2-207(2) like any other definite expression of acceptance.”).

<sup>78</sup> See U.C.C. § 2-207(2) (“The additional terms are to be construed as proposals for addition to the contract.”).

<sup>79</sup> See *id.* § 2-206(1)(b) (“[A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.”).

<sup>80</sup> See *id.* § 2-207(1)–(2) (establishing that such a written confirmation would operate as an acceptance despite its additional terms). The terms would be “proposals,” as the hypothetical involves a non-merchant.

<sup>81</sup> See *id.* § 2-209(1) (stating that an agreement “modifying a contract . . . needs no consideration to be binding”); see also *id.* § 2-207(1) (establishing that an expression of acceptance or a written confirmation will operate as an acceptance even if it has been modified to state additional terms).

## III. THE BIRTH OF THE “ROLLING CONTRACT”

A. *Development of the Rolling Contract Approach*

Though Judge Easterbrook’s opinion in *ProCD II* is one of the seminal cases in the development of rolling contract theory, the United States Supreme Court may have paved the way for Easterbrook five years earlier in the case of *Carnival Cruise Lines, Inc. v. Shute*.<sup>82</sup> In *Shute*, the Court was faced with the enforceability of a forum selection clause.<sup>83</sup> The petitioner, Carnival Cruise Lines, Inc., sold the Shutes cruise tickets through a travel agent.<sup>84</sup> The Shutes paid for the tickets and were subsequently sent the tickets along with attached pages with additional terms and conditions of sale.<sup>85</sup> Among the terms was a forum selection clause stipulating that all disputes would be litigated in Florida (Carnival’s principal place of business).<sup>86</sup> During the course of the cruise, Mrs. Shute was injured while in international waters and brought suit in federal court in Washington.<sup>87</sup> Carnival moved for summary judgment based upon the forum selection clause and lack of personal jurisdiction, which the district court granted based upon the latter.<sup>88</sup> The court of appeals reversed, holding that jurisdiction was not lacking, and that the forum selection clause should not be enforced as it was not freely bargained for.<sup>89</sup>

The Supreme Court reviewed the clause in light of its own precedent under *Bremen v. Zapata Offshore Co.*,<sup>90</sup> another admiralty decision in which the validity of a forum selection clause negotiated by two sophisticated parties was upheld.<sup>91</sup> The *Shute* Court noted that the forum selection clause at issue in *Shute*, unlike the one in *Bremen*, was one of adhesion, neither freely bargained for nor the subject of negotiation.<sup>92</sup>

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<sup>82</sup> 499 U.S. 585 (1991), *superseded by statute*, Provisions Limiting Liability for Personal Injury or Death, 46 U.S.C. § 30509 (2006), *as recognized in* *Oran v. Fair Wind Sailing, Inc.*, No. 08-0034, 2009 WL 4349321, at \*7 n.5 (D.V.I. Nov. 23, 2009); *see* Hillman, *supra* note 13, at 744–47 (describing standard-form contracts and the development of rolling contract theory).

<sup>83</sup> *Shute*, 499 U.S. at 587.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 587–88.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 588.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 588–89. The court of appeals alternatively held that there was evidence that the Shutes were physically and financially incapable of pursuing their claim if the clause was enforced. *Id.* at 589.

<sup>90</sup> 407 U.S. 1 (1972).

<sup>91</sup> *Id.* at 15–17.

<sup>92</sup> *Shute*, 499 U.S. at 593. Though the Court did not use the term “contract of adhesion,” its description of the forum selection clause at issue meets the classic definition of one. The Court described the clause thusly:

In contrast, respondents’ passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other

Despite this conclusion, the Court upheld the clause's validity based on what it termed the "reasonableness" of the clause under the circumstances.<sup>93</sup> Specifically, the Court noted three rationales for why the clause was "reasonable," all of which implicated economic concerns. First, the Court noted that Carnival had an interest in limiting where it could be sued, particularly given the diverse make-up of its clientele's citizenship.<sup>94</sup> Second, picking a forum in advance would save litigant and judicial resources by providing clarity as to where suit could be brought, thus limiting the expense of pretrial motions.<sup>95</sup> Finally, the Court opined that consumers as a whole would actually benefit from such clauses as ticket prices would reflect the savings that cruise lines enjoyed by limiting where they could be sued.<sup>96</sup> The Court did caveat its decision on the premise that all such clauses should be subject to judicial scrutiny, indicating that bad faith, fraud, over-reaching, and lack of conspicuousness should all be examined.<sup>97</sup> However, the facts did not support such claims, and thus the clause was upheld.<sup>98</sup>

There are a number of facts in the *Shute* decision that should be noted to limit its application. First and foremost, the decision was one of the rare opportunities through which the Supreme Court opined on contract law without reference to state law, as the case was decided under the Court's admiralty jurisdiction.<sup>99</sup> Furthermore, the Court did not address the issue of whether a contract was formed due to lack of notice directly; indeed, the Shutes did not contest that the terms of the forum selection clause were reasonably communicated to them.<sup>100</sup> Thus, the issue of when the offer

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cruise lines. In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioners the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.

*Id.* (citations omitted).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 593–94.

<sup>96</sup> *Id.* at 594. The Court additionally dismissed the court of appeals's alternative ground that the Shutes would be incapable of pursuing litigation in Florida for financial and physical reasons as unsupported by the record. *Id.*

<sup>97</sup> *Id.* at 595.

<sup>98</sup> *Id.* The Court also rejected the Shutes' argument that the forum selection clause violated 46 U.S.C. § 183c, which limited the ability of vessel owners to contractually alter the rights of passengers to sue. *See id.* at 595–97 (finding that the language of the forum-selection clause "does not take away respondents' right to 'a trial by [a] court of competent jurisdiction'" in violation of § 183c; rather, the forum-selection clause "states specifically that actions arising out of the passage contract shall be brought" in a "court of competent jurisdiction").

<sup>99</sup> *Id.* at 590.

<sup>100</sup> *Id.*

and acceptance occurred, which is a central inquiry in rolling contract cases, was not squarely before the Court. Even if it was, its precedential value under state law would have been merely persuasive. Nonetheless, echoes of the Court's reasonableness analysis and its economic rationales can be found in subsequent rolling contract cases, particularly in *ProCD II*.<sup>101</sup>

The *ProCD II* opinion, authored by Judge Frank H. Easterbrook, is the modern genesis of rolling contract theory.<sup>102</sup> The facts at issue in the case mirror, in many ways, the hypotheticals used in Part I and Part II of this Article. Matthew Zeidenberg entered a local retail store and bought ProCD's product, "Select Phone," which was a CD-ROM disk containing over 95,000,000 telephone listings compiled by ProCD.<sup>103</sup> Inside the package was a user guide, which also contained a "Single User License Agreement" that prohibited the purchaser from copying the software other than for personal use.<sup>104</sup> Additionally, once the software was loaded, the license would appear on most screens before the listings could be accessed.<sup>105</sup> The license provided that: "By using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software . . . to the place where you obtained it."<sup>106</sup> The software's box made reference to the license on the outside in small print, but did not give any details.<sup>107</sup> Zeidenberg purchased Select Phone in late 1994 and soon realized he could copy the information and make it available to the public himself.<sup>108</sup> He subsequently incorporated under the name Silken Mountain Web Services, Inc. and purchased an updated version of Select Phone.<sup>109</sup> Zeidenberg ignored the license agreement, believing it was not binding, and eventually made his database available over the Internet.<sup>110</sup>

ProCD learned of Zeidenberg's actions and brought suit to enjoin him, claiming both a violation of copyright law as well as violation of the

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<sup>101</sup> See *ProCD II*, 86 F.3d 1447, 1451 (7th Cir. 1996) ("The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous." (citing *Shute*, 499 U.S. 585)).

<sup>102</sup> See *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1068 (R.I. 2009) ("In *ProCD, Inc. v. Zeidenberg*, the court challenged the traditional understanding of offer and acceptance in consumer transactions by holding that a buyer of software was bound by an agreement that was included within the packaging and later appeared when the buyer first used the software." (citation omitted)).

<sup>103</sup> *ProCD, Inc. v. Zeidenberg (ProCD I)*, 908 F. Supp. 640, 644-45 (W.D. Wis.), *rev'd*, 86 F.3d 1447, 1451 (7th Cir. 1996).

<sup>104</sup> *Id.* at 644.

<sup>105</sup> *Id.* at 644-45.

<sup>106</sup> *Id.* at 644.

<sup>107</sup> *Id.* at 645.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 645-46.

license agreement.<sup>111</sup> After dispatching ProCD's copyright claim, the district court turned to the enforceability of the license agreement under the U.C.C.<sup>112</sup> In its analysis, the court considered whether the contract offer was accepted once Zeidenberg had received the goods and had an opportunity to inspect them, or whether the contract was formed in the store and thus the terms of the license should be viewed under either U.C.C. section 2-207 or as a modification under section 2-209.<sup>113</sup> Reviewing section 2-206, the court concluded that the act of placing the Select Phone product on the store shelf constituted the offer,<sup>114</sup> which was accepted by Zeidenberg when he paid for the software.<sup>115</sup> With the contract formed in the store, the district court concluded that the additional terms of the license agreement were mere proposals that could be ignored by Zeidenberg either under section 2-207(2) or as a modification under section 2-209, both of which would require Zeidenberg's express consent.<sup>116</sup> Thus, the district court's approach was generally in line with the consensus on how such terms should be treated, as discussed in Part II.

On appeal, Judge Easterbrook began his analysis by noting that Zeidenberg and the district court had found that the offer was made when the goods were placed on the shelf.<sup>117</sup> Easterbrook did not take issue with this premise, but instead questioned the district court's treatment of the

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<sup>111</sup> *Id.* at 646, 650.

