

DEFAULT RULES IN SALES AND THE MYTH OF CONTRACTING OUT

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I. INTRODUCTION

In his celebrated article *The Problem of Social Cost*,¹ Ronald Coase argued that rules of law alterable by agreement were not inherently inefficient because parties could and would negotiate to an efficient result. Coase explicitly qualified his principle with the corollary that the costs of negotiating might keep parties from reaching efficient outcomes.² Where this is so, the existing law that governs the transaction – now sometimes called the “default rule” – prevails despite its inefficiencies.

In the modern sale of goods, Coase’s corollary has overtaken the principle. Few contracts for the sale of goods are fully negotiated either in person or by electronic or other remote communication. In some face-to-face cases, such as the sale of an automobile to a consumer, the buyer will sign the seller’s form. But the great majority of American contracts for the sale of goods

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1. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

2. *Id.* at 18. See, e.g., Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 266-67 (1987). Schwab notes:

Obviously the Coasean assumption of zero transaction costs is stylized, but the Coasean prediction will often remain accurate with a less extreme assumption. Specifically, transaction costs will not impede efficient bargaining whenever the difference in values that the [parties] place on an item exceeds the costs of bargaining over the item.

Id., quoted in Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 613 n.9 (1998).

are composed of fragmentary, conflicting, or discontinuous documents, electronic messages, and actions.³ The industrial prototype is the exchange of purchase orders, confirmations, acknowledgements, and the like. Many contracts arise from a telephone call followed by a written acknowledgement, and, of course, many transactions are electronic orders sent over the Internet that may be confirmed in the same way. Do not forget the case considered at length below where there is a telephone or other order, and the goods come with terms in or on the box.⁴

Most of these cases share certain characteristics. The explicit terms written, sent, or uttered by one are never identical to the other's express terms. At minimum, one party adds terms to which the other seldom explicitly agrees. In many cases, one party offers terms that contradict the other's terms. In all of these cases—from the purchase of an ice cream cone to the sale of \$40,000 of steel—the costs of negotiating a contract outweigh the value of having a fully negotiated deal.

If one accepts my hypothesis that fully negotiated sales contracts are the exception, default rules are more important than students of Professor Coase might conclude.⁵ I speak of two sets of default rules. First are the commonly recognized defaults: implied warranties, statute of limitations, consequential damages, and rules on jurisdiction, jury trial, and forum. Second are the less prominent default rules on contract formation and contract interpretation in the absence of formal agreement. Contract formation and interpretation rules tell whether the substantive default rules prevail or whether the contract that results from a fragmented contracting ritual, as described above, overrides those substantive provisions.⁶ Put differently, does the

3. This is also true of informal and undocumented sales, such as the sale of ice cream cones or groceries where virtually all of the quality and remedy rules are UCC default rules.

4. *See, e.g.*, *Hill v. Gateway 2000*, 165 F.3d 1147 (7th Cir. 1997).

5. Of course, it is conceivable but highly unlikely that the Article 2 default rules are the most efficient for all combinations of sales transactions. It is more plausible that those rules are not efficient except for the unusual case. I assume for the purpose of this article that efficiency would demand substantial variation from the default rules in a significant part of all sales contracts.

6. Although it is common to speak of the rules in §§ 2-204 and 2-207 and of the analogous common law rules as rules of "contract formation," the rules are more often used to interpret the contract. In almost all of the cases that I deal with here, indisputably a contract has been made, the court uses the contract formation rules to decide which terms are in the contract, i.e. to interpret the contract that has been

substantive rule allowing consequential damages govern or does the seller's form that bars consequential damages control?

At least three default rules on contract formation and interpretation are in common use. The first, brought to America as part of the English common law and still prevalent in contracting outside Article 2, is the mirror image rule.⁷ By that rubric any response to an offer that is not identical to the offer is a counteroffer. The contract that results from this rule usually contains all of one party's deviant terms and none of the other's deviant terms. So an offer to buy that did not mention arbitration would be rejected by a response that provided for arbitration. If the offeror then performed in the face of the counteroffer, the counteroffer's terms would be the terms of the contract.

A second default formation rule, Section 2-207, now prevails in Article 2. Section 2-207 was apparently devised to find a contract in cases where the mirror image rule would not. *Poel v. Brunswick-Balke-Collender*⁸ is sometimes cited as the target for Section 2-207(1) and (2). After the parties had exchanged seemingly immaterially different forms, one party pulled out.⁹ The court found that no contract was formed under the mirror

made.

7. Under the mirror-image rule, an acceptance must mirror the terms of the offer exactly to create an enforceable contract. RESTATEMENT OF CONTRACTS §§ 58 & 59 (1932). Section 60 reads: "A reply to an offer, though purporting to accept it which adds qualifications or requires performance of conditions, is not an acceptance but a counteroffer." *Id.* § 60. Section 38 of the Restatement states that a counteroffer rejects the original offer. *Id.* § 38. The Restated 2d has the same rules. See §§ 39 and 59 *Restatement of Contracts* 2d (1979). According to Karl Llewellyn, "An acceptance upon terms varying from those offered is a rejection of the offer and terminates negotiations unless the modifications are assented to by the original offeror." Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 789 (1953).

8. 110 N.E. 619 (1915). In *Brunswick*, the court held that an exchange of letters between a buyer and seller did not amount to a contract where the buyer's acceptance was conditioned on terms obliging seller to acknowledge the order and the seller's guarantee to deliver within a specified time. *Id.* at 623. Seller failed to acknowledge the order, and when the price of rubber dropped, buyer revoked the offer. *Id.* at 621. The court held that the buyer's letter constituted a counteroffer, which the seller never accepted. *Id.* at 623; *see also*, RESTATEMENT OF CONTRACTS § 60, illus. 1 (1932) ("A makes an offer to B, and B in terms accepts but adds, 'Prompt acknowledgment must be made of receipt of this letter.' There is no contract, but a counteroffer"); *but see* *Orr v. Doubleday, Page & Co.*, 119 N.E. 552, 554 (1918) (acknowledgment not essential to formation of contract despite unfulfilled request for it).

9. *Poel*, 110 N.E. at 619.

image rule despite the fact that the deviance in the response to the offer was insignificant.¹⁰ Brunswick, of course, was a sport, for the deal aborted before performance.¹¹ In almost all of the cases with which I deal here, the parties have performed and are quarreling not about the presence of a contract but about its terms.

Only by the addition of Subsection (3)¹² late in the drafting was 2-207 fully extended to these more common cases where both parties have performed. In those cases Section 2-207 usually gives a different answer from the answer that the mirror image rule would give. Under 2-207 a deviant respondent form can be an acceptance.¹³ Whether the additional terms in the second form become part of the contract is a question of interpretation that Section 2-207(2) governs.¹⁴ Some get in, and some do not. According to some courts, even some of the terms in the offer do not get into the contract. Where the responsive document is so substantially different from the offer that it cannot be made into an acceptance but the parties perform, 2-207(3) makes a contract out of the fragments together with the default rules from Article 2.

It appears that Llewellyn's early focus was on *Brunswick* and that the critical subsection (3) was an afterthought from the pen of a "hack in Philadelphia."¹⁵ So it is quite possible that the

10. With respect to the buyer's request for the seller's acknowledgment of its order, the court observed, "As the party making this offer deemed this provision material and as the offer was made subject to compliance with it by the plaintiffs it is not for the court to say that it is immaterial." *Poel*, 110 N.E. at 619.

11. *Id.*

12. Subsection (3) reads:

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. 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.

U.C.C. § 2-207(3) (1977).

13. *Id.*

14. Subsection (2) reads:

The additional terms are to be construed as proposals for addition to the contract. Between merchants, such terms become part of the contract unless: the offer expressly limits acceptance to the terms of the offer; they materially alter it; or notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

U.C.C. § 2-207(2).

15. Letter from Grant Gilmore to Robert S. Summers (September 10, 1980), *in* RICHARD E. SPEIDEL, ROBERT S. SUMMERS & JAMES J. WHITE, SALES AND SECURED

drafters stumbled to the current version of 2-207 without careful thought about the cases for which it is routinely used. But note how it differs from the mirror image rule. First, there is no virtue in becoming the last speaker or actor. No power is accorded to the counteroffer; in fact the counteroffer, coming second, is likely to fare worse than the offer, for the counteroffer but not the offer must pass through 2-207(2).

Equally important is Subsection 2-207(3). Where the mirror image rule would search for the last counteroffer and give that document all of its terms, subsection (3) makes a contract out of the terms found in the utterances of both parties and then seasons them with the default terms. Put differently, under the mirror image rule one person got all and the other nothing, but now each likely gets some of his terms and terms that may be important to one but objectionable to the other fall out.

