

A SHIELD AGAINST ARBITRATION: U.C.C. SECTION 2-207'S ROLE
IN THE ENFORCEABILITY OF ARBITRATION AGREEMENTS
INCLUDED WITH DELIVERY OF PRODUCTS

I. INTRODUCTION

Consumers Rich and Enza Hill telephoned Gateway 2000, Inc. to order a computer. The parties discussed hardware and software configurations and options, price and billing information, and where to ship the computer. Once the order was completed, Gateway's purchasing department sent the details of the Hills' order to its shipping department. The shipping department then selected the proper machine, packaged it, stamped a mailing address on the box, and shipped it to the Hills in consideration for the Hills' payment arrangement.

A few days later, when the Hills opened the box to their new Gateway computer system, they risked waiving their right to a jury trial, replacing it with mandatory and binding arbitration. Enclosed in the box was a clause requiring the Hills to arbitrate any dispute once they had kept the computer for more than thirty days. According to the Seventh Circuit in *Hill v. Gateway 2000, Inc.*,¹ because the computer box contained a "Standard Terms and Conditions Agreement" that included an arbitration clause, the Hills waived their right to a trial on any issues that might arise after they failed to return the computer within thirty days of receiving it.²

The key argument rejected by the Seventh Circuit was that the contract between the parties was formed upon the conversation between the two parties.³ Instead, the court concluded that the additional term of arbitration was part of the parties' agreement because the Hills had an opportunity to return the computer after reading the "[t]erms."⁴ These "terms" forced arbitra-

1. 105 F.3d 1147 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997).

2. *Gateway*, 105 F.3d at 1150.

3. *Id.* at 1148-49.

4. *Id.* at 1148.

tion when the Hills kept the computer for more than thirty days.⁵ In the eyes of the court, the contract was not formed when the Hills purchased the computer over the phone, and Gateway packaged and sent the computer.⁶ Instead, it was formed thirty days after the computer was delivered.⁷

The outcome in *Gateway* is not without faults. This Article will examine that outcome alongside a potential solution embodied in Uniform Commercial Code ("U.C.C.") section 2-207 ("section 2-207" or "2-207").⁸ In a nutshell, applying 2-207 provides that if a contract were actually formed—as other cases have held—during the telephone order, then any additional terms thereafter (such as the arbitration clause in *Gateway*) would merely constitute proposals for modification.⁹ Even if a court sides with *Gateway* and determines that 2-207 is inapplicable, a court should consider further whether a customer assented to the arbitration clause.

II. *HILL V. GATEWAY 2000, INC.*: THE CONTRACT WAS DORMANT UNTIL THE CONSUMER KEPT THE PRODUCT BEYOND THIRTY DAYS

In *Gateway*, the Hills ordered a computer and kept it for more than thirty days before complaining to Gateway about the computer's performance.¹⁰ The Hills filed suit, alleging that the problems with the product made Gateway a racketeer, leading to treble damages under the Racketeer Influenced and Corrupt Organization Act ("RICO") for the consumers and a class of all other purchasers.¹¹ The Seventh Circuit, in a succinct opinion written by Judge Easterbrook, reversed the trial court, finding that the arbitration clause in the product shipment must be enforced.¹²

5. *Id.*

6. *Id.* at 1150.

7. *Gateway*, 105 F.3d at 1150.

8. U.C.C. § 2-207 (1995).

9. *See, e.g., Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

10. *Gateway*, 105 F.3d at 1148.

11. *Id.*

12. *Id.* at 1151.

The court first discounted the Hills' argument "that the arbitration clause did not stand out."¹³ The Hills conceded noticing the statement of terms but denied "reading it closely enough to discover the agreement to arbitrate."¹⁴ The Supreme Court, however, has held that any requirement that an arbitration agreement be prominent is inconsistent with the Federal Arbitration Act ("FAA").¹⁵ The Seventh Circuit stated: "A contract need not be read to be effective; people who accept [it] take the risk that the unread terms may in retrospect prove unwelcome."¹⁶ It noted that the "[t]erms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced."¹⁷

As the court continued its examination of the arbitration agreement, it relied heavily upon *ProCD, Inc. v. Zeidenberg*.¹⁸ The dispute in *ProCD* was addressed in the context of the U.C.C.¹⁹ The parties in *Gateway* cited no "atypical doctrines"

13. *Id.* at 1148.