<sup>112</sup> *Id.* at 650–51. The district court noted that the sale of software put forward a question of whether Article II of the U.C.C., which applies to the sale of “goods,” should apply. *Id.* The district court chose to apply Article II, believing it the sounder approach to software transactions. *Id.* at 651.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 651–52. This conclusion is counter to the generally accepted rule that placing of the goods on the shelf *is not* the offer, but merely a solicitation. See CORBIN, *supra* note 41, § 2.4 (“It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, a catalog or circular or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way.” (footnote omitted)). Apparently, the argument that the offer was made by Zeidenberg in the store when he tendered his money was not made to the court. See Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1, 39 n.218 (2009) (“The record in *ProCD*, however, indicates that it was the parties, not the trial court or the Seventh Circuit, who so decided.”); see also Epstein, *supra* note 1, at 109 (“The Easterbrook analysis of delayed acceptance . . . solves the central problem with shrinkwrap contracts.”).

<sup>115</sup> *ProCD I*, 908 F. Supp. at 652.

<sup>116</sup> See *id.* at 654–55 (finding that the defendants were not bound by the user agreement under either section 2-207 or section 2-209, because they had not expressly agreed to the terms contained therein). Interestingly, the court seemed to assume Zeidenberg was a consumer and thus did not consider the application of subsections 2-207(2)(a)–(c). It seems possible that Zeidenberg could have been bound, as a merchant, to the license agreement if it did not materially alter the contract. See U.C.C. § 2-207(2)(b) (2011) (providing that additional terms in an acceptance become part of a contract between merchants unless “they materially alter it”). The court may have considered this argument mooted by its subsequent holding in the same opinion that ProCD's contract claims were preempted under federal copyright law. *ProCD I*, 908 F. Supp. at 659.

<sup>117</sup> *ProCD II*, 86 F.3d 1447, 1450 (7th Cir. 1996).

acceptance, which the district court held occurred in the store.<sup>118</sup> Easterbrook did not agree with this premise, asking: “[w]hy would Wisconsin fetter the parties’ choice in this way?”<sup>119</sup> Easterbrook then described the advantages of permitting standard term agreements to be enforceable, despite the fact that they are often read for the first time after the buyer has the goods.<sup>120</sup> These advantages include the saved time and expense of trying to describe all of the terms on the outside of a box.<sup>121</sup> As examples of the utility of such contracts, Easterbrook references the insurance industry, drug industry, and the purchase of airline and concert tickets, all of which take advantage of the ability to provide information or terms after a purchase has been made.<sup>122</sup> Interestingly, Easterbrook frequently refers to the ongoing relationship between the purchaser and the seller, such as the expected coverage an insured immediately gets when the premium is paid, though the details are still coming.<sup>123</sup> While there may be practical and economic advantages (particularly to the vendor/seller) in doing business in such a way, what of the district court’s analysis under section 2-207? Easterbrook summarily dismisses its application stating, “Our case has only one form; UCC § 2-207 is irrelevant.”<sup>124</sup>

Instead of analyzing under section 2-207 (or section 2-206, which is not even mentioned), Easterbrook turned to U.C.C. section 2-204 as the guiding principle for such “terms later” contracts.<sup>125</sup> Section 2-204 broadly provides that a contract may be formed “in any manner sufficient to show agreement,” which Easterbrook used to justify his view that the vendor or seller is the master of its offer and can choose to invite acceptance by conduct, such as by using the product.<sup>126</sup> This view of contract formation is limited by the caveat that the buyer must be given an opportunity to review and reject the offer; otherwise, such contracts are enforceable.<sup>127</sup> Thus, as Zeidenberg had been given notice of the license agreement and continued to use the software, he was bound by the license agreement’s

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1450–51.

<sup>120</sup> *See id.* at 1451 (“Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.”).

<sup>121</sup> *See id.* (“Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful . . . or both.”).

<sup>122</sup> *Id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1452. Easterbrook does not appear to address the district court’s section 2-209 discussion; however, given his conclusion that these were the terms of the contract rather than a modification of an already existing contract, the omission is not surprising.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (quoting U.C.C. § 2-204(1) (1995)).

<sup>127</sup> *See id.* (“A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened.”).

terms.<sup>128</sup>

### B. ProCD II's Progeny and the Limits of the Rolling Contract Approach

Many questioned the applicability of *ProCD II* beyond the narrow facts at hand.<sup>129</sup> The case involved a buyer, who was arguably a merchant and had notice of the terms at issue prior to purchasing the subsequent CD-ROMs.<sup>130</sup> Additionally, the case involved an atypical good—software.<sup>131</sup> However, any doubt about how Easterbrook felt about the broader applicability of his new view of contract formation was quickly addressed a little over seven months later when he authored the opinion in *Hill v. Gateway 2000, Inc.*<sup>132</sup>

In *Hill*, Rich and Enza Hill purchased a Gateway computer over the phone.<sup>133</sup> The Hills gave their credit card information, but were never alerted to any additional terms that were coming with the computer.<sup>134</sup> Once the computer arrived, the Hills found a list of terms inside the box—including an arbitration clause—that purportedly governed the parties' agreement unless the Hills returned the product within thirty days.<sup>135</sup> The Hills did not return the computer within the thirty-day period, but eventually found fault with the computer and sought to sue Gateway for civil RICO violations.<sup>136</sup> Gateway invoked the arbitration clause, but the district court refused to uphold the clause because the Hills were not given adequate notice of the terms.<sup>137</sup>

On appeal, the Seventh Circuit vacated and remanded, finding that the terms of the contract that came in the box were fully enforceable.<sup>138</sup> Citing to *ProCD II*, as well as to *Shute*, Judge Easterbrook, with broad strokes, affirmed the use of standard form contracts that come later, stating that these cases “exemplify the many commercial transactions in which people pay for products with terms to follow.”<sup>139</sup> Easterbrook stated that the

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<sup>128</sup> *Id.* at 1452–53. The court of appeals went on to address the district court's alternative finding that the contract was preempted by federal law and found that the Copyright Act did not preempt ProCD's contract claim. *Id.* at 1454–55.

<sup>129</sup> *See, e.g.,* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1337–38 (D. Kan. 2000) (comparing cases that had to determine “whether terms received with a product become part of the parties' agreement” and noting that the cases partly turn on whether it is found that the parties formed the contract before or after terms are communicated).

<sup>130</sup> *ProCD II*, 86 F.3d at 1449–50.

<sup>131</sup> *Id.* at 1449.

<sup>132</sup> 105 F.3d 1147 (7th Cir. 1997).

<sup>133</sup> *Id.* at 1148.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1151.

<sup>139</sup> *Id.* at 1148–49.



transaction at issue was governed by these same principles, as Gateway used the “same sort of accept-or-return offer ProCD made to users of its software.”<sup>140</sup> Of particular note is that Easterbrook explicitly rejected the notion that *ProCD II* should be limited to software sales,<sup>141</sup> or that it mattered whether there was a notice of the coming terms on the outside of the box (as was the case in *ProCD II*).<sup>142</sup> Easterbrook also dismissed the notion that the *ProCD II* decision somehow turned upon application of U.C.C. section 2-207, again erroneously dismissing the provision as irrelevant because there was only one form;<sup>143</sup> however, he did elaborate on the true question presented in *ProCD II*:

The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed—in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general “send me the product,” but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers “yes,” for merchants and consumers alike.<sup>144</sup>

Thus, to Easterbrook, the issue was simple—whether a vendor can transform an in-store or over-the-phone contract into a mere offer—and it was resolved in favor of the vendor whom he claims is the “master of the offer.”<sup>145</sup> However, Easterbrook gives no guidance on the issue of when, if ever, a contract is formed in-store or over-the-phone. His analysis in *Hill*, like in *ProCD II*, seems to turn on the simple efficiency (and thus economics) of rolling contracts rather than on the intention of the parties or the nature of their relationship under the contract.<sup>146</sup> Indeed, Easterbrook

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<sup>140</sup> *Id.* at 1149.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1150. Easterbrook also noted, in dicta, that he was doubtful of Zeidenberg’s merchant status, even if section 2-207 did apply, as he bought the software at a retail shop. *Id.* This fact should not preclude merchant status, but has added fodder for those who have excoriated his application of the U.C.C. See, e.g., Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 *BYU J. PUB. L.* 1, 10 (2011) (“[*ProCD II*] is a classic case of putting the cart before the horse. Rather than resolve the case through the mechanism established in the Uniform Commercial Code (U.C.C.) for dealing with later additions of new and different terms, Judge Easterbrook first articulated the result he believed he had to obtain for purposes of supporting market economics, and then simply declared that the terms were enforceable without much effort to locate a rule somewhere in traditional contract law.” (footnote omitted)).

<sup>143</sup> *Hill*, 105 F.3d at 1149–50.

<sup>144</sup> *Id.* at 1150.

<sup>145</sup> *Id.* at 1149.

<sup>146</sup> See *id.* (“Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales.”).

dismisses the notion that it should matter whether the contract is an executory one;<sup>147</sup> however, he does note that the contracts at issue in both *ProCD II* and *Hill* involved continuing obligations, such as ongoing customer service and warranties, perhaps indicating that such obligations factored into the analysis.<sup>148</sup> Furthermore, in both cases, Easterbrook pointed out that there was notice of additional terms to come, though in *Hill* the notice was through Gateway's advertisements rather than on the box.<sup>149</sup>

Despite the analytical flaws in both *ProCD II* and *Hill*, the opinions have been widely cited and adopted in a number of decisions on the issue of whether "rolling" or "layered" contracts are enforceable. Some commentators<sup>150</sup> and a number of courts, both state and federal, have cited approvingly to the "rolling contract" approach.<sup>151</sup> Unfortunately, a number

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<sup>147</sup> *Id.* at 1149–50.

<sup>148</sup> *See id.* at 1149 (“[B]oth ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides.”).