The third default rule comes to sales law from Judge Easterbrook's pen. In two cases, *ProCD v. Zeidenberg*¹⁶ and *Hill v. Gateway 2000*,¹⁷ Judge Easterbrook articulated what is now sometimes called the "rolling contract" rule of contract formation.¹⁸ Under this rule, lately embraced by several other courts and incorporated in the Uniform Computer Transactions Act (UCITA), the contract is formed piecemeal over time.¹⁹ When a consumer orders a computer by telephone and gives his credit card information, there is a contract to purchase but the contract's terms are not complete until the computer arrives with additional terms in the box. According to Judge Easterbrook, many of those terms become part of the contract, at least if the buyer has been told they are coming or is given the right to return the computer if he does not like them.²⁰

At this writing, the rolling contract rule is used exclusively by sellers, but it is conceivable that it might also apply to a crafty buyer who sent his terms to the seller. In cases where buyers are unlikely to return goods that they have just purchased by phone or over the Internet, this rule is much more favorable to the seller

TRANSACTIONS 513-15 (5th ed. 1993).

16. 86 F.3d 1447 (7th Cir. 1996).

17. 105 F.3d 1147 (7th Cir. 1997).

18. See Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: "There's a New Sheriff in Town!"*, 35 U. RICH. L. REV. 943, 970-71 (2002).

19. See U.C.I.T.A. § 102 (2001).

20. *Hill*, 105 F.3d at 1150; *Zeidenberg*, 86 F.3d at 1442-43.

than 2-207 is; it may be even more favorable to sellers than the mirror image rule would be.

Gateway's battle in the courts to establish its contracting default rule has had a parallel in the elite legislatures, the ALI, and NCCUSL. Before the drafting committee for the revision of Article 2 was reconstituted in 1999, Gateway, representing itself and perhaps others, argued for changes in Section 2-207 and had won some tentative concessions.²¹ After the 1999 draft was substantially changed in late 1999 and 2000, another proposal was added to Section 2-207 that was designed to give Gateway some of its wishes.²² Meanwhile in UCITA, licensors got most of their contract formation default rules. So the battle was waged not just before the courts but also before the drafting committees for UCITA and Article 2 and, to a limited extent, on the floor of the ALI and NCCUSL.

In this article, I trace the dispute in the courts and before the ALI and NCCUSL over the proper contract formation and interpretation default rules. In Part II, I consider the Gateway litigation. In Part III, I deal with UCITA and the revision to Article 2. In Part IV, I consider the merits of the competing default rules.

Before turning to the contract default rules, one might ask why parties are fighting over default contracting rules and not over the substantive default rules themselves. If sellers really want to avoid consequential damages, enjoy "repair or replacement" and escape class actions and the like, why do they not lobby for changes to the substantive rules themselves? After all, Article 4A adopted a default rule that barred consequential damages unless the contract explicitly granted them,²³ so such rules are possible.

There are several reasons why sellers do not confront the default rules head on. First, the courts lack the power to give that remedy. Even a judge as smart and strong willed as Frank Easterbrook will not decree that sellers in a particular industry shall no longer be liable for consequential damages. Courts have

21. See discussion *infra* text accompanying note 19.

22. See discussion *infra* text accompanying notes 23-31.

23. See U.C.C. § 4A-305(c) (2001) (limiting a receiving banks liability for consequential damages to the extent provided for in an express limited agreement of the receiving bank).

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the power to interpret Section 2-207 to be inapplicable to Gateway's transaction, but they would be embarrassed to twist the remedies as far as sellers wish to change them by contract.

Second, sellers do not confront the substantive default rules in the elite legislatures because they lack the power to get their way on those issues. Buyers, particularly consumer buyers, and their friends in the ALI and NCCUSL are keenly aware of the significance of implied warranties, rules on disclaimers, and other remedy rules such as those giving consequential damages. Any proposal to change these would raise every consumer advocate to the defense and would meet with defeat. And these buyers' advocates would be deeply suspicious of any efficiency argument that might suggest that exclusion of remedies would mean little to buyers, might substantially reduce sellers' costs, and that those savings might result in lower prices for buyers.

A third reason that keeps sellers from confronting certain rules head on in the UCC revision process is that some of those rules lie outside of commercial law. For instance, one of the principal functions of Gateway's arbitration clause is to defeat class actions.²⁴ If each person with a complaint about a particular product has agreed to arbitrate, none can be the representative of a class in a court action and a class cannot be constructed. Yet drafting general rules for class actions is beyond the jurisdiction of any Article 2 drafting committee.

II. COURT MADE CONTRACT DEFAULT RULES

Recent court made contract formation rules arose from the increasing tendency of sellers to include contract terms with their goods. Judicial responses to such "payment now, terms later" transactions are divided into two camps. Judge Easterbrook of the Seventh Circuit heads one group allowing post-payment terms into sales contracts under certain circumstances. For Judge Easterbrook and others, a consumer's expectation of future

24. Class actions, even class actions that arise from product defects that cause insignificant injuries can be grossly expensive for the defendants. See Andy Pasztor & Peter Landers, *Toshiba Agrees to Settlement on Laptops*, WALL ST. J., Nov. 1, 1999 (reporting that Toshiba Corp. of Tokyo agreed to a \$2.1 billion settlement of a class action claim brought in Beaumont, Texas relating to a floppy-disk drive controller problem in its computers, a flaw that may be common to the products of many computer manufacturers. Toshiba agreed to pay the plaintiffs' law firms \$147.5 million. The settlement gives consumers rebates of up to \$443 each, determined by the age of their laptops.)

terms coupled with a provision for returning goods accompanied by objectionable terms at the seller's expense justifies allowing the new terms into contracts.²⁵ The common law of contracts and Sections 2-204 and 2-209 of the Code underlie this analysis.²⁶ An opposing group relies on Section 2-207. That Section makes it difficult, if not impossible, for sellers to get their post-payment terms into contracts without the express assent of their buyers.²⁷ The line of cases best illustrating this split in jurisprudence involves a single seller, Gateway, in several virtually identical consumer transactions.

Judge Easterbrook's *ProCD, Inc. v. Zeidenberg* decision laid the analytical foundation for nearly half a dozen litigation victories for Gateway.²⁸ ProCD sold²⁹ an electronic database

25. See *ProCD v. Zeidenberg*, 86 F.3d 1447, 1452-53 (7th Cir. 1996); *Hill v. Gateway 2000*, 105 F.3d 1147, 1150 (7th Cir. 1997).

26. Section 2-204 reads:

Formation in General

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.

An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

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.

U.C.C. § 2-204

Section 2-209 reads:

Modification, Rescission and Waiver

An agreement modifying a contract within this article needs no consideration to be binding.

A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

The requirements of the statute of frauds section of this article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

U.C.C. § 2-209.

27. See U.C.C. § 2-207(2) and (3).

28. *Hill v. Gateway, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Filius v. Gateway 2000, Inc.*, No. 97 C. 2523, 1998 U.S. Dist. LEXIS 20358 (N.D. Ill. Jan. 15, 1998); *Westenforf v. Gateway 2000, Inc.*, 41 U.C.C. Rep. Serv. 2d (Callaghan) 1110 (Del. Ch. 2000); *Brower v. Gateway 2000, Inc.*, 676 W.Y.S. 2d 569, 246 A.D. 2d 246 (N.Y. App. Div. 1998); *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d (Callaghan) 1060 (N.Y. Sup. Ct. 1997) (unpublished).

29. ProCD doubtless would describe its transaction as a "license" and not as a "sale." Since the case uses Article 2 and not common law licensing law, I refer to the transaction with Zeidenberg as a "sale."

containing more than three thousand telephone directories.³⁰ It marketed both commercial and consumer versions of its product that were distributed in a CD-ROM format.³¹ Except for the price,³² the two versions differed only in their licenses.³³ The consumer product limited the purchaser to noncommercial uses whereas the commercial version authorized broader uses.³⁴ The licenses did not appear on the packaging, but purchasers could tell which version they were acquiring from the package labels. Every box declared that its software was subject to enclosed terms.³⁵ These licenses were found in the user's manual and splashed on the computer screen every time the user accessed the software.³⁶ Upon installation of the ProCD software, a user could not proceed without indicating acceptance to the terms.³⁷ The license provided that any customer finding the terms disagreeable could return the software for a refund of its purchase price.³⁸

Matthew Zeidenberg bought a consumer version of the software and operated an Internet service through which patrons could access the ProCD database at a cost less than the software's retail price.³⁹ ProCD brought suit in federal district court seeking an injunction against Zeidenberg's actions in violation of the license terms.⁴⁰ The district court held that Zeidenberg was not bound by the license terms because they were kept secret at the time of purchase.⁴¹ ProCD appealed.

30. The court notes that ProCD spent over \$10 million compiling the database. *ProCD*, 86 F.3d at 1449.

31. *Id.*

32. The consumer version retailed at approximately \$150, whereas the commercial product sold "for a higher price." *Id.* at 1459.