14. *Id.*

15. *Gateway*, 105 F.3d at 1148 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)). Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). *Doctor's Associates* involved a Montana statute that required: "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration." MONT. CODE. ANN. § 27-5-114(4) (1995). The Montana Supreme Court held that such a requirement was not preempted by the FAA, as the notice requirement did not undermine the goals of that Act. *Casarotto v. Lombardi*, 886 P.2d 931, 938 (Mont. 1994). The U.S. Supreme Court reversed the Montana Supreme Court's holding. *Doctor's Assocs.*, 517 U.S. at 686. The Court noted that section 2 of the FAA permits state law to invalidate arbitration agreements "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 686-87 (emphasis added) (quoting *Perry v. Thomas*, 482 U.S. 483, 493 & n.9 (1987)). "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.* at 687 (emphasis added) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

16. *Gateway*, 105 F.3d at 1148 (citing *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 547 (7th Cir. 1996); *Chicago Pac. Corp. v. Canada Life Assurance Co.*, 850 F.2d 334 (7th Cir. 1988)).

17. *Gateway*, 105 F.3d at 1148.

18. 86 F.3d 1447 (7th Cir. 1996).

19. *ProCD*, 86 F.3d at 1450 ("Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed

between Illinois and South Dakota law that might be pertinent, leading the *Gateway* court to conclude that *ProCD* and its analysis of pertinent U.C.C. sections applied to the present dispute.²⁰

ProCD held that terms inside a box of software bind consumers who use the software after having had an opportunity to read the terms and reject them by returning the product.²¹

ProCD, the plaintiff, "compiled information from more than [3000] telephone directories into a computer database."²² It sold a version of this database on CD-ROM disks.²³ The company marketed both a commercial version (for use by businesses in sales) and a non-commercial version (a less expensive version for home personal use).²⁴ Inside every box containing *ProCD*'s consumer product was a "shrinkwrap license."²⁵ The license was encoded on the CD-ROM disks as well as printed in the manual, and it appeared on the user's screen every time the software was run, noting that the use of the program and the directory listings is limited to non-commercial purposes.²⁶

Matthew Zeidenberg bought a consumer package of *ProCD*'s product from a retail outlet and "decided to ignore the license."²⁷ He acted in contravention of the license when he formed a corporation to resell the database on the Internet for less than what *ProCD* charged its commercial customers.²⁸

The *Gateway* court, in a review of *ProCD*, noted that the district court in *ProCD* concluded that "the contract is formed when the consumer pays for the software; as a result . . . only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count."²⁹ The *Gateway* court commented that "[a]lthough this is one way a contract can be formed, it is not the only way."³⁰ Quoting

by the common law of contracts and the Uniform Commercial Code.").

20. *Gateway*, 105 F.3d at 1149.

21. *ProCD*, 86 F.3d at 1449, 1452-53.

22. *Id.* at 1449.

23. *Id.*

24. *Id.*

25. *Id.*

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

27. *Id.*

28. *Id.*

29. *Gateway*, 105 F.3d at 1148.

30. *Id.* at 1148-49.

ProCD's "vendor" analysis, the court said, "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance."³¹

ProCD based its "vendor . . . master of the offer" reasoning on U.C.C. section 2-204(1), after finding that U.C.C. 2-207 was irrelevant because there was only one form.³² U.C.C. 2-204(1) states: "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."³³ *ProCD* concluded:

A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. *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. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. *ProCD* proposed such a different way, and without protest Zeidenberg agreed.³⁴

The *Gateway* court found U.C.C. 2-204(1) and the reasoning of *ProCD* applicable.³⁵ The court noted that "Gateway shipped computers with the same sort of accept-or-return offer *ProCD* made to users of its software."³⁶ Thus, the vendor proposed limitations on the kind of conduct that invited acceptance, and the

31. *Id.* at 1149 (quoting *ProCD*, 86 F.3d at 1452).

32. *ProCD*, 86 F.3d at 1452. *ProCD* explained that because Wisconsin's version of the U.C.C. does not differ from the Official Version in any material respect, the regular numbering system would be used in its opinion. *Id.* Thus, the numbering system of the Official Version will be used when this Article discusses *ProCD* and *Gateway*. *ProCD* reviewed *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991), as "a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails" and noted that U.C.C. 2-207 is irrelevant, as "[o]ur case has only one form." *ProCD*, 86 F.3d at 1452.