<sup>149</sup> *Id.* at 1150.

<sup>150</sup> *See* Epstein, *supra* note 1, at 122 (defending Easterbrook's approach on intellectual grounds and suggesting that courts and commentators that are critical of the approach are uneasy with the way it meshes with traditional doctrinal analysis); Hillman, *supra* note 13, at 744–45 (arguing that because few parties even think about when contract formation occurs, and given that consumers do not read the terms regardless of when the contract was formed, the formation issue should not be a bar to rolling contracts and such contracts should instead simply be reviewed for their conscionability); *see also* Andrew Vogeler, Note, *Rolling Contract Formation and the U.C.C.'s Approach to Emerging Commercial Practices*, 30 J.L. & COM. 243, 243–44 (2012) (arguing that rolling contract theory is consistent with the policies underlying the U.C.C.). This approach has also been adopted under the Uniform Computer Information Transactions Act (UCITA). UNIF. COMPUTER INFO. TRANSACTIONS ACT § 202 cmt. 4 (2002).

<sup>151</sup> *See, e.g.*, Sherr v. Dell, Inc., No. 05 CV 10097(GBD), 2006 WL 2109436, at \*2 (S.D.N.Y. July 27, 2006) (“Approve-or-return contracts have been found to be enforceable in consumer transactions.”); Meridian Project Sys., Inc. v. Hardin Constr. Co., 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (finding the rationale in *ProCD II* “compelling” and recognizing that where a consumer had notice of an end user license agreement and an opportunity to return the software if he did not agree to the terms, the agreement is not “rendered invalid” solely because the consumer did not receive the agreement before opening the package); Chandler v. AT&T Wireless Servs., Inc., 358 F. Supp. 2d 701, 704 (S.D. Ill. 2005) (“By using her phone rather than canceling immediately, or no later than thirty days after her activation date, Chandler accepted the offered services and the terms and conditions under which they were offered. She had a clear mechanism and reasonable opportunity to reject them.”); Davidson & Assocs. v. Internet Gateway, 334 F. Supp. 2d 1164, 1178 (E.D. Mo. 2004) (“[T]he defendants had sufficient notice of the EULAs and TOU. It is true that the terms of the EULAs and TOU were not on the box, but the terms were disclosed before installation of the games and access to Battle.net was granted. The defendants also expressly consented to the terms of the EULA and TOU by clicking ‘I Agree’ and ‘Agree.’ . . . Accordingly, the Court finds that the EULA and TOU are enforceable contracts under both Missouri or California law.”); O’Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 515–16 (M.D. La. 2003) (approving of the approach taken in *Hill* and *ProCD*); Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., 236 F. Supp. 2d 907, 911 (N.D. Ill. 2002) (“The Court finds that Mudd-Lyman accepted the terms of UPS’s limitation of liability through the breaking of the shrinkwrap seal and by its on-screen acceptance of the terms of the software license agreement. Mudd-Lyman was thereby provided with reasonable notice of UPS’s limited liability and was given a

of these courts have failed to analyze why the common understanding of contract formation should be displaced by the “rolling” contract, and instead simply cite to the aforementioned cases and adopt their approach.<sup>152</sup>

One of the first cases to cite to this duo of cases, *Brower v. Gateway 2000 Inc.*,<sup>153</sup> is emblematic of such an approach. *Brower* involved a similar fact pattern as *Hill*, and the same arbitration clause at issue in *Hill*.<sup>154</sup> In *Brower*, a class of consumers had purchased computers and software products from Gateway either by mail-order or over the phone.<sup>155</sup> When the goods arrived, a copy of Gateway’s “Standard Terms and Conditions Agreement” was found with the product.<sup>156</sup> Among other things, the agreement provided an arbitration clause and stated that, by

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fair opportunity to purchase higher liability.”); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) (finding *Hill* to be “instructive”); *I.Lan Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (agreeing “with those cases embracing the theory of *ProCD*,” holding that “clickwrap license agreements are an appropriate way to form contracts,” and determining that “[m]oney now, terms later” is a practical way to form contracts, especially with purchasers of software”); *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at \*3 (Del. Ch. Mar. 16, 2000) (“The 7th Circuit rejected that argument, however, and found the agreement enforceable as written. Judge Easterbrook, writing for the unanimous panel, noted ‘[b]y keeping the computer beyond 30 days, the [buyers] accepted Gateway’s offer, including the arbitration clause.’ Undeniably, plaintiff in the present case retained the computer and accessories for more than thirty days. The same rationale, therefore, applies to this plaintiff as in the case before the 7th Circuit.” (alteration in original) (footnotes omitted) (quoting *Hill*, 105 F.3d at 1150)), *aff’d*, 763 A.2d 92 (Del. 2000); *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at \*3 (Del. Super. Ct. Sept. 3, 1999) (“Analogous support for this Court’s conclusion that the physical location of the disclaimer of the implied warranty of merchantability inside the Zip drive packaging does not make the disclaimer inconspicuous can be found in some cases from other jurisdictions.”); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 140 (Me. 2005) (“By accepting delivery of the computers, and then failing to exercise their right to return the computers as provided by the agreement, Stenzel and Gerber expressly manifested their assent to be bound by the agreement, including its arbitration clause.”); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251 (N.Y. App. Div. 1998) (“While *Hill* and *ProCD*, as the IAS Court recognized, are not controlling (although they are decisions of the United States Court of Appeals for the circuit encompassing the forum State designated for arbitration), we agree with their rationale that, in such transactions, there is no agreement or contract upon the placement of the order or even upon the receipt of the goods.”); *Levy v. Gateway 2000, Inc.*, 1997 WL 823611 (N.Y. Sup. Ct. Aug. 12, 1997) (holding that section 2-207 did not apply as the contract formed once the plaintiff exercised the opportunity to accept the goods and accompanying terms); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1071 (R.I. 2009) (“[W]e are satisfied that the *ProCD* line of cases is better reasoned and more consistent with contemporary consumer transactions.”); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000) (en banc) (“We find the approach of the *ProCD*, *Hill*, and *Brower* courts persuasive and adopt it to guide our analysis . . .”).

<sup>152</sup> See, e.g., *Mortenson*, 998 P.2d at 313 (“We find the approach of the *ProCD*, *Hill*, and *Brower* courts persuasive and adopt it . . .”); *Brower*, 246 A.D.2d at 250–51 (noting that *ProCD II* and *Hill* were applicable); see also Friedman, *supra* note 28, at 11 (summarizing cases which focus on return policies rather than notice).

<sup>153</sup> 246 A.D.2d 246.

<sup>154</sup> *Id.* at 250.

<sup>155</sup> *Id.* at 248.

<sup>156</sup> *Id.*

keeping the computer beyond thirty days, the consumer would consent to the terms of the agreement.<sup>157</sup> A group of consumers subsequently sued for breach of warranty and other causes of action related to the goods, and Gateway moved to dismiss due to the arbitration clause.<sup>158</sup> On appeal, the consumers argued that the clause was not enforceable under U.C.C. section 2-207.<sup>159</sup> The court, guided by *ProCD* and *Hill*, found that provision inapplicable. Instead, the court adopted the “rolling contract” approach, stating:

[W]e agree with [*ProCD II* and *Hill*’s] rationale that, in such transactions, there is no agreement or contract upon the placement of the order or even upon the receipt of the goods. By the terms of the Agreement at issue, it is only after the consumer has affirmatively retained the merchandise for more than 30 days—within which the consumer has presumably examined and even used the product(s) and read the agreement—that the contract has been effectuated.<sup>160</sup>

However, any mention of why the consumers should be on notice as to forthcoming terms was noticeably absent from its discussion.<sup>161</sup> Furthermore, the decision makes no mention of U.C.C. section 2-206 or why such orders made over the phone (or by mail) are not offers by the consumers. Given the analytical flaws in Easterbrook’s analysis, this failure to even examine the interplay of U.C.C. sections 2-206 and 2-207 and why the basic understanding of contract formation should be dismissed is troubling.

The subsequent case of *M.A. Mortenson Co. v. Timberline Software Corp.*,<sup>162</sup> which also relied upon *ProCD* and *Hill*, demonstrates the dangers of this approach. M.A. Mortenson Company (Mortenson), a general construction contractor, purchased software from Timberline Software Corporation (Timberline).<sup>163</sup> The software was used to assist in calculating bids.<sup>164</sup> Mortenson had been using Timberline software for approximately three years when it sought to purchase a newer version of the software and asked for a price quote.<sup>165</sup> Upon receiving the quote, Mortenson placed a

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 248–49.

<sup>159</sup> *Id.* at 249.

<sup>160</sup> *Id.* at 251.

<sup>161</sup> See Friedman, *supra* note 28, at 11 n.63 (citing *Brower* as an example of a case in which the court followed *Hill*’s rationale without considering whether the buyer received any notice that additional terms would be included post-purchase).

<sup>162</sup> 998 P.2d 305 (Wash. 2000) (en banc).