33. Easterbrook notes, "[i]nstead of tinkering with the product and letting users sort themselves – for example, furnishing current data at a higher price that would be attractive only to commercial customers, and two-year-old data at a low price – ProCD turned to the institution of contract." *Id.* at 1450.

34. *Id.* at 1450.

35. *ProCD*, 86 F.3d at 1450.

36. *Id.*

37. *Id.* at 1452. Note that the case could have been resolved by finding that Zeidenberg's explicit agreement to the terms of the license bound him.

38. *Id.*

39. *Id.* at 1450. Zeidenberg formed Silken Mountain Web Services, Inc. to resell the information, but for simplicity Zeidenberg will be referred to interchangeably with his corporation.

40. *ProCD*, 86 F.3d at 1450.

41. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 654 (W.D. Wis. 1996).

Judge Easterbrook, writing for a unanimous court, reversed the district court's ruling. Judge Easterbrook begins his analysis by noting the economic advantages of price discrimination strategies such as ProCD's.⁴² After dismissing Section 2-207 as inappropriate in a case involving only one form,⁴³ Judge Easterbrook says Section 2-204(1) is the place to start. That section reads, "[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."⁴⁴ Turning next to the common law of contracts, Judge Easterbrook notes, "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance."⁴⁵ According to Judge Easterbrook:

ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance.⁴⁶

Therefore, *ProCD's* license terms became part of the parties' contract.

Judge Easterbrook buttresses his conclusion by citing the United States Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*.⁴⁷ As Judge Easterbrook points out, the transaction in that case involved the exchange of money before the communication of detailed terms.⁴⁸ Although *Shute* resulted in the enforcement of post-payment terms, the Court did not address issues of contract formation or interpretation in reaching its conclusion. Instead, the Court evaluated and ultimately rejected the plaintiff's constitutional challenges to a forum selection clause.⁴⁹ Thus, while the result in *Shute* supports the *ProCD* outcome, its reasoning does not touch on the same issues.

Of course, Zeidenberg deserved to lose. Surely he knew what

42. *ProCD*, 86 F.3d at 1449.

43. *Id.* at 1452.

44. U.C.C. § 2-204(1).

45. *ProCD*, 86 F.3d at 1452.

46. *Id.* at 1452.

47. 499 U.S. 585 (1991).

48. *ProCD*, 86 F.3d at 1452.

49. *Id.*

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he was doing. Even his mother could have told him that it was wrong to appropriate the work of another. Yet, Section 2-207 might have allowed him to get away with his scheme. Judge Easterbrook had several routes to the correct answer that he did not use. One is to note that the contract was for the sale of information (the data) that happened incidentally to be riding on goods (the CD). That reasoning could have led out of Article 2 and away from the threatening Section 2-207. Secondly, as I suggest above, Judge Easterbrook could have treated Zeidenberg's clicking "I accept" as an express agreement either as part of the original deal or of a modification—so again avoiding Section 2-207.⁵⁰

In either case the opinion could best have omitted language that implies that an offeror can ascribe meaning to the offeree's acts even when it might be clear that no offeree would ascribe the same meaning to those acts. Contrary to Judge Easterbrook's suggestion, recognizing the offeror as "master of the offer" does not give him the power to turn the offeree's equivocal acts into acceptance. Judge Easterbrook is right when he says that an offeror may *limit* the acts that he will recognize as acceptance.⁵¹ But the offeror has only limited power to *add* to the acts that the offeree would otherwise intend to be acceptance. For example, treating a click on an "I accept" button as an acceptance is allowed not because the offeror says so, but because conventional, objective contracting behavior would make that act an acceptance. Conversely, a term that one accepts all of the terms in the box by tying his shoelaces the morning after its receipt would not be effective. In this setting, use of the product, like tying one's shoelaces, is equivocal.⁵² A buyer could easily claim that he had earned the right to use by paying and that no inference of agreement to other terms should be drawn from his use.

In *Hill v. Gateway 2000, Inc.*, customers who purchased a Gateway computer over the phone brought a class action against Gateway in federal court claiming breach of warranty⁵³ and that

50. *ProCD*, 86 F.3d at 1452.

51. *Id.*

52. One of my students showed me the plastic bag in which her computer power cord had been delivered. It stated that opening the plastic wrap enclosing the power cord was an acceptance.

53. *Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997).

the product's shortcomings made Gateway a racketeer, invoking treble damages under RICO for them and a class of all other purchasers.⁵⁴ Gateway responded by asking the district court to enforce an arbitration clause included in a list of terms delivered with the computer but not mentioned at the time of ordering.⁵⁵ The district court refused, citing a lack of agreement and failure of adequate notice to the consumer plaintiffs, even though the Hills conceded seeing the terms.⁵⁶ Gateway appealed this decision to the Seventh Circuit.

Judge Easterbrook ruled that the case came under the holding of *ProCD*.⁵⁷ Specifically, Easterbrook cited *ProCD* for the proposition that, "[a] buyer may accept by performing the acts the vendor proposes to treat as acceptance."⁵⁸ Here Gateway invited acceptance by a customer's retention of the computer for 30 days beyond its delivery.⁵⁹ The Hills kept their computer for more than 30 days, and therefore, Gateway's "in the box" terms governed the agreement.⁶⁰

The Hills asked that *ProCD*'s holding be limited to software, but Judge Easterbrook, citing non-software transactions in which enforceable contract terms were supplied after payment, declined their invitation.⁶¹ The Hills also argued that *ProCD* applied to only executory contracts, and because their contract was completed when the computer was delivered *ProCD* was inapplicable.⁶² Judge Easterbrook, however, declared that "this is legally and factually wrong: legally because the question at hand concerns the formation of the contract rather than its performance, and factually because both contracts were incompletely performed."⁶³ Since the Hills had "invoked

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

55. *Id.*

56. *Id.*

57. *Id.* at 1149.

58. *Id.* (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996)).

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

60. *Id.* at 1150.

61. According to Easterbrook, "*ProCD* is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products." *Id.* at 1149.

62. *Id.* at 1149.

63. *Hill*, 105 F.3d at 1149.

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Gateway's warranty and... [were] not satisfied with its response, [they were]... not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box."⁶⁴ Finally, the Hills unsuccessfully asserted that Section 2-207 prevented Gateway's terms from becoming part of the contract because they were material alterations.⁶⁵ According to Judge Easterbrook, "This argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, 'section 2-207 is irrelevant.'"⁶⁶ The Hills lost.

Rejecting Judge Easterbrook's assertion that Section 2-207 does not apply to cases with only one form, *Klocek v. Gateway, Inc.*⁶⁷ applied Section 2-207 to a Gateway transaction virtually identical to the one in Hill. In *Klocek*, the plaintiff brought both a class action and an individual claim against Gateway.⁶⁸ The court explained that it was "not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*... [because] in each case the Seventh Circuit concluded without support that UCC § 2-207 was irrelevant [simply] because the cases involved only one written form."⁶⁹ Judge Vratil pointed out that nothing in Section 2-207's language precluded application of Section 2-207 to a case that involved only one form.⁷⁰ *Klocek* won.⁷¹

Under Section 2-207 Gateway's "in the box terms" were

64. *Hill*, 105 F.3d at 1149. Note, however, that under the implied warranty of merchantability, the Hills may have similar rights. The U.C.C.'s provisions on merchantability requires that, among other things, goods must be "fit for the ordinary purposes for which such goods are used." U.C.C. § 2-314(2)(c).

65. See U.C.C. § 2-207(2)(b).

66. *Hill*, 105 F.3d at 1150.

67. 104 F. Supp. 2d 1332 (D. Kan. 2000).

68. *Id.* at 1334.

69. *Id.* at 1339.

70. *Id.* at 1340. Judge Vratil quotes Comment 1 of § 2-207, which says 2-207(1) and (2) apply "where an agreement has been reached orally . . . and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed." *Id.* at 1340.

71. Following the court's decision, Gateway filed a motion to dismiss for lack of subject matter jurisdiction. The motion was granted. Gateway then filed a motion to vacate the order in *Klocek*, which held that Gateway provided insufficient evidence of Klocek's assent to arbitration. Judge Vratil denied this motion. *Klocek v. Gateway, Inc.*, No. 99-2499-KHV, 2001 U.S. Dist. LEXIS 20546 (D. Kan. Oct. 31, 2001).

either an acceptance or a written confirmation.⁷² If deemed an acceptance, the terms would not conclude a contract under Section 2-207 only if Gateway expressly made agreement conditional on plaintiff's assent to the additional or different terms.⁷³ The court found no evidence that Gateway informed its customers that its acceptance was conditional.⁷⁴ In any case, because the plaintiff was not a merchant, Gateway's terms did not become part of the parties' agreement unless plaintiff expressly agreed to them.⁷⁵ The court concluded that "the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms."⁷⁶ Consequently, Gateway's motion to dismiss on the basis of an enforceable arbitration clause was denied.⁷⁷

III. STATUTORY CONTRACT DEFAULT RULES

The Article 2 revision process began in 1988 with the appointment of a study committee to determine whether Article 2 should be revised.⁷⁸ In 1991, a drafting committee to revise Article 2 was appointed.⁷⁹ Shortly it decided to adopt a wheel that would have spokes for sale of goods (2), leases of goods (2A), and software sales and licenses (2B). When it became clear that the same committee could not do 2 and 2B, the committee was divided in two. When, later, it appeared that 2B would be rejected by the ALI, that article was made into a separate Uniform Law, the Uniform Computer Information Transactions Act ("UCITA").⁸⁰

72. *Klocek*, 104 F. Supp. 2d at 1340.