<sup>163</sup> *Id.* at 307. Mortenson actually purchased the software from a licensed dealer of Timberline’s, Softworks Data Systems, Inc.; however, the opinion focuses on Timberline. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

purchase order, which detailed price, quantity, credits to be given for past purchases, software support, notice that any changes in the goods or costs needed prior approval, and a request to be notified promptly if shipping could not occur as detailed.<sup>166</sup> In response to the order, Timberline sent the software, which came packaged with a license agreement as well as a limitation on consequential damages.<sup>167</sup> The license advised that if the buyer did not agree to the terms, it should promptly return the programs for a full refund.<sup>168</sup> Mortenson proceeded to use the software to calculate a bid, but due to a glitch in the software, Mortenson underbid a project—which it was awarded—by \$1.95 million.<sup>169</sup> Mortenson sued, and Timberline moved for summary judgment based on the consequential damages limitation found in the licensing agreement. Timberline’s motion was granted and upheld by the court of appeals.<sup>170</sup>

On appeal to the Washington Supreme Court, Mortenson argued that the consequential damage limitation was barred under U.C.C. section 2-207(2) as a material alteration to the contract.<sup>171</sup> The court dismissed the applicability of section 2-207 as it found the contract was not formed until Mortenson had assented to the license agreement.<sup>172</sup> The court thus avoided any discussion of U.C.C. section 2-206, and instead decided the case under the broad language of section 2-204 and rolling contract theory.<sup>173</sup> This failure to address why Mortenson’s purchase order was not an offer leaves one with the notion that all a vendor needs to do to apply its terms is to ship favorable contract terms after the purchase and grant an opportunity for the buyer to reject them—a result which harkens back to the “last-shot” doctrine that U.C.C. section 2-207 was meant to address.<sup>174</sup>

The rolling contract theory does have its limits. For instance, a consistent theme in rolling contract cases is the right of the buyer to return the goods should the buyer not agree to the terms presented. This is really no more than the concept that an offeree is free to accept or reject an offer.

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<sup>166</sup> *Id.* at 307–08.

<sup>167</sup> *Id.* at 308.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 309.

<sup>170</sup> *Id.* at 309–10.

<sup>171</sup> *Id.* at 311.

<sup>172</sup> *Id.* at 313 (citing *ProCD II*, *Hill*, and *Brower*). Mortenson attempted to apply *Step-Saver*, which followed the more traditional approach to contract formation. *Id.* at 311–12. Interestingly, in distinguishing the case before it from *Step-Saver*, the court noted that Mortenson and Timberline had utilized a license agreement throughout their prior relationship. *Id.* at 312. Had the court’s majority bothered to conduct such an analysis, this fact could have been persuasive in determining why the initial purchase order was not the offer under section 2-206.

<sup>173</sup> *Id.* at 312–13.

<sup>174</sup> See John E. Murray, Jr., *The Chaos of the “Battle of the Forms”*: Solutions, 39 VAND. L. REV. 1307, 1331 (1986) (“[Section 2-207’s] purpose was to alter the ‘matching acceptance’ rule, which oppressed the offeror under the ‘last shot’ principle.”).

Furthermore, the consequences of keeping the product must be made clear to the buyer. As the court in *DeFontes v. Dell, Inc.*<sup>175</sup>—a case involving Dell’s ability to compel arbitration through its rolling contract standard terms<sup>176</sup>—stated:

Yet in adopting the so-called “layered contracting” theory of formation, we reiterate that the burden falls squarely on the seller to show that the buyer has accepted the seller’s terms after delivery. Thus, the crucial question in this case is whether defendants reasonably invited acceptance by making clear in the terms and conditions agreement that (1) by accepting defendants’ product the consumer was accepting the terms and conditions contained within and (2) the consumer could reject the terms and conditions by returning the product.<sup>177</sup>

The court concluded that the failure to inform the purchasers how to reject the offer prevented the terms from taking effect.<sup>178</sup>

Finally, rolling contracts are still vulnerable to the other doctrines of contract voidability, such as unconscionability.<sup>179</sup> Thus, in the *Brower* case, though the court held the contract was formed on a rolling contract theory, it nonetheless reformed the arbitration clause at issue as being substantively unconscionable.<sup>180</sup>

### C. Criticisms and Critiques of the Rolling Contract Approach

While some courts eagerly embraced the “rolling contract” theory,<sup>181</sup> a number of courts have declined an invitation to depart from the traditional contract formation paradigm.<sup>182</sup> In *Klocek v. Gateway, Inc.*,<sup>183</sup> the United

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<sup>175</sup> 984 A.2d 1061 (R.I. 2009).

<sup>176</sup> *Id.* at 1063.

<sup>177</sup> *Id.* at 1071 (footnote omitted).

<sup>178</sup> *Id.* at 1073.

<sup>179</sup> One commentator has argued that unconscionability should be sufficient ground to deal with rolling contract law, and that focusing on the timing of contract formation “yields little fruit.” Hillman, *supra* note 13, at 744–45. To the degree that current attitudes in the law regarding unconscionability render it an ineffective defense, Hillman simply asserts that these concerns should be taken up with lawmakers. *Id.* at 757.

<sup>180</sup> *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 254–56 (N.Y. App. Div. 1998). The clause at issue in *Brower* required arbitration before the International Chamber of Commerce, which was cost prohibitive to the normal consumer. *Id.* at 254–55. Thus, the court found that provision of the arbitration agreement unconscionable and remanded to determine a more appropriate arbitrator. *Id.* at 255–56.

<sup>181</sup> *See, e.g., Meridian Project Sys. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (finding the rationale in *ProCD II* “compelling”).

<sup>182</sup> *See, e.g., Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (“The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*.”).

States District Court for the District of Kansas was faced with the now familiar fact-pattern: a consumer who received terms and conditions after purchasing a Gateway computer.<sup>184</sup> In response to the consumer's lawsuit, Gateway moved to dismiss under an arbitration clause found in the later-revealed terms, and urged the district court to follow the precedent established in *Hill*.<sup>185</sup> The court declined to do so, however, by first noting that the Seventh Circuit's conclusion regarding the inapplicability of U.C.C. section 2-207 was "not supported by the statute or by Kansas or Missouri law."<sup>186</sup> The court then refuted Judge Easterbrook's assertion that the "vendor is the master of the offer,"<sup>187</sup> and explained:

In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. While it is possible for the vendor to be the offeror, Gateway provides no factual evidence which would support such a finding in this case. The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff).<sup>188</sup>

As section 2-207 was applicable, the court refused to enforce the arbitration clause because it was not a part of the original contract, and the consumer did not expressly agree to the new terms.<sup>189</sup>

The *Klocek* court is not alone in declining to adopt the "rolling contract" approach or in pointing out the doctrinal disconnect of Easterbrook's analysis. A number of other courts have similarly either declined to follow or distinguished *ProCD II* and *Hill*.<sup>190</sup> Furthermore,

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<sup>183</sup> *Id.* at 1334–35.

<sup>184</sup> *Id.* at 1334.

<sup>185</sup> *Id.* at 1334, 1338.

<sup>186</sup> *Id.* at 1339.

<sup>187</sup> *See id.* at 1340 (quoting *ProCD II*, 86 F.3d 1447, 1452 (7th Cir. 1996)).

<sup>188</sup> *Id.* (citations omitted).

<sup>189</sup> *Id.* at 1341.

<sup>190</sup> *See Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957 JCH, 2011 WL 797505, at \*3–4 (D. Conn. Feb. 24, 2011) (determining that enrolling in a program online, paying monthly fees, and receiving terms and conditions by email did not constitute assent to such terms as the contract was already formed before the consumers received the email), *aff'd*, 697 F.3d 110 (2d Cir. 2012); *Ben-Trei Overseas, L.L.C. v. Gerdau Ameristeel US, Inc.*, No. 09-CV-153-TCK-TLW, 2010 WL 582205, at \*6–7 (N.D. Okla. Feb. 10, 2010) (finding that a forum selection clause was an additional term, governed by U.C.C. section 2-207, rather than an implied term in line with the parties' course of dealing); *Triad Int'l Maint. Corp. v. Aim Aviation, Inc.*, 473 F. Supp. 2d 666, 670 n.2 (M.D.N.C. 2006) (stating that a forum selection clause found on the back of an acknowledgement form may not be a part of the contract under U.C.C. section 2-207); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747, 752 (Kan. 2006) (rejecting an argument that a consumer "expressly consented to the shrinkwrap agreement

numerous commentators have criticized the rolling contract approach on various grounds, such as the doctrinal analysis,<sup>191</sup> the economic assumptions it makes,<sup>192</sup> the norms it stands for,<sup>193</sup> moral grounds,<sup>194</sup> and fairness.<sup>195</sup> However, the rolling contract theory certainly has its appealing side with regard to efficiency, and too strict an adherence to traditional contract formation could obstruct freedom of contract. In response to these various concerns, commentators have suggested solutions that would address fairness and efficiency by increasing the notice requirements so that consumers can be aware of the terms' existence *ex ante*.<sup>196</sup>

Recognizing that sellers need to have flexibility in deferring some

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when it installed and used the software rather than returning it" by reasoning that "continuing with the contract after receiving a writing with additional or different terms is not sufficient to establish express consent to the additional or different terms"); *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 393 (N.Y. Civ. Ct. 2001) (holding that even though the buyer chose to retain the computer, the terms should not be enforced because of the "'take it or leave it' situation," including non-negotiable terms and no mechanism through which the customer would be able to question the terms); *Rogers v. Dell Computer Corp.*, 138 P.3d 826, 834 (Okla. 2005) ("Section 2-207 and other provisions of the U.C.C. apply to the contracts here and apply to terms which Dell can show were enclosed with the invoice, with the acknowledgment, or in the package containing the purchased product."); *Lively v. IJAM, Inc.*, 114 P.3d 487, 492–93 (Okla. Civ. App. 2005) (conducting its analysis under section 2-207, deciding there was insufficient evidence to determine whether the plaintiff was a merchant, and finding that the plaintiff was not bound by the forum selection clause as it materially altered the contract).

<sup>191</sup> See Bern, *supra* note 7, at 642–43 n.5 (collecting criticisms); Shubha Ghosh, *Where's the Sense in Hill v. Gateway 2000?: Reflections on the Visible Hand of Norm Creation*, 16 *TOURO L. REV.* 1125, 1134 (2000) ("Even though Judge Easterbrook concludes that § 2-207 is inapplicable because the provision governs the situation when there are two opposing forms from the offeror and the offeree, not one as in the *Gateway 2000* case, this view has been expressly rejected."); Hillman, *supra* note 13, at 753 ("Easterbrook was plainly wrong about section 2-207's applicability. Nothing in the text of the section limits it to transactions involving more than one form."); Murray, *supra* note 8, at 47–48 ("Either this highly sophisticated court did not understand the contract formation sections of the U.C.C., or it chose to ignore them.").