73. *Id.*

74. The court says, "Gateway provides no evidence that at the *time of the sales transaction*, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of the Standard Terms." (emphasis added) *Id.* at 1341. The time of the sales transaction apparently means the time of the phone order.

75. *Id.* at 1341. With some restrictions, § 2-207(2) allows terms additional to those in an offer into an agreement that is between merchants. If the contract is not between merchants, "The additional terms are to be construed as proposals for addition to the contract." *Id.* at 1329.

76. *Id.* at 1341. Note that the Gateway contract disputed in *Hill* gave customers thirty days before its terms became binding.

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

78. Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1683 (1999).

79. *Id.*

80. ULA Vol. 7, Part II (West Supp. 2001).

In due course powerful advocates pressed a version of the ProCD contract formation model on both the Article 2 and the UCITA committees. Gateway was the advocate before the Article 2 committee and software licensors were the advocates before UCITA. The software licensors got most of what they wanted; Gateway was not happy with either of the proposals made to it in the Article 2 drafting.

A. UCITA

UCITA applies to computer information transactions.⁸¹ “Computer information” is “information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer.”⁸² A “computer information transaction,” in turn, is “an agreement . . . to create, modify, transfer, or license computer information or informational rights in computer information.”⁸³ The Comment makes clear that transfers of software are computer information transactions governed by UCITA.⁸⁴

UCITA consciously accommodates transactions, such as that in *ProCD*, in which some important terms are fully disclosed only after payment. Section 208 says that a party adopts terms of record “if the party agrees to the record, such as by manifesting assent.”⁸⁵ This holds true even if the terms are found in a standard form document and even though the terms were not available until after the commencement of performance.⁸⁶ The sole requirement is that the parties have “reason to know that their agreement would be represented in whole or part by a later record . . . and there would not be an opportunity to review the record . . . before performance.”⁸⁷ A term in a record may be adopted “without regard to the party’s knowledge or understanding of individual terms in the record.”⁸⁸

A manifestation of assent occurs if a person, “acting with knowledge of, or after having an opportunity to review the

81. U.C.I.T.A. § 103(a) *in* ULA vol. 7, Part II (West Supp. 2001).

82. *Id.* § 102(a)(10).

83. *Id.* § 102(a)(11).

84. *Id.* § 102 cmt. 9.

85. *Id.* § 208.

86. U.C.I.T.A. § 208.

87. *Id.*

88. *Id.*

record,” authenticates the record or “intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record.”⁸⁹ An

89. U.C.I.T.A. § 112(a)(2). This provision adopts Judge Easterbrook’s position. It does what the common law would not: it makes the offeror more than the master of the offer. Under its rubric, shoelace tying in the morning may serve as acceptance.

Section 112 reads:

- (a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:
 - (1) authenticates the record or term with intent to adopt or accept it; or
 - (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.
- (b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:
 - (1) authenticates the record or term; or
 - (2) engages in operations that in the circumstances indicate acceptance of the record or term.
- (c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.
- (d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights and that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to do so. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means.
- (e) With respect to an opportunity to review, the following rules apply:
 - (1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.
 - (2) An electronic agent has an opportunity to review a record or term only if it is made available in a manner that would enable a reasonably configured electronic agent to react to the record or term.
 - (3) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However, a right to a return is not required if:
 - (A) the record proposes a modification of contract or provides particulars of performance under Section 305; or
 - (B) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began.
 - (4) The right to a return under paragraph (3) may arise by law or by agreement.
- (f) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.
- (g) Providers of online services, network access, and telecommunications services, or the operators of facilities thereof, do not manifest assent to a contractual relationship simply by their provision of those services to other parties, including, without limitation, transmission, routing, or providing connections, linking, caching, hosting, information location tools, or storage of

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opportunity to review the record will only occur if the license is “made available in a manner that ought to call it to the attention of a reasonable person and permit review.”⁹⁰ Generally, if payment precedes revelation of license terms, an opportunity to review exists only if a party who does not agree to the record has a right to return.⁹¹ A right to return is not required when the contract’s “primary performance” is not the tender or acceptance of a copy, the agreement is not mass-marketed, and the parties had reason to know at the time of contracting that terms would follow performance.⁹²

Section 209 on mass-market licenses is of particular relevance to software companies. That Section states that a party adopts a term of record if it manifests assent “during the party’s initial performance or use of or access to the information.”⁹³ Furthermore, if the mass-market terms are not available for review prior to payment and the party rejects the license, the licensee is entitled to a return and “reimbursement of any reasonable expenses incurred in . . . returning” the computer information.⁹⁴

These provisions essentially codify the rationale in *ProCD*. Within limits,⁹⁵ licensors are allowed to present terms following the licensee’s payment. If the licensee manifests assent to these terms, such as by clicking “I Agree” on the terms, the contract is governed by the license.⁹⁶ Even in a case such as *Data Sys. v. Wyse Technology*,⁹⁷ where the licensee expressly declined to authenticate license terms, UCITA may nevertheless find assent in the licensee’s use of the software.⁹⁸

materials, at the request or initiation of a person other than the service provider.
U.C.I.T.A. § 112

90. U.C.I.T.A. § 112(e)(1).

91. *Id.* § 112(e)(3).

92. *Id.* § 112(e)(3)(B).

93. *Id.* § 209(a).

94. *Id.* § 209(b)(1).

95. Mass-market license terms are unenforceable if unconscionable. U.C.I.T.A. § 209(a)(1). Terms contrary to those expressly agreed upon are likewise disallowed. *Id.* § 209(a)(2).

96. *Id.*

97. 939 F.2d 91 (3rd Cir. 1991).

98. *Id.*

B. REVISING 2-207

In the spring of 1999, Bob Rader, counsel for Gateway, solicited law professors' indorsements of the *Gateway* position.⁹⁹ Eventually, Gateway presented to the drafting committee letters from leading law professors who indorsed the *Gateway/(ProCD)* rationale. Among them were Professors Baird,¹⁰⁰ Schwartz,¹⁰¹

99. Mr. Rader is a partner at Winston & Strawn's Washington D.C. office. When I told Mr. Rader that I thought 2-207 governed these cases, he thanked me for my time but did not offer to buy a letter from me.

100. *See* letter from Douglas G. Baird, Law Professor, The University of Chicago Law School, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 9, 1999). The letter states:

I am writing to express my views on 2-207(d) in proposed Article 2. I have taught contracts and commercial law since 1980 at the University of Chicago Law School. While I have discussed these issues with lawyers representing clients concerned about these issues, I write in my own behalf and not as a representative of anyone else.

When buyers purchase goods by telephone or over the Internet, they may not be fully informed with respect to the product itself, nor the terms at the time they place their order. By acquiring goods in this way, buyers expose themselves to the risk that they will not receive what they expect. The keyboard to the computer may not be to their liking. They might be disappointed in the styling of the suit or the sound of the stereo speakers. Similarly, buyers might not like the terms on which the seller proposes to do business.

Current law offers buyers some protection. The goods, for example, must pass without objection in the trade under the contract description. The proposed terms cannot materially alter terms on which the parties agreed previously. Moreover, these terms must comply with the protections of Magnuson-Moss as well as other laws and regulations. Goods and terms, however, can fall short of buyers' expectations without being unfit or unenforceable. For the most part, buyers must rely on the seller's reputation and the forces of competition.

An unscrupulous seller may be able to take advantage of buyers, but trying to eliminate this problem may do more harm than good. We could, for example, specify the kind of disk drive or the kinds of software that must accompany a computer bought over the telephone in the absence of special agreement, but lawmakers and regulators are rarely well-equipped to such a task. Moreover, rules that steer sellers towards making products in a particular way tend to homogenize products and stifle innovation. We are better off accepting the risk that buyers will be disappointed by the goods when they arrive, than we would be prescribing the attributes they must have, beyond such general requirements that they be consistent with the seller's representations and pass without objection in the trade.

Proposed 2-207(d) has the effect of changing this state of affairs, not with respect to products themselves, but rather with the terms that accompany them. Under proposed 2-207(d), buyers receive generic terms, rather than ones tailored to the product itself unless the seller jumps through special hoops. Proposed 2-207(d) rests on the idea that the terms on which a seller does business are fundamentally different from other product attributes. It assumes that sellers are peculiarly likely to take advantage of buyers with respect to the terms that they offer, but not with respect to the quality of the goods themselves. Sellers, in other words, can take advantage of buyers by the way they craft warranties, but not by building computers with cheaper keyboards.