<sup>192</sup> See Bern, *supra* note 7, at 716–18 (characterizing Easterbrook's "Terms Later" approach as ignorant of human nature and economic reality); Ghosh, *supra* note 191, at 1139 (questioning the assumption that the terms in rolling contracts are efficient).

<sup>193</sup> See Ghosh, *supra* note 191, at 1129 (arguing that Judge Easterbrook's opinion amounts to creating a norm to govern situations similar to *Hill*).

<sup>194</sup> See Bern, *supra* note 7, at 641–44, 742–53 (arguing Judge Easterbrook's opinion lacks "moral sanction").

<sup>195</sup> See *id.* at 643–44 ("[N]otwithstanding Easterbrook's window dressing of economics, a rule sanctioning 'terms later' contracting increases . . . distributional unfairness by systematically redistributing wealth from consumers to vendors."); Jean Braucher, Commentary, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 *WIS. L. REV.* 753, 757 (referring to rolling contracts as "steamrolling," because they attempt to pile on undesirable terms).

<sup>196</sup> See Friedman, *supra* note 28, at 2 ("I propose a mechanism that will ensure that sellers continue to have needed flexibility to defer some contract terms, but that will also protect purchasers against the unfair imposition of unexpected and important contract terms arriving at a time when purchasers are very unlikely to read or act on them."); Murray, *supra* note 8, at 77 ("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.").



terms, but also recognizing the potential for abuse of such practices, Professor Stephen Friedman proposes utilizing “template notice” as an intermediate solution.<sup>197</sup> Upon reviewing *ProCD* and *Hill*, Friedman concludes that notice of additional terms is a key element of Easterbrook’s analysis in each opinion, even if it is rather easily met.<sup>198</sup> Subsequent decisions have failed to give proper attention to the need to give buyers notice that additional terms are forthcoming.<sup>199</sup> Therefore, Friedman proposes that all sellers be required to provide a “template notice” that:

[P]rovide[s] the following vital information before or during purchase or order: a brief and clear list or summary of important terms being deferred (but not the full text), a statement that the buyer will have the right to reject the terms and avoid the transaction, and a description of how to exercise that right.<sup>200</sup>

Such notice would permit buyers to be aware of the consequences of their purchase and the existence of additional terms without requiring sellers to provide those terms on the box itself. This allows the purchaser to be aware of the terms when the purchaser is most focused on the transaction while also limiting the scope of terms that are agreed to through the initial nominal assent.<sup>201</sup>

One of the weaknesses of the “template notice” approach, as noted by Professor John Murray, is that summaries of the terms, even if not given in detail, still face the obstacles that *ProCD II* and *Hill* sought to avoid, i.e., requiring unrealistic disclaimers that would not fit on a box or that would be too burdensome for a store clerk to handle.<sup>202</sup> Furthermore, the adequacy of the summaries would be predictable litigation issues.<sup>203</sup> Instead, Murray suggests that all that should be required is a conspicuous notice that additional contract terms are inside the package.<sup>204</sup> Murray’s suggested language is: “[R]ead the important contract terms inside this package. If you are not satisfied with these contract terms, return the product for a full refund of the purchase price.”<sup>205</sup> This model, according to Murray, would create a contract at the time the buyer purchases the item in the store, but subject to the condition of reading and agreeing to the

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<sup>197</sup> Friedman, *supra* note 28, at 2–4, 13–14.

<sup>198</sup> See *id.* at 10 (“Although the notice in *ProCD* and *Hill* may have been weak, at least it came before purchase or order.”).

<sup>199</sup> *Id.* at 10–12.

<sup>200</sup> *Id.* at 2–4.

<sup>201</sup> *Id.* at 29.

<sup>202</sup> Murray, *supra* note 8, at 77.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 77–78.

<sup>205</sup> *Id.*

terms inside the box.<sup>206</sup>

Professor Murray's proposal is an attractive one, but it is not without its own faults. First, neither Murray nor Friedman fully explain how their increased disclosure models avoid the application of U.C.C. section 2-207 (though Murray asserts that it does).<sup>207</sup> According to Murray, the placement of a statement on the package indicating that the contract is subject to a condition solves the problem.<sup>208</sup> Presumably, what is meant here is that when a buyer brings a product with such a disclaimer up to the counter, the buyer is making an offer with the condition listed on the product, which the vendor accepts. Thus, section 2-207 would have no application because no additional terms are ever introduced.<sup>209</sup> This rationale is not entirely convincing as an explanation of how courts would treat such matters.<sup>210</sup> Recall that the district court in *ProCD* found that the

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<sup>206</sup> *Id.* at 78. Professor Murray suggests that the same result can be achieved over the phone through a verbal advisement to the same effect. *Id.* at 79.

<sup>207</sup> *See id.* ("Under this analysis, section 2-207 would have no application unless there was either no statement on the package or the statement was inconspicuous.")

<sup>208</sup> *Id.* at 78–79. Murray posits that, in a phone order, an oral warning that terms are coming creates a counter-offer for a conditional contract that the buyer would accept if he or she moved forward with the contract. *Id.* at 79. This view assumes a court would not view the follow-up terms as a confirmation of an oral agreement. Alternatively, the Murray approach could be viewed as giving rise to a preliminary agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981) ("Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations."). As it is not fully enforceable yet, this must envision a preliminary type II agreement, which could obligate the parties to negotiate further terms in good faith. However, as no further negotiations are envisioned, it does not seem to be an ideal fit for the fact scenario.

<sup>209</sup> *See* U.C.C. § 2-207 (2011) (applying to contracts that have "Additional Terms in Acceptance or Confirmation").

<sup>210</sup> *See* *Pioneer Hi-Bred Int'l, Inc. v. Ottawa Plant Food, Inc.*, 283 F. Supp. 2d 1018, 1046–49 (N.D. Iowa 2003) (holding that a clause which limited resale of corn seed product that was posted on the packaging label was enforceable under section 2-207); *Monsanto Co. v. Scruggs*, 249 F. Supp. 2d 746, 754 (N.D. Miss. 2001) (applying section 2-207(2) to a license that was received post-purchase), *amended by* 342 F. Supp. 2d 568 (N.D. Miss. 2004), *aff'd in part, vacated in part*, 459 F.3d 1328 (Fed. Cir. 2006); *cf.* *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980) (applying section 2-207 when a buyer orally ordered an adhesive and in response, seller sent adhesive with additional written terms, but seller admitted such terms were part of a confirmatory memoranda). The Murray proposal also raises the possibility that the in-store contract is nothing more than a preliminary agreement, which may itself be subject to scrutiny. *See* RESTATEMENT (SECOND) OF CONTRACTS § 26 ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). If the effect of the notice language is that a contract is formed subject to acceptance of additional terms to be viewed later, it can be argued that no contract has been formed at that point at all. *See id.* § 21 cmt. b ("Agreement not to be legally bound. Parties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. In the absence of any invalidating cause, such a term is respected by the law like any other term, but such an agreement may present difficult questions of interpretation: it may mean that no bargain has been reached, or that a particular manifestation of intention is not a promise; it may reserve a power to revoke or terminate a promise under certain

contract was subject to section 2-207 despite the presence of a clause on the product itself.<sup>211</sup> Furthermore, this assumes that the buyer is actually making such an offer. What may be more likely is that the buyer simply believes that he or she is entering into an agreement to buy the product at a set price and nothing more.<sup>212</sup>

This reluctance to consider the context and nature of the transaction is no small matter. If all a vendor needs to do is place a warning label on its products that additional terms are coming, every product will easily be subject to a rolling contract approach and section 2-207 will become a dead letter as applied to consumers. But that is not to say such labels are irrelevant either. Certainly, fairness dictates that a buyer should be permitted to know that additional terms may apply and are forthcoming prior to engaging in the transaction. Such notice permits the buyer to engage, if necessary, in additional inquiry as to the terms. The problem with the Murray and Friedman approaches are that they put an emphasis on packaging disclosures, but do not take into account context.

Having determined that a blind adherence to rolling contract theory ignores doctrine and is potentially abusive, it is tempting to simply reject the theory. However, to do so would ignore the perceived benefits such standard form contracting may offer. A middle ground is preferable, and though Professor Murray's approach offers a workable and perhaps efficient solution to the doctrinal and fairness problems rolling contracts raise, a more nuanced approach that takes into account context could offer a workable solution as well. The remainder of this Article explains how contract formation informed by both a legal realist approach and relational contract approach may provide courts the flexibility needed to address a number of situations moving forward without having to re-write the U.C.C.

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circumstances but not others. In a written document prepared by one party it may raise a question of misrepresentation or mistake or overreaching; to avoid such questions it may be read against the party who prepared it." (second emphasis added)).

<sup>211</sup> *ProCD I*, 908 F. Supp. 640, 652–55 (W.D. Wis. 1996) (analyzing and applying section 2-207), *rev'd*, *ProCD II*, 86 F.3d 1447 (7th Cir. 1996).

<sup>212</sup> Friedman himself noted this danger, stating:

Whether or not the contract is technically consummated at purchase or order, the buyer is most fully focused on the transaction at that point. To consider which terms may be deferred without reference to the circumstances of the purchase, as though the purchase and deferral of terms are independent of one another, is not appropriate.

Friedman, *supra* note 28, at 26; *cf.* *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 390–92 (N.Y. Civ. Ct. 2001) (interpreting “cash now, terms later” transactions as meaning that “a contract has been formed with the price, the equipment and time of delivery agreed to, but almost nothing else” and any subsequent terms “should not be enforced merely because the consumer retains the equipment for 30 days after receipt”).