We must however, be aware of a countervailing danger. We may hurt consumers by channeling sellers toward a single Procrustean bed of terms in the absence of explicit dickering. We cannot assume that every product should come with the

same warranties, the same balance of rights and obligations between buyers and sellers. When buyers can minimize a particular kind of risk, they may be better off taking on this risk themselves through a less generous warranty, if the market forces the seller to make a corresponding reduction in price.

We cannot justify proposed 2-207(d) merely by pointing to the possibility of unfair surprise. The assumption that sellers craft terms unilaterally in their favor has long been suspect. Nor can we assume that it is enough to allow sellers and buyers to bargain around generic protections. Indeed, in recent years it has become a commonplace that the law should make it easier for sellers to compete with respect to terms as well as the physical attributes of the products themselves. See, e.g., George L. Priest, A Theory of Consumer Product Warranty, 90 Yale L.J. 1297 (1981).

Proposed 2-202(d) may have the effect of suppressing innovation in contract terms. Markets in distance selling are rapidly evolving, and we are far away from knowing what contract terms make sense with respect to any particular product, let alone all of them. When legal rules encourage sellers to compete with respect to terms they offer, buyers may be better off. Pushing all sellers in the direction of offering the same generic terms is suspect, but this is exactly the effect of proposed 2-207(d). It imposes risks and costs on sellers who want to depart from the default provisions of Article 2. In the absence of systematic evidence of abuse and advantage-taking, we should be cautious.

If you would like me to elaborate on these comments, I would be pleased to do so. Sincerely,

Douglas G. Baird

Harry A. Bigelow Distinguished Service Professor of Law

Letter from Douglas G. Baird, Law Professor, The University of Chicago Law School, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 9, 1999)

101. See letter from Alan Schwartz, Sterling Professor of Law, Yale Law School, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 8, 1999). The letter states:

I have been retained by Gateway 2000, Inc, to express my views respecting proposed UCC sections 2-206 and 2-207(d). Regarding my qualifications to give these views, (i) I have taught Contracts and Commercial Law for over twenty years; (ii) I have published a Casebook that deals with the subjects of these proposed sections, "Sales Law and the Contracting Process" (Foundation Press, 2nd ed. 1991); (iii) I have published numerous articles on unconscionability and related, relevant subjects; (iv) I am Editor of the Journal of Law, Economics & Organization, a leading law and economics journal; and (v) I am a past President of the American Law and Economics Association and a past Chair of the Association of American Law Schools Section on Commercial and Consumer Law. I will argue here that neither proposed section should be adopted.

Section 2-206. Unenforceable Terms In Consumer Contracts

Section 2-302 of the current UCC authorizes a court to refuse enforcement to unconscionable terms in consumer contracts, and to take evidence respecting the unconscionability issue. A new UCC section authorizing courts to regulate consumer contracts would be justifiable if (a) it clarified the application of unconscionability concepts to consumer contracts, or (b) it extended the courts' power under the UCC in a normatively appropriate way. This letter will show that the proposed section 2-206 clarifies nothing, and as a consequence likely will extend the courts' power in a normatively inappropriate way.

The new section 2-206(a) provides that "In a consumer contract, a court may refuse to enforce a standard term in a record the inclusion of which was materially *inconsistent* with *reasonable* commercial standards of *fair* dealing in contracts of that *type* . . ." To apply section 2-206(a) to actual contracts will require giving content to the four italicized terms. This letter will use the examples that follow to show: (i) to make the terms justiciable requires a prior identification of the policy goals that section 2-206(a) intends to realize, but (ii) the drafters have made none of the necessary policy choices, so that (iii) the

section's actual effect will be to make a standardless delegation to courts to expand the regulation of consumer contracts.

1. Type: The statute directs a court to compare a contested standard term with a reasonable and fair contract of the same "type". Are all retail contracts one type? Are retail electronic contracts a type? retail stereo contracts? Assume that all stereo contracts in a market contain a standard product return policy and a stereo seller then changes its contract to adopt a stricter return policy. The firm's new contract is similar in this respect to contracts for the sale of televisions and radios. Should a court compare the new contract only to stereo contracts? To contracts for the sale of products that are similar to stereos? How similar must those other products be?

Section 2-206(a) creates what is called a description problem. Whether two contracts fall under the same description—are of the same type—turns on the policy goal that animates the classification task. For example, if the goal is to allocate the risk of manufacturer caused product defects to firms, and to allocate the risk of consumer caused product defects to buyers, then stereo and television contracts will fall under the same description if consumer use affects the probability of defects in the same way; but the stereo and television contracts might fall under a different description—be of different types—, given the policy goal, if consumer use affects the defect probability in different ways. As a consequence, section 2-206(a) cannot be applied to an actual case—the terms at bar cannot be compared to an ideal contract of the same "type"—unless the rule applier has access to the policy goal that the section intends to realize. The drafters of section 2-206(a) have made no policy choices at all, however, so this prerequisite cannot be satisfied. Rather, courts must solve the description problem on their own by choosing the policy goal that they want to pursue in the consumer context.

2. Inconsistent: If a court must choose the policy goal that will permit it to decide whether the standard terms at bar are of the same type as the terms in some comparison contract, then section 2-206 apparently would not accomplish much. In response, the section may be said to control the nature of the court's inquiry. For example, once it has been decided that stereo contracts are a discrete contract type, the section directs a court to ask whether the stereo contract in the case is "materially inconsistent" with a reasonable and fair stereo contract. As will immediately appear, however, section 2-206(a) as written will not control courts at all.

Assume that all stereo contracts in a market require the consumer to return the product within ten days if she wants to cancel the order. A particular firm changes its contract to require return in five days. Is a five day term "inconsistent" with a ten day term? Or is a five day term just different from a ten day term? Is a contract that requires a consumer to bear the cost of return inconsistent with a contract that puts this cost on the firm? Or are they just two different kinds of possible product return contracts? As a logical matter, it is difficult to see how a contract between seller S_1 and buyer B_1 can be "inconsistent" with contracts between seller S_2 and buyer B_2 , seller S_3 and buyer B_3 , and so forth. These appear to be different contracts between different parties that direct different results. Courts apparently cannot apply section 2-206 as written because contracts between different parties that direct different outcomes differ from each other, but cannot contradict each other.

A sympathetic reading of section 2-206(a) might hold that a firm's contracts could differ so materially from what appears to be a good contract as to be inconsistent with the good contract. This resolution of the problem is no resolution at all because it creates another version of the description problem. If section 2-206(a) were animated by a policy that identifies a stereo seller's ten day return practice as good and a five day return practice as bad, then a court should find the contract with a five day return practice to be "materially inconsistent" with a reasonable and fair stereo contract of that type, which would have a ten day return practice. But if the section were animated by a different policy, then a court may find that the five and ten day contracts differed from each other but were not "materially inconsistent". As said, the

drafters made no discernable policy choices. A court thus could not answer the consistency question without first choosing a policy goal to guide its inquiry. In sum, section 2-206 does not control how courts classify contracts—to see if they are of the same type—nor how courts compare contracts—to see if they are consistent.

To see why the consistency description problem really matters, assume that a stereo seller deviates from the ten day nonn to adopt a five day return practice, but the seller charges a lower price for the product itself. Is a set of standard terms that embody a strict return practice with a lower price “materially inconsistent” with “contracts of that type” that offer a loose return practice and a higher price? If so, and if the loose return practice is itself reasonable and fair, then section 2-206(a) apparently authorizes a court not to enforce terms embodying the strict return practice. This would be a bad result if the policy goal were consumer sovereignty because striking the five day product return term. would restrict consumer choice: stereo sellers no longer could offer consumers the option of paying less for less or more for more. On the other hand, if the section 2-206(a) policy goal were to protect unsophisticated consumers from themselves, any terms that deviated from what a well informed consumer would choose in ideal conditions would be materially inconsistent with a reasonable and fair contract of that type. To summarize, because the drafters made no policy choices, the “type” and “consistency” inquiries that section 2-206(a) requires would be so unconfined that the section will permit a very wide range of outcomes in real cases, from serious restrictions on consumer choice to letting a hundred contracts flourish.

3. Reasonable and fair (a): Let a court find that a strict product return practice at a lower price is inconsistent with a loose return practice at a higher price, and that the loose return practice is itself reasonable and fair. Then, as just said, section 2-206 would authorize the court not to enforce the standard terms embodying the strict return practice. Could the innovating firm prevent this outcome by showing that a strict return practice with a lower price *also* is reasonable and fair? If not, then consumers would be prevented from agreeing to reasonable and fair terms—the strict but cheap return practice. This result would appear to contradict any policy goal that could plausibly be assigned to section 2-206(a). If the deviating firm can establish the fairness of its own terms, however, then the section falls apart altogether because a court need not compare particular standard terms with ideal contract types at all. Instead, the court need only evaluate the reasonableness and fairness of a challenged contract term itself—here the strict product return practice.