## IV. REHABILITATING THE “ROLLING CONTRACT”

Before addressing how this approach to contract formation would work, it is useful to take a moment to explain how rolling contracts can exist without implicating section 2-207. One of the doctrinal blunders from *ProCD II* and *Hill* that has been decried repeatedly is the statement that section 2-207 does not apply to situations involving only one form.<sup>213</sup> This is blatantly wrong. Though section 2-207 can apply to a true battle of the forms situation, it can also apply to oral contracts with a single written confirmation.<sup>214</sup> However, it is understandable why Easterbrook would want to avoid application of section 2-207.

If section 2-207 did apply, then the *Hill* case would likely have come down differently. The contract formed over the phone would be the contract, and the terms that followed would be additional terms in a confirmation that, as consumers, the Hills could ignore. *ProCD II* may have been a closer call if Matthew Zeidenberg were a merchant (which Easterbrook denied in *Hill*), as the license agreement would turn on section 2-207(2)(b) and whether it materially altered the contract.<sup>215</sup> Indeed, the case could have been decided in ProCD’s favor on this ground, but this outcome would deny Easterbrook the ability to put forth the rolling contract theory. Thus, application of section 2-207 was likely seen as a danger to future application of the theory (and to the perceived economic efficiencies that Easterbrook espoused).

However, Easterbrook may have been right, but not for the reason he articulated. Easterbrook makes it clear that the offer comes not in the store, but when the product goes home.<sup>216</sup> To Easterbrook, the offer is the writing that comes in the package, which the buyer accepts by performance.<sup>217</sup> If this is indeed the offer, then Easterbrook is correct in saying section 2-207 does not apply. The reason this is true is that section

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<sup>213</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (“Plaintiffs tell us that *ProCD* came out as it did only because Zeidenberg was a ‘merchant’ and the terms inside ProCD’s box were not excluded by the ‘unless’ clause. This argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, ‘sec. 2-207 is irrelevant.’” (quoting *ProCD II*, 86 F.3d at 1452)); *ProCD II*, 86 F.3d at 1452 (“Our case has only one form; U.C.C. § 2-207 is irrelevant.”).

<sup>214</sup> See *W. Indus., Inc. v. Newcor Can. Ltd.*, 739 F.2d 1198, 1205 (7th Cir. 1984) (“Newcor’s formal written quotation was merely a written confirmation, which under the UCC could not alter the oral contract materially.” (citing U.C.C. § 2-207(2)(b) (1978))).

<sup>215</sup> See U.C.C. § 2-207(2)(b) (2011) (“Between merchants [additional] terms become part of the contract unless . . . they materially alter it.”).

<sup>216</sup> See *ProCD II*, 86 F.3d at 1452–53 (pointing out that Zeidenberg had an opportunity to review the license terms before using the software).

<sup>217</sup> See *id.* (“Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods.”).

2-207 does not apply to a written offer with acceptance by performance.<sup>218</sup> Instead, section 2-206 would be the most relevant statute (ironically one which Easterbrook did not discuss) and the vendor's offer could be accepted "[u]nless otherwise unambiguously indicated by the language or circumstances . . . in any manner and by any medium reasonable in the circumstances."<sup>219</sup>

So this turns the real question about rolling contracts into one of formulation of the offer. Is the offer made in the store by the buyer, as traditional contract law would treat the situation, or is the offer deferred?

#### V. A LEGAL REALISM/RELATIONAL CONTRACT APPROACH TO OFFER

Having identified the conceptual base of the doctrinal problem, all that remains is to form a framework that solves the riddle of "when is the offer made?" Legal realism, the theory underlying much of the U.C.C. and the Restatement, provides a good starting point, but rolling contract theory may actually be served, perhaps surprisingly, by the insights provided by relational contract theory. Applying legal realism—as informed by relational contract theory's view of contracts as lying on a spectrum, from near-discrete contracts to contracts with complex and ongoing obligations—permits courts the flexibility to determine when it is proper to place the offer in the store or to defer the offer. Such an approach can explain the *ProCD II* and *Hill* decisions without having to distort the U.C.C. However, such an approach should be applied cautiously and with a number of limiting caveats, which are sometimes ignored by courts.

#### A. Legal Realism and Contract Law

Legal realism is largely associated with the work of Arthur Linton Corbin and his student Karl Llewellyn.<sup>220</sup> This approach to law is popularly characterized as rejecting the rigidity of classical contract law.<sup>221</sup> Instead, legal realism proposed to look at contracts within the context of

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<sup>218</sup> See U.C.C. § 2-207 (applying only to contracts that have "Additional Terms in Acceptance or Confirmation"); cf. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE PRACTITIONER TREATISE SERIES 63 (5th ed. 2006) (noting that section 2-207 has no application to a situation in which a written acceptance is silent as to additional terms of a buyer's written offer).

<sup>219</sup> U.C.C. § 2-206.

<sup>220</sup> See Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595, 599 (2003) (describing Corbin as "one of the original legal realists"); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 768 (2002) (noting Professor Karl Llewellyn's focus on contract law during the legal realism movement).

<sup>221</sup> See Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 14 ("[Llewellyn] wanted to replace . . . the rough-and-tumble hard bargaining of classical capitalism.").

the facts of the individual case being decided.<sup>222</sup> To the realists, contract law was not, and should not be, a cold mechanical application of formal rules with little regard for the context within which the contract was made.

This influence, via Llewellyn, was carried through into the drafting of the modern U.C.C. and the Restatement (Second) of Contracts.<sup>223</sup> Specifically, in the U.C.C., Llewellyn sought to bring contract law into line with business practices and customs as they operated in real life.<sup>224</sup> This influence can be seen in provisions such as section 2-202, which permits consideration of parol evidence such as course of performance, course of dealing, or usage of trade even in a fully integrated contract.<sup>225</sup> Similarly, section 2-208 of the U.C.C. and section 203 of the Restatement advise that course of performance, course of dealing, and trade usage should be used in determining the meaning of a contract.<sup>226</sup> Section 2-204, which was cited approvingly in *ProCD II*,<sup>227</sup> permits a contract to be enforceable—even if there are terms left open and even if the exact moment of its making is undetermined—as long as the parties intended to make a contract and there is a reasonably certain basis for giving a remedy.<sup>228</sup> Section 2-206(1)(b) and the “battle of the forms” provision, section 2-207, both discussed in Part II, were also seen as enabling courts to apply a set of laws that better reflected the true business practices of the parties involved. As Frank Snyder has summarized, “[t]he point of the new rules, then, was to replace the tired old technicalities of the Formalist era with new rules that would better fit modern commercial practice.”<sup>229</sup>

The U.C.C. also incorporated a number of provisions with an eye toward interactions between consumers and merchants. Section 2-207 applies to both consumers and merchants and presumes additional terms

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<sup>222</sup> Murray, *supra* note 18, at 891.

<sup>223</sup> *See id.* at 878–79 (“Corbin . . . rejected monistic rules and provided a foundation for a modern and realistic contracts jurisprudence. . . . The genuine ‘wholly different conception’ of contract law, however, occurred a half century ago with the introduction of Article 2 of the Uniform Commercial Code, created by Llewellyn, who had been Corbinized by his teacher.”).

<sup>224</sup> Knapp, *supra* note 220, at 768.

<sup>225</sup> U.C.C. § 2-202 (2011).

<sup>226</sup> *Id.* § 2-208; RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).

<sup>227</sup> *See supra* text accompanying notes 125–26.

<sup>228</sup> U.C.C. § 2-204; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (“A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.”).

<sup>229</sup> Snyder, *supra* note 221, at 23. Professor Snyder actually makes a compelling case in his article that Llewellyn’s U.C.C., in fact, does not reflect legal realism, but rather Llewellyn’s own personal value norms. *See id.* at 13 (“[A] look at what Llewellyn actually wrought suggests that, for him, the proper relationship between theory and doctrine is to use whichever one gives him the result he wants in a given situation.”). Snyder refers to the legal realism that is purported to be influencing the U.C.C. as “Pop Realism.” *Id.* at 19.

are not a part of contracts formed under section 2-207(1).<sup>230</sup> But perhaps the most consumer-oriented provision incorporated into both the U.C.C. and the Restatement (Second) of Contracts is the unconscionability provision.<sup>231</sup> Worded in nearly identical terms, these provisions permit reviewing courts to void or reform contract provisions that are viewed as unconscionable under the circumstances.<sup>232</sup> The unconscionability determination, in line with the legal realists' call for consideration of context, is to be made in light of the surrounding circumstances.<sup>233</sup> The test for unconscionability under the comments to the U.C.C. reads as follows:

[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.<sup>234</sup>

Most courts apply Professor Arthur Leff's framework, which provides that unconscionability can be either procedural or substantive, with many courts requiring a showing of both.<sup>235</sup> A number of courts have applied unconscionability doctrine to boilerplate terms, such as those found in a rolling contract, and granted relief to plaintiffs under this provision.

Though boilerplate is often dealt with under the unconscionability provisions, the Restatement addresses the subject head-on. Section 211 states:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

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<sup>230</sup> See U.C.C. § 2-207 (“[A]dditional terms are to be construed as proposals for addition to the contract.”).

<sup>231</sup> *Id.* § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208. Unconscionability is not necessarily limited to consumers, but consumers are generally more likely to benefit from these provisions than merchants.

<sup>232</sup> U.C.C. § 2-302 & cmt. 1; RESTATEMENT (SECOND) CONTRACTS § 208 & cmt. a.

<sup>233</sup> U.C.C. § 2-302(2) & cmt. 1; RESTATEMENT (SECOND) OF CONTRACTS § 208 & cmt. a; see Murray, *supra* note 18, at 887–89 (“[Llewellyn] designed [the unconscionability provision] exclusively as a device that would empower courts to assure a more precise and fair determination of the factual bargain.”).

<sup>234</sup> U.C.C. § 2-302 cmt. 1 (citation omitted).