A standard canon of statutory construction tells courts not to ignore words in a statute. This canon would prevent a firm from showing that its inconsistent term is itself reasonable and fair because if that showing could carry the day, a court could simply make it and ignore the comparison the statute says should be made between a standard term and an ideal contract type. On the other hand, if courts must make this comparison, then, we have seen, they sometimes would be required to refuse enforcement to standard terms that are themselves reasonable and fair. Courts tend to abandon a canon of statutory construction when the canon would lead to unacceptable results. Thus, courts probably would let the stereo seller with the strict return practice defend the reasonableness and fairness of its standard terms (recall, the alternative would be to prevent consumers from accepting the practice though it was reasonable and fair). But if courts will let sellers defend their own practices directly, then section 2-206 says only that courts should police the reasonableness and fairness of consumer contracts simpliciter. Courts need not worry about contract types or the consistency of contractual practices.

4. Reasonable and fair (b): The section purports to contain two normative standards: (i) “reasonable commercial standards”; (ii) “fair dealing in contracts of that type”. As should be apparent by now, these phrases do not embody any policy choices. The reasonableness and fairness of a standard term is not a physical property of the contract in which it is contained, but rather is to be determined by the application of normative criteria that are more specific than

an injunction to enforce only the reasonable and the fair. The drafters do not set out any such normative criteria. Therefore, not only may a court under section 2-206 police consumer contracts directly (without having to make the apparently redundant statutory comparisons); the court also is free to decide whether a challenged standard term is acceptable according to values—and under intellectual procedures that the court alone will chose.

5. The Comments: Comment 2 to section 2-206 purports to explain that “an included term that was beyond what a reasonable seller in a competitive market would include in contracts of that type might be denied enforcement.” A competitive market satisfies consumer preferences at the lowest price that permits firms to make a return on invested capital. If a “reasonable seller” denotes a profit maximizing seller, then this seller would offer a new term in a competitive market only if that term would better satisfy consumer preferences than the prior terms did. Therefore, if a particular market were competitive and a firm were to deviate with a new contract, that contract would be normatively acceptable prima facie. The Comment thus may tell courts to enforce consumer contracts made in competitive markets but not to enforce monopoly contracts. Such a directive would be consistent with economically oriented scholarship dealing with unconscionability, and may be administrable by courts. The directive is not easily reconciled with section 2-206’s language, however. Also, the drafters could have included in the statute a directive to courts to make the output of a competitive market their normative benchmark. The drafters’ failure to do this may suggest that they meant “reasonable seller” to refer to something other than a profit maximizing seller, and meant “competitive market” to refer to something other than what an economist would mean by that term. The drafters, however, have not said what these possible other meanings are, and so the Comments to section 2-206 do nothing to clarify the vagueness of the statutory words.

6. Summary: The UCC now has an unconscionability provision, current section 2-302. Courts would also have to give content to a new section 2-206. In light of the analysis in this letter, courts will take the new section to say only this: “A court may be more aggressive in regulating consumer contracts than the court would be were it applying section 2-302 alone.” The drafters, however, have neither shown why courts should be more aggressive than section 2-302 permits them to be today, nor have they given courts any guidance as to how their new power should be exercised. The result will be confusion and uncertainty, as courts, consumer advocates and firms struggle to discover which contract terms (if any) would be conscionable under section 2-302 but would also be morally unacceptable under section 2-206.

Section 2-206 is as poor a job of statutory drafting as one is likely to see. It is badly written and conceptually confused, and manages to be both vacuous in content and probably pernicious in effect. The new Article 2 should omit it.

Section 2-207(d)

Proposed section 2-207(d) provides, in relevant part, that when it is infeasible for the seller to disclose all of the terms to the consumer before payment and shipment, “the seller shall inform the buyer at or before the time for payment that additional terms will be proposed.” A buyer who rejects the additional terms must promptly notify the seller and “return the goods within a reasonable time.” A buyer who returns goods is entitled to a refund of the price (this has long been the law), and also has “a right to any reasonable expenses incurred”. This subsection was meant to overrule *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 47 (1997), which held that a seller need not notify the buyer that terms in addition to price and product would be forthcoming.

It is difficult to add to Judge Easterbrook’s excellent analysis of the notice issue in *Hill* itself. This letter instead will show that section 2-207(d) is animated by the same indefensible philosophy of statutory drafting that produced section 2-206. To begin, the illustrations to section 2-207(d) concern the sale of a computer, and the type of case in which there could be a serious disagreement over terms after a product is shipped will involve computers or

other major consumer durables, where there is enough at stake for the seller to write a set of contract terms and for parties to argue over what they should contain. The buyers in these cases, who are paying hundreds or thousands of dollars for an item, are among the most sophisticated of consumers. A case in which such a buyer could have a disagreement with the seller over a contract term also is unlikely to be the first purchase the buyer has made when the goods are shipped before all contract terms have been disclosed. A section 2-207(d) buyer thus knows that there will be terms in addition to price and product in the box; such terms always are in the box.

The result that a new section 2-207(d) would achieve may thus be set out in this way: (1) in consumer sales, the seller sometimes cannot conveniently disclose all of the terms in advance, but rather must send the terms later, with the product; (2) the seller can disclose in advance that there will be additional terms; (3) but buyers know that there will be additional terms; (4) hence, requiring the seller to say that there will be additional terms will not provide buyers with new information, but will provide an opportunity for buyers to litigate over whether the seller's disclosure statement is legally adequate. This litigation will substitute for the buyer's real concern, which is that the product did not perform as the buyer wished but the buyer's quality claims either are explicitly precluded by the written language or are too idiosyncratic to persuade a court or jury. In sum, a new section 2-207(d) would permit buyers to substitute a non merits claim, concerning the quality of notice, for a less promising merits claim, concerning the quality of the contract.

The section thus permits consumers to keep the product but not be bound by the seller's terms whenever the consumer can raise a legally colorable claim over the quality of the seller's notice. Litigation over notice in other contexts suggests that these claims will be easy to raise. To be sure, if courts hold that a pre-shipment notice of the form "There are additional terms to this contract" will suffice, then sellers could conveniently comply with section 2-207(d). Blanket notices of this type have not been enforced in other contexts, however. For example, a notice on the front of a form that there are more terms on the back does not give sufficient notice of a disclaimer on the back. On this view, the seller must highlight especially important terms that will follow later, and there would be a great deal of litigation over whether the seller's disclosure notice was appropriate in form and included the "especially important" terms.

Conclusion

Section 2-207(d) thus is similar in its intention and in its effect to section 2-206. Both sections rest on the drafters' belief that consumer contracts often are unfair and both sections seek to expand the power of courts to refuse enforcement to these contracts. Section 2-206 uses the method of empty statutory language; section 2-207(d) uses the method of creating a notice requirement without setting out criteria to tell courts and firms how much notice is enough. The drafters have proceeded in this unsatisfactory way because they cannot show either generally or in detail just which types of consumer contracts are unfair and how, nor can they provide courts with justiciable criteria for resolving consumer fairness questions. Sections 2-206 (a) and 2-207(d) thus are substitutes for thought, not thought itself.

The drafters' apparent hope is that by expanding the opportunities for standardless litigation some principled standards will emerge that the Permanent Editorial Board can later embrace. This drafting philosophy is indefensible. There is no accepted theory of statutory interpretation that authorizes a legislature to delegate a task to courts, or even to expert agencies, under the naked directive: "Things are bad out there. Regulate". Rather, the legislature must decide *something*, and in the Commercial Law context, NCCUSL and the ALI are supposed to help the legislature choose. When the drafters provide no help at all, as here their product should be rejected. Hence, neither proposed section 2-206 nor section 2.207(d) should appear in a revised Article 2.

Sincerely,

Alan Schwartz

Barnett,¹⁰² Scott,¹⁰³ Alces,¹⁰⁴ and Gillette.¹⁰⁵

In March 1999, the drafting committee proposed additions to Section 2-207 addressing transactions such as *Gateway's*. Subsections (a), (b) and (c) remained essentially the same as in the October 1998 draft. Subsections (d) and (e) were new additions. They are as follows:

(d) If at the time of full or partial payment for goods by a buyer, a seller intends the agreement to contain additional terms and after payment but not later than delivery of the goods those terms are proposed to the buyer, the following rules apply:

(1) If it was reasonable under the circumstances to disclose or make available the terms to the buyer at or before the time of payment and it fails to do so, the terms provided after payment do not become part of the agreement unless the buyer expressly agrees to them;

(2) If it was not reasonable under the circumstances for the seller to disclose the terms or make available a source of the terms to the buyer, the seller shall inform the buyer at or before the time of payment that additional terms will be proposed.