<sup>235</sup> See Arthur Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 488 (1967) (discussing procedural and substantive unconscionability).

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.<sup>236</sup>

This provision acknowledges the problem of standard term agreements and assent and applies a type of “blanket assent” to all such terms in the writing, subject to the caveat listed in subsection three.<sup>237</sup>

Comment f to section 211 clarifies that “[a]lthough customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.”<sup>238</sup> Interestingly, the comments also address a situation common in rolling contracts—terms appearing on instructions of use and the like. Comment d states:

The same document may serve both contractual and other purposes, and a party may assent to it for other purposes without understanding that it embodies contract terms. He may nevertheless be bound *if he has reason to know* that it is used to embody contract terms. Insurance policies, steamship tickets, bills of lading, and warehouse receipts are commonly so obviously contractual in form as to give the customer reason to know their character. But baggage checks or automobile parking lot tickets may appear to be mere identification tokens, and a party without knowledge or reason to know that the token purports to be a contract is then not bound by terms printed on the token. Documents such as invoices, instructions for use, and the like, delivered after a contract is made, may raise similar problems.<sup>239</sup>

The comment advises that the individual’s situation, as viewed through objective reasonableness or subjective knowledge, should be taken into account. Thus, as with unconscionability, Llewellyn’s legal realism calls

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<sup>236</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211.

<sup>237</sup> *Id.* § 211 cmt. c; LLEWELLYN, *supra* note 13, at 370; *see also* Hillman, *supra* note 13, at 750 (“Llewellyn’s conception of ‘blanket assent’ is better read to mean only that, despite failing to read form contracts, users comprehend the existence of standard terms and agree to bind themselves to them, *provided the terms are not unreasonable.*”).

<sup>238</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

<sup>239</sup> *Id.* § 211 cmt. d (emphasis added).



for consideration of the context of the contract.

### B. *Relational Contract Theory*

Relational contract theory is the life's work of Professor Ian R. Macneil.<sup>240</sup> Under Macneil's view of contract law, contracts are relationships and not discrete, isolated interactions.<sup>241</sup> In one of his latest works, Macneil summarized relational contract theory as having four core propositions:

First, every transaction is embedded in complex relations.

Second, understanding any transaction requires understanding all essential elements of its enveloping relations.

Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.

Fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.<sup>242</sup>

With this focus on relationships, relational contract theory rejects classic formulations of offer and acceptance as inaccurate.<sup>243</sup> Stewart Macaulay has recounted an analogy to explain the relational approach:

Often, however, in a long-term continuing relationship, the situation resembles a rheostat. As more and more power is sent to the bulb, we get more and more light. It is hard to say when the light has been turned on. On and off are not useful terms. Similarly, in a relational contract often it is hard to say when the contract is formed. Moreover, it is not likely to be formed once and for all.<sup>244</sup>

An important aspect of relational contract theory worth noting is that it divides contracts into two ends on a spectrum with discrete contracts at one

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<sup>240</sup> Murray, *supra* note 18, at 877.

<sup>241</sup> Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian MacNeil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 801 (2000); Macneil, *supra* note 23, at 878; Murray, *supra* note 18, at 877.

<sup>242</sup> Macneil, *supra* note 23, at 881–82 (footnotes omitted).

<sup>243</sup> See Macaulay, *supra* note 241, at 778 (“Macneil . . . points out that our assumed story about making contracts often fits the facts poorly.” (citing Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974))).

<sup>244</sup> *Id.* (crediting Macneil as the genesis of the analogy).

end and relational ones at the other.<sup>245</sup> The discrete describes a simple sale such as an exchange of goods.<sup>246</sup> However, Macneil admits that even discrete contracts have some relational aspects, so the idea of a purely discrete contract is a fiction.<sup>247</sup> He therefore labels such transactions “as-if-discrete.”<sup>248</sup> Running from as-if-discrete relations, contracts increase in complexity to the highly relational. Macneil lists a number of factors to be considered in determining where a contractual relation should lie on the spectrum, including the personal relations of the parties; the number of parties involved; the subject of the exchange; the commencement, duration and termination of relationship; planning; and future cooperation.<sup>249</sup>

Perhaps it should come as no surprise that relational contract theory is critical of the rules formed by the legal realists as mere tweaks to the prior formalistic regime.<sup>250</sup> Macneil has asserted that though neoclassical law can deal adequately with discrete contracts, when discrete and relational principles conflict, neoclassical law lacks the resources necessary to deal adequately with the problem.<sup>251</sup> However, while relational contract theory asserts itself as a stand-alone theory, neoclassicists view the theory as just a subset of legal realism.<sup>252</sup> This Article does not attempt to resolve that debate, but simply recognizes what relational contract theory could add to our understanding of offer under a neoclassical framework.

### C. *A Legal Realism/Relational Approach to Offer*

In reviewing the principles of legal realism, it appears that the rules promulgated were meant to be flexible enough to deal with both changing and evolving commercial practices. The many provisions cited in both the U.C.C. and Restatement focus on the context within which the contract before the court was made. Unfortunately, due to the way the sections

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<sup>245</sup> Macneil, *supra* note 23, at 894; see IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 10 (1980) [hereinafter MACNEIL, SOCIAL CONTRACT] (delineating two types of relational contracts: the primitive community contractual relation and the modern contractual relation).

<sup>246</sup> MACNEIL, SOCIAL CONTRACT, *supra* note 245, at 10.

<sup>247</sup> *Id.*; Macneil, *supra* note 23, at 895.

<sup>248</sup> Macneil, *supra* note 23, at 895.

<sup>249</sup> MACNEIL, SOCIAL CONTRACT, *supra* note 245, at 13–20. Macneil lists a total of eleven such factors. These factors were put forth in relation to the primitive community relational contract, but Macneil later stresses that they are all relevant to the modern contractual relation as well. *Id.* at 21.

<sup>250</sup> See *id.* at 72–77 (criticizing U.C.C. section 2-207’s failure to address relations); Murray, *supra* note 18, at 877 (“Advocates of relational theory assert that the neoclassical school simply absorbs the theory, pretending that it is neither revolutionary nor radical but simply an extension of neoclassical truth.”).

<sup>251</sup> MACNEIL, SOCIAL CONTRACT, *supra* note 245, at 72.

<sup>252</sup> Murray, *supra* note 18, at 877–78; see Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 817–20 (2000) (“There can be no special law of relational contracts, because relational contracts and contracts are virtually one and the same.”).

have been written and the way they have been applied, many situations are bound to a rather mechanical offer and acceptance model. This presents problems for the rolling contract, which, as explained in Part IV, needs to displace the typical offer model if it is to avoid section 2-207 and survive. Unfortunately, the U.C.C. does not address how to differentiate between two possible offers, thus creating a problem when our consumer enters a store, walks up to the counter with a package of software, and pays. The problem presents just the sort of situation Macneil suggested neoclassical rules were inadequate to address—a discrete contract with relational aspects. Therefore, it would appear apropos to utilize the relational concept of the discrete/relational spectrum as a means of resolving the issue.

A legal realist view of offer would require an examination of the circumstances under which the parties transacted. The notice, both on the package and perhaps elsewhere, would help determine which is the offer. But a relational approach would further inquire into the nature of the contract being contemplated. What is the nature of the product? Do the parties expect to have further interaction? Will the seller provide ongoing technical support and if so, for how long? Is the buyer aware of such additional services when the product is bought? Was the transaction part of a larger negotiation? All of these questions would be relevant in determining the nature of the transaction.<sup>253</sup>

At this point, it should be clarified that this is not a relational approach to offer. Relational theorists would likely cringe at the suggestion that the approach could be used to support a deferred offer that began the contractual relationship like a light switch.<sup>254</sup> However, under a legal realism approach to offer that is informed by the relational contract theory, the nature of the relationship, and whether it is fair that the parties expected a further communication as the formal offer, is perhaps the best way to view and justify the rolling contract.<sup>255</sup> The more discrete a transaction is, the more likely it is that the traditional offer and acceptance model should apply. Transactions that envision ongoing services may very well be understood to involve more than a simple in-store payment and thus justify

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<sup>253</sup> MACNEIL, *SOCIAL CONTRACT*, *supra* note 245, at 13–20; *see* *Rogers v. Dell Computer Corp.*, 138 P.3d 826, 832 (Okla. 2005) (“In this case, the time of formation of the contracts and their terms depend on the conversations and circumstances between Dell and the plaintiffs at the time the orders were placed. If the language and circumstances were such that when the orders were placed, the contracts were not formed until after the plaintiffs received the ‘Terms and Conditions of Sale’ document, the arbitration provisions would be a term of the contracts. The arbitration provision would also be a term of the contracts if it were incorporated into them at the time the plaintiffs placed the orders.”).

<sup>254</sup> *See* Macaulay, *supra* note 241, at 778 (describing the light switch analogy).

<sup>255</sup> *See* Murray, *supra* note 18, at 906 (“Ironically, this ‘rolling’ or ‘layered’ contract theory may be viewed as ‘relational’ though the true relationist would reject any such characterization as heretical.”).

delaying the offer.

This is not to say that every sale of goods that has an ongoing relational aspect is now subject to rolling contract treatment. As the relationists have admitted, no contract is purely discrete. The fact that implied warranties may apply should not transform an otherwise discrete transaction into a relational one. Both parties must also be aware of the nature of the relationship.<sup>256</sup> In this regard, notice, such as described by either Friedman or Murray, will be highly relevant in analyzing when the offer occurs.<sup>257</sup>

To understand how this approach might apply, consider the facts of *ProCD II*. Zeidenberg was, in fact, somewhat of a villain.<sup>258</sup> He had purchased software from ProCD before and was aware that the software would be subject to some sort of license agreement.<sup>259</sup> The software package warned him on the box that the software was subject to a license.<sup>260</sup> He also knew that the software simply permitted him to access the ProCD database, which was unquestionably in the nature of an ongoing relationship.<sup>261</sup> The contract was, therefore, not a discrete (or as-if-discrete) transaction, but one that contemplated an ongoing relationship. Given the circumstances, it was perfectly reasonable to assume Zeidenberg knew his in-store purchase was not the end of the deal, but the beginning, and that contract terms, i.e. the offer, would be forthcoming. Indeed, all of the examples provided by Easterbrook in his opinion that purport to be in the nature of rolling contracts (insurance agreements, airline tickets, and concert tickets) are more than discrete relationships.<sup>262</sup>

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<sup>256</sup> Macneil addresses this somewhat in the factor of attitudes. The collection of attitudes of the parties that the participants have towards the transaction is a relevant factor and takes into account attitudes regarding conflict of interest, unity, time, and expectations about trouble. MACNEIL, *SOCIAL CONTRACT*, *supra* note 245, at 17–20.

<sup>257</sup> See *supra* Part III.C (presenting Friedman and Murray’s suggestions concerning notice).

<sup>258</sup> See James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 741 (“Zeidenberg was surely a naughty fellow who should have his hands slapped.”).

<sup>259</sup> *ProCD II*, 86 F.3d 1447, 1450 (7th Cir. 1996).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1449.

<sup>262</sup> *Id.* at 1451. This approach would also help to explain the result in *Mortenson*, discussed in Part III.B. In *Mortenson*, the buyer had been using the seller’s software for three years before purchasing the updated software at issue. *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 307 (Wash. 2000) (en banc). There was evidence that Mortenson had been operating under the license agreement at issue during this time so there was an awareness of the license, even if the purchase order made no mention of it. *Id.* at 312. Also, the purchase order at issue had ongoing relational aspects such as “software support” for an unspecified number of hours, which would have put both parties on notice that further terms would be forthcoming. *Id.* at 311. *Hill* is a more difficult case to justify, but it can still be resolved under the legal realist/relational approach to offer. Easterbrook’s references to the ongoing technical support that the purchasers were receiving tends to lend credence to the transaction being more than a discrete relationship; the failure to give notice on the box, however, that terms were coming raises questions of whether the buyers would really have known about the support and warranties. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997)

#### D. *A Cautious Approach to the Rolling Contract*

While this approach may be useful for resolving the issue of identifying when an offer can be deferred, a cautious approach should be taken lest every vendor attempt, through boilerplate language and standard warranties, to turn discrete contracts into relational ones. First, for a sale of goods, the presumption should be that the basic rule applies and the offer occurs in-store by the purchaser. It should be up to the vendor to rebut this presumption, which it can do by showing either that the buyer subjectively knew that the offer was coming, or, based on the circumstances, it was objectively reasonable to assume that the offer was coming.<sup>263</sup> It is in this second method that the legal realism/relational approach will be useful. In assessing reasonableness, courts should consider the language on the product, such as notices of additional terms, as well as the nature of the contract contemplated. The closer a transaction comes to a discrete transaction, the less likely it is that an ongoing relationship is contemplated by both parties. It may be that in some circumstances, the nature of the contract contemplated requires little in the way of product labeling because the contract clearly is not a discrete one. In other circumstances, the labeling may be of higher importance, as the ongoing nature of the relationship may not be readily apparent to the buyer. Either way, the labeling or notice used should not necessarily be the determining factor, but should be instructive on the nature of the contractual relationship. Finally, the terms of the deferred offer should be related to the nature of the ongoing relationship so that the buyer will have notice of their existence, if not their details, prior to making the purchasing decision.

Under a rolling contract theory, if the contract offer is deferred, then the limitations described in Part III.B, should still be followed. The terms should be conspicuous and should describe how the purchaser can reject the offer.<sup>264</sup> Furthermore, in keeping with section 69 of the Restatement (Second) of Contracts, silence or inaction should not be the proscribed

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(describing the difference as “functional, not legal”). These issues should have been explored further under the legal realism/relational approach. See Friedman, *supra* note 28, at 9 (criticizing the *Hill* court’s conclusion regarding the buyers’ ability to obtain the terms ahead of time as “a bit underwhelming” because of the buyers’ lack of awareness that additional terms existed).

<sup>263</sup> See *Rogers v. Dell Computer Corp.*, 138 P.3d 826, 832 (Okla. 2005) (“Under section 2-206(1) of the U.C.C., the buyer is the offeror, and a contract is formed when an order is placed and the seller agrees to ship unless the language and circumstances involved in the transaction unambiguously show otherwise.”).

<sup>264</sup> See *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1071–72 (R.I. 2009) (holding that consumers were not bound by deferred terms when it was not reasonably apparent that they could reject the terms simply by returning the goods).

mode of acceptance, though the simple use of the product should suffice.<sup>265</sup> Also, in keeping with section 211 of the Restatement, the deferred offer should not be incorporated into a user's manual or the like, but instead should clearly identify itself as the contract terms.<sup>266</sup>

Finally, given that the buyer has the product and the vendor has the buyer's money before the buyer even gets to realistically see the detailed terms, such contracts go beyond mere "contracts of adhesion."<sup>267</sup> There is an added level of procedural gamesmanship when the only way to reject an offer is to travel back to a store or to pay for shipping the product back.<sup>268</sup> To the degree that such rolling contracts engage in this sort of gamesmanship, courts should not be reluctant to find procedural unconscionability, thus lessening the burden of the buyer/plaintiff should the contract also contain onerous terms.<sup>269</sup>

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<sup>265</sup> RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981). Section 69 provides that silence or inaction can only act as an acceptance in specified circumstances, such as when the "offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation," or "an offeree . . . does any act inconsistent with the offeror's ownership." *Id.* But see *Rogers*, 138 P.3d at 833 ("The plaintiffs' accepting the computers and not returning them is consistent with a contract being formed at the time that the orders were placed and cannot be construed as acquiescing in the 'Terms and Conditions of Sale' document whether included with the invoice or acknowledgment or with the computer packaging."); Gillette, *supra* note 10, at 681 ("Assent typically reflects some arrangement to which there has been mutual agreement created by negotiations or conduct more explicit than opening a box or using a product that is accompanied (unknown to or ignored by the user) by a recitation of obligations."); White, *supra* note 258, at 737 ("To say that the offeror is the 'master of his offer' means only that he may rule out certain things as acceptance. That is, he can limit the universe of things that will be regarded as acceptances, not that he can expand *acceptance* beyond the universe that a reasonable person in the offeree's shoes would believe to be acceptance.").

<sup>266</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 & cmt. d.

<sup>267</sup> See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1265 (2003) (discussing *ProCD II* and *Hill* as examples of "situation-specific monopolies," in which the sellers can take advantage of the fact that the purchase already occurred not by raising the price but by providing terms of low quality). Unfortunately, a number of courts that have adopted the rolling contract approach have been content to simply cite to the widespread use and efficiency of such deferred terms as well as to rely on the conspicuousness of the terms themselves rather than on the procedural unconscionability of deferring such terms in the first place. See Friedman, *supra* note 28, at 38 (noting that there was no real discussion in *Mortenson* of whether the deferral itself was unconscionable). This Article agrees with Professor Friedman that such a limited analysis is insufficient.

<sup>268</sup> White, *supra* note 258, at 748. Professor White presents a humorous visual to illustrate his point regarding such deferred offers:

The buyer has received and spent all evening setting up his computer, and he is sitting in his study in International Falls, Minnesota, in his underwear with a beer when he has to decide whether to agree to the new terms or go out in the negative-thirty-degree temperature and return the computer. This offer is more objectionable than a predelivery e-mail because it is coercive.

*Id.*

<sup>269</sup> See Friedman, *supra* note 28, at 35–40 (asserting that, absent template notice, deferred terms are more susceptible to unconscionability attacks even with only a small degree of substantive

## VI. CONCLUSION

Rolling contracts have indeed become commonplace in many transactions. However, this does not mean that all such contracts are sinister or should be abhorred. The ability to read terms later in the convenience of one's own home may indeed appeal to a buying consumer. But caution must be exercised to ensure that the buyer has actually anticipated such an arrangement. If the buyer has, then a rule that strikes such contracts down under a mechanical approach to the U.C.C. interferes with the parties' expectations and freedom to contract. However, a rule that upholds rolling contracts, with little regard for the context of the transaction, similarly defeats freedom of contract by imposing additional terms upon buyers without considering the bargained exchange that was expected.

The U.C.C. and the legal realism movement that is at the heart of many of its provisions should reject such mechanical applications in either direction. A legal realism/relational approach to when an offer is made takes into account the context and expectations of the parties. This approach, coupled with protections, such as conspicuous terms and the unconscionability doctrine, should ensure a proper balance between the efficiency of rolling contracts and protection from overreaching by vendors. Discrete contracts will continue to enjoy a presumption of the traditional contract formation rules, but will be displaced where reasonable. This approach gives courts the flexibility to take account for, and give credence to, the rolling contract without casting aside decades of contract law or the reasonable expectations of the parties involved.

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unconscionability present). Professor James Gibson has advocated a similar approach in which the entire transaction, from start to finish, should be considered in the procedural unconscionability analysis. James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 219–20 (2013). Professor Gibson found, in an empirical study of contracts in the desktop computer industry, that the average transaction bound the buyer to twenty-five different contracts totaling 74,897 words. *Id.* at 190. As part of a judicial response to such contracts, he urges that “courts must look beyond the four corners of the contract itself and consider the entire transaction from start to finish with all of its information costs.” *Id.* at 219–20. Professor Gibson explains that “[a] term may be unresponsive to market forces, notwithstanding its prominence, if it arrives after the consumer has invested considerable time in the purchase (the acquisition cost issue) or has concentrated his or her limited attention on other product features (the processing cost issue).” *Id.* at 220.