(A) If the buyer is not informed by the seller, the subsequently proposed terms do not become part of the agreement unless expressly agreed to by the buyer.

(B) If informed by the seller, the buyer may either

Sterling Professor of Law

Letter from Alan Schwartz, Sterling Professor of Law, Yale Law School, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 8, 1999).

102. See letter from Randy E. Barnett, Austin B. Fletcher Professor, Boston University School of Law, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 9, 1999) (on file with the Loyola Law Review).

103. See letter from Hal S. Scott, Nomura Professor of International Financial Systems, Harvard Law School, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 10, 1999) (on file with the Loyola Law Review).

104. See letter from Peter A. Alces, Professor of Law, William and Mary Law School, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 3, 1999).

105. See letter from Clayton P. Gillette, Perre Bowen Professor of Law and John v. Ray Research Professor of Law, University of Virginia School of Law, to Lawrence J. Bugge, Chair, U.C.C. Article 2 Drafting Committee (March 8, 1999) (on file with the Loyola Law Review).

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accept the subsequently proposed terms by agreement or reject them by promptly notifying the seller. If the terms are rejected, the buyer, subject to paragraph (3), must return the goods within a reasonable time.

(3) Upon returning goods to the seller under subsection (2)(B), the buyer has:

(A) a right to refund of the price;

(B) a right to reimbursement of any reasonable expenses incurred related to the return and in compliance with any instructions of the seller for return or, in the absence of instructions, return postage or similar reasonable expenses in returning the goods;

(C) the rights and duties of a buyer who has rightfully rejected goods under Section 2-704 and 2-829(b).

(e) In this section, a term is not expressly agreed to by the mere retention or use of goods.¹⁰⁶

Whether Gateway liked the March 1999 draft of Section 2-207 is unclear. The status of Gateway's transaction under the "reasonable under the circumstances" test employed by Subsections (d)(1) and (d)(2) probably would depend on which judge hears the case. Certainly Judge Easterbrook would say disclosing its terms at the time of payment is unreasonable for Gateway, but equally likely is Judge Vratil's conclusion that such disclosures are reasonable. Thus, Gateway may have been no better off under this version than under current Section 2-207. If a court were to decide that it was reasonable for Gateway to make full disclosure at the time of payment, its terms would be excluded from the contract unless the consumer expressly assented to them. Subsection (e) states that express assent is not manifested merely by retention or use of the goods.¹⁰⁷ The *Klocek* rule is thereby given statutory recognition and force.

Assuming a court concludes full disclosure at the time of payment is unreasonable, Gateway is still not as well off as under Judge Easterbrook's rule. Recall that Judge Easterbrook did not force Gateway into telling its customers additional terms were

106. U.C.C. § 2-207 (March 1999 draft).

107. U.C.C. § 2-207(e) (March 1999 draft).

coming.¹⁰⁸ Instead, a consumer's expectation that the transaction was not unfettered by future terms was sufficient.¹⁰⁹ Subsection (d)(2) provides sellers with strong incentives to notify customers of upcoming terms. If the seller gives no such notice, the terms are barred unless a buyer expressly assents to them.¹¹⁰ This excludes Gateway's terms from the contract.

If the seller gives notice at the time of payment, the terms may become part of the contract.¹¹¹ Subsection (d)(2)(B) provides some help in determining the effect of these terms. It says the buyer may accept or may reject by promptly notifying the seller and returning the goods.¹¹² Although this Subsection seemingly gave Gateway much of what it wants, Gateway's terms are still excluded under it because the company currently does not notify its customers of the additional terms.

At the 1999 meeting of NCCUSL, the draft of revised Article 2 was withdrawn from the floor by the leaders of NCCUSL. Although there was no public statement to that effect, the act was a result of opposition to the 1999 draft by the auto industry, General Electric, and many others, presumably including Gateway. That withdrawal led to the resignation of the reporters and was followed by NCCUSL's reconstituting the committee. The new committee proposed a shorter version of Section 2-207 in its March 2000 draft.¹¹³

In addition, the committee considered new Subsection (b) that dealt with the Gateway issue.¹¹⁴ Its provisions and the accompanying comments had been drafted with the help, if not the agreement, of Gateway and other industry persons and of representatives of consumer buyers.

Subsection (b) would have allowed terms not previously agreed upon to become part of the contract only if three conditions were met:

108. See *Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997).

109. *Id.* (considering how both consumers and vendors are better off when the terms of a contract are left for the purchaser to read upon receipt).

110. U.C.C. § 2-207 (d)(2)(A).

111. *Id.* (d)(2)(B).

112. *Id.*

113. See U.C.C. § 2-207 (March 2000 draft) available at <http://www.law.upenn.edu/uls/uss2/2300.htm>.

114. *Id.* § 2-207(b).

(b) Terms to which the buyer had not otherwise agreed that are delivered to the buyer with the goods become part of the contract, subject to 2-202, only if:

- (1) the buyer does not within thirty days of their receipt object to the terms and offer to return the goods at the seller's expense,
- (2) the terms do not contradict the terms of the parties' agreement, and
- (3) taken as a whole, the terms do not materially alter the contract to the detriment of the buyer.¹¹⁵

According to the comments, "Subsection (b) is intended to strike a balance between the buyer's need for protection from unexpected and unfair terms which the buyer does not see until the product is delivered and the seller's need for an inexpensive way of contracting with its buyers."¹¹⁶ The comments also note that "to the extent that . . . [*Hill* found] no agreement . . . at the end of a telephone exchange in which the seller agrees to ship and the buyer agrees to pay, the subsection rejects the reasoning in" *Hill*. The comments further state, "[W]here the buyer does not object, the terms do not contradict the terms of the parties' 'agreement' (not including Article 2 default terms . . .) and the terms delivered with the product contain some sugar (express warranties, promises of help or maintenance) with the medicine (disclaimers, and other conventional limitations on remedies) those terms will become part of the contract under subsection (b)."¹¹⁷ Enough sugar with the medicine test keeps the additional terms from "materially altering the contract to the detriment of the buyer."¹¹⁸

Gateway was at least somewhat ambivalent about the March 2000 draft. On its face, Subsection (b) adopted Gateway's contract formation rules. Gateway's usual terms include the requisite sugar (e.g., express warranties) for getting its medicine (e.g., arbitration clauses) into its contracts under Subsection (b). That Subsection, however, forced some of its own medicine on Gateway: it overruled *Hill's* validation of the rolling contract model. According to the comments, a contract is formed at the

115. U.C.C. § 2-207 (March 2000 Draft).

116. *Id.* cmt. (3).

117. *Id.*

118. *Id.* § 2-207(b)(3).

time of payment. This feature coupled with the latitude afforded judges in determining the proper mixture of sugar and medicine probably caused Gateway some measure of trepidation. Although this version of Section 2-207 is certainly more accommodating to Gateway's sales model than current Section 2-207, Judge Easterbrook's rule remained the most appealing to Gateway. Any version of Section 2-207 directly overruling Judge Easterbrook would be unacceptable.

At the March 2000 committee meeting in Chicago, the committee voted to exclude Subsection (b) from the draft. Several events and concerns controlled that vote. First, neither Gateway nor the consumers were willing publicly to indorse the proposal; apparently both thought that they would do better in the courts than they had done with the proposed language in Section 2-207. Second, the committee was concerned about the rationale¹¹⁹ and feasibility of drawing a line between conventional, commercial 2-207 cases and cases like Gateway.

With the rejection of the Gateway provisions in March 2000, the Article 2 revision draft is again agnostic. The comments tell that the Section takes no position on whether courts should follow the reasoning in *Hill* (contract not made until after delivery of goods with additional terms) or that in *Step-Saver* (contract made at time of oral or other bargain). Of course, it will no longer be possible to avoid Section 2-207 with Judge Easterbrook's sweep of the hand; it is clear that Section 2-207 applies not only to cases with more than one document but also to cases with only one, or with no documents.

IV. WHAT THE LAW SHOULD BE

A. THE GATEWAY - 2-207 CONUNDRUM

So here we are. By legislative afterthought (the application of 2-207(2) and (3) to cases where the parties perform after the exchange of documents) and by some hard cases making bad law (*ProCD* and *Hill*), we come to contradictory conclusions.

Compare the position of the Ford Motor Co. as a purchaser of

119. The thesis of this article is that there is a conceptual problem in distinguishing a commercial seller's last form to a commercial buyer (governed by 2-207) from a commercial seller's last form to a consumer (governed by (b)). That problem worried the drafting committee.

headlights from GE with the position of the Hills as purchasers of a PC from Gateway. Assume in each case that the price, description of the goods, and time of delivery had been agreed and that the goods have been shipped and paid for. Assume that both the PC and the headlights arrived with a printed form from the seller that limits the buyer to arbitration. Most cases, ignoring Section 2-207, would tell us that the Hills are bound, yet most cases, relying on Section 2-207, would conclude that Ford is not. In the modern parlance, the Hills are subject to a “rolling contract” where one party expects and is therefore bound by terms that come after the initial exchange. For Ford, the arbitration clause is a proposal for addition to the contract under Subsection 2-207(2) that does not make it into the contract because it materially alters the existing deal. Gateway escapes the default rule, but GE does not.

Both cases would presumably apply the same default liability and remedy rules. The difference in outcome arises from their applying different contract formation default rules to equivocal contracting behavior. The Hills’ use of the computer binds them to the term modifying the default forum, but Ford’s use of the headlights does not bind it.

Perhaps the cases can be distinguished, but I am doubtful. When, Judge Easterbrook in *ProCD* states that Section 2-207 does not apply to transactions that involve only one document, he is wrong. Although the Section is most commonly applied in commercial cases where both parties send documents, nothing in the text or the comments limits the Section to those cases. To the contrary, the second sentence to the first comment specifically deals with cases where there are one or two forms.¹²⁰ Cases affirm the Section’s application to transactions where there is only one form.¹²¹

120. U.C.C. § 2-207 cmt. 1 (2001).

121. See *Shur-Value Stamps v. Phillips Petroleum Co.*, 50 F.3d 592 (8th Cir. 1995) (applying 2-207 where oral contract was followed by seller’s confirmatory form containing additional term); *Telpro, Inc. v. Renello*, No. 94-2964 & 94-3048, 1995 U.S. App. LEXIS 26050 (7th Cir. June 7, 1995) (applying 2-207 where seller’s invoice included with product contained additional terms; court notes no other forms); *Ralph Shrader, Inc. v. Diamond International Corp.*, 833 F.2d 1210 (6th Cir. 1987) (holding that 2-207 applies where seller’s acknowledgment form is the only document offered); *Supak & Sons Mfg. Co. v. Pervel Industries, Inc.*, 593 F.2d 135 (4th Cir. 1979) (concluding that 2-207 governs where oral contracts were followed by seller’s confirmation forms); *One Step Up, Ltd. v. Kmart Corp.*, No. 97 Civ. 1469, 1997 U.S. Dist. LEXIS 9897 (S.D. N.Y. July 10, 1997) (applying 2-207 where buyer sent

Nor can the cases be distinguished on the basis that the Hills would have expected new terms in the box but Ford would not have any such expectation. The Ford purchasing managers and their lawyers would be well aware that a seller like GE would be sending its own document and that GE's boilerplate would be unilaterally favorable to it.

A third possibility, that I have considered elsewhere,¹²² is that the efficiencies might be different in the two cases. It might be inefficient to force Gateway to engage in a costly negotiation ritual in order to get its arbitration clause.¹²³ If one assumes that almost all consumers of Gateway PC's would agree to an arbitration clause for pennies but that any alternative contract ritual would cost Gateway a few dollars (and that Gateway values the clause at more than a few dollars), forcing the parties into that ritual is inefficient. That is because the new ritual costs the parties (Gateway and ultimately its buyers) dollars for something that is worth only pennies to the buyer.

The case might be different between GE and Ford because one transaction may cover millions of pieces and tens of millions of dollars. If that is so, the cost of requiring a more elaborate contract ritual might be only a few dollars per tens of millions of sales.

In dealing with the Hills, Gateway may not be behaving strategically but GE may be doing so with Ford. If my guess is right, the Hills would have signed an arbitration clause without requiring any payment in a face-to-face transaction. As a consumer I regard the possibility that I will have litigation with any seller so low that I routinely agree to restrictions on my remedies; I would exchange arbitration for the right to go to court for a trivial sum. The same may not be true of Ford. If I were a GE salesman, I would not expect Ford to agree to arbitration or to a limitation on consequential damages in a deal worth tens of millions without a measurable price reduction. If that is true, GE is trying something that Gateway is not; it is trying to get

purchase orders following oral agreements); *Frontier Ford v. Technical Chem. Co.*, No. C96-20678 PVT n.1, 1997 U.S. Dist. LEXIS 13977 (N.D. Cal. May 6, 1997) (holding that where there is an oral agreement subsequent terms supplied in seller's invoice are governed by 2-207).

122. See, James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693, 1714-21 (2000) (considering efficiency arguments in the context of contract formation).

123. *Id.*

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something by an exchange of documents that it would not get at the same price in a face-to-face transaction.

So both cases might make economic sense, if not necessarily legal sense. We bless Gateway's transaction as beneficial to all, but we slap GE's hand for trying to snatch something that its buyer would not knowingly give. But different assumptions make this distinction seem questionable. Assume that Gateway can communicate with all of its Internet buyers and with 95 percent of its phone buyers for pennies by e-mail. Should we not then force it to send its terms by e-mail before it is allowed to take the buyer's money? In this scenario the added cost of making the terms available to the buyer might not exceed the value of that knowledge. Such e-mail confirmations are now routinely sent by some sellers (travel agents, airlines, certain catalog internet sellers, Amazon). To be sure, the sellers who now confirm electronically are confirming the guts of the transaction, not its extremities, but their use of this process in small dollar transactions shows its low price.

I still doubt that the two cases can be made to lie down in harmony. I have always found it ironic that Ford as a buyer enjoys more favorable default rules than a consumer buyer does. It may be that GE is trying to get something by acting strategically whereas Gateway is getting only what it could get at the same price in a face to face transaction, but I am not sure that that matters.

B. NEW RULES?

The cases and examples discussed above show the complexity of making sensible default rules. First, the behavior of both consumer and commercial contracting parties shows that the default contracting rules are the governing rules; only a minority – in some cases a small minority – of those contracting will execute a single document as their contract. For example, an opponent of terms in another's form can almost always defeat them under Section 2-207 by including a "mine and mine only" term in its form. This provision activates Subsection 2-207(2) and so keeps any conflicting or different term in the other party's form from becoming part of the contract.

Second, the current Article 2 default rules favor the person who wishes to keep the default liability rules and to defeat any attempt to contract out of those liability rules.

Third, it is probably impossible to make neutral contracting default rules. Contracting default rules inevitably favor the person trying to defeat the offered terms or the one who is offering those terms. The mirror image rule enables a determined party to get all of its terms by sending the last document before the other's performance. Section 2-207 defeats such attempts.

Section 2-207 so favors the typical buyer. The buyer enjoys Article 2's generous liability and remedy default provisions. And Section 2-207 gives him an easy veto of the seller's effort to escape the default liability and remedy rules. Changing the liability rules (no consequentials, no damages against a seller that offers to repair or replace, arbitration as a default) would be as unsatisfactory to buyers as the current law is to sellers. In that regime, the seller could stymie the buyer's attempts to contract out by use of forms that added remedies and more favorable forums.

A Solomonic division (giving the contracting rules to the seller and the liability and remedy rules to the buyer) has little to commend it, but sellers would certainly welcome such a change.

A better answer is to examine the liability and remedy default rules more carefully than they have been examined since Article 2 was first drafted. If a negotiated and executed single document contract is the rare exception because the transaction costs of such a negotiation are too high for all but the most unusual commercial sales contract and we retain a rule of contracting default like Section 2-207 that disfavors contracting out, it means that the liability and remedy default rules of Article 2 will not be the default rules- they will be the governing rules. If that is so, they should be efficient, and fair, for our bargains will not rescue us from them.

To my knowledge, the drafters of the revision of Article 2 never in their eleven years of labor (1991-2002) truly considered the possibility of removing consequential damages from the buyer's default armory. Nor did they give any thought that I know of to more radical ideas such as making repair or replacement the basic remedy or making arbitration the default forum. I was the ghostwriter of a paper presented to the article 2 drafting committee in the early 1990's, and written on behalf of GE, that argued for making consequential damages available only if the contract so provided. The paper barely got its head

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above water.

It is possible that the current remedies and liability rules in Article 2 are not efficient. A commercial buyer may have greater control over the incidence of consequential damages than his seller does. That buyer can often minimize his own loss by a quick cover or an early return to the seller. I suspect that the shrinking shadow of *Hadley v. Baxendale* protects ever fewer sellers from consequential damages. Of course, both parties (but not the class action lawyers) might be served by arbitration. The prevalence of a “repair or replace” term suggests that it might be the most efficient outcome in many transactions – even where the buyer may wish to preserve its power to behave strategically by suing. Article 4A, where consequential damages are barred unless the contract calls for them, is a precedent for reconsideration of such remedies.

The uneasy relation between the Gateway cases and the Section 2-207 cases should tell us to reconsider not only the contracting default rules but also the default rules on liability and remedies. Even though the result in the Gateway cases can be justified on grounds of efficiency and fairness, their presence is an affront to Section 2-207. But a careful consideration of the practical operation of Section 2-207 shows that it has raised up the liability and remedy default rules of Article 2 to the true rules, the applicable rules, more than default rules. As such, they should be critically examined. After all, if the Gateway cases are right in life if not in law, then the law should be changed.