33. U.C.C. § 2-204(1) (1995).

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

35. *Gateway*, 105 F.3d at 1149-50.

36. *Id.* at 1149.

Hills agreed to the terms through their conduct.

The court declined to limit the *ProCD* holding to software.³⁷ The court determined that the *ProCD* holding "is about the law of contract, not the law of software."³⁸ The court noted that practically, vendors should be allowed to enclose the full legal terms with their products.³⁹ The court reasoned that if cashiers were required to read a lengthy legal document to consumers, "the droning voice would anesthetize rather than enlighten many potential buyers," and "[o]thers would hang up in a rage over the waste of their time."⁴⁰

The court found that the performance of the parties was not complete when the Gateway box arrived at the Hills' door.⁴¹ It noted that Gateway had not yet completed its performance with delivery, drawing upon the fact that the Hills relied upon the warranty included in the box, and "[the Hills] are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box."⁴²

Finally, the court held that the Hills had knowledge that the Gateway box would contain additional terms.⁴³ The court

37. *Id.* When referring to the Hills' request to limit the *ProCD* holding, the court asked, "where's the sense in that?" *Id.* The court also rejected the Hills' argument that *ProCD* shouldn't apply because *ProCD* dealt with merchants. *Id.* at 1150. The court explained that the plaintiff in *ProCD* purchased the software at a retail store and illegally posted the software database on the Internet, which did not make the plaintiff a software merchant. *Gateway*, 105 F.3d at 1150.

38. *Id.* at 1149.

39. *Id.* The court noted that the Supreme Court enforced a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket. *Id.* at 1148 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)). It can be argued that there is an expectation of such additional terms when one purchases a ticket, whether it be for the cinema or a cruise. However, the argument is more tenuous when extended to purchasers of a computer system over the telephone.

40. *Id.* at 1149.

41. *Gateway*, 105 F.3d at 1149.

42. *Id.* This is an interesting statement. However, it cannot be said that because the Hills relied upon warranties included within the box, Gateway had not already completed its performance with shipment. As any first-year law student learns, a warranty is part and parcel of the product itself. It is understood upon making the contract that certain required warranties will be included; indeed, they were in existence when the parties negotiated over the telephone. See U.C.C. §§ 2-314 & 2-315.

43. *Gateway*, 105 F.3d at 1150. The court said, "[p]erhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to

found that "the Hills knew *before* they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance."⁴⁴

III. THE FEDERAL ARBITRATION ACT—THE STRONG ARM OF THE COMMERCE CLAUSE.

The FAA⁴⁵ was passed in 1925 "to ensure the enforceability of arbitration clauses and codify the procedures through which such clauses would be enforced."⁴⁶ Arbitration is a process that allows parties to "voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal."⁴⁷ "Unlike judicially enforced dispute resolution, arbitration is voluntary and can be imposed only when all parties agree to its use."⁴⁸ Arbitration is counter to public policy in some jurisdictions, and as a result, some states had erected statutory barriers to arbitration.⁴⁹ With the FAA, Congress intended to create a "national policy favoring arbitration and [to withdraw] the power of the states to require a judicial forum for

avoid disagreeable terms, but were dissuaded by the expense of shipping." *Id.* The court, however, found that the Hills knew about the terms *before* they opened the box. *Id.*

44. *Id.* (first emphasis added). In the words of the court:

Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request. . . . Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery.

Id. (citation omitted).

45. 9 U.S.C. §§ 1-16, 201-208 (1994).

46. Traci L. Jones, *State Law of Contract Formation in the Shadow of the Federal Arbitration Act*, 46 DUKE L.J. 651 (1996).

47. *Id.* at 654 (quoting MARTIN DOMKE, 1 DOMKE ON COMMERCIAL ARBITRATION § 1:01 (1996)).

48. *Id.*

49. See, e.g., ALA. CODE § 8-1-41(3) (1993) (refusing to specifically enforce an agreement to submit a controversy to arbitration).

the resolution of claims which the contracting parties [had] agreed to resolve by arbitration."⁵⁰

Despite a policy favoring broad application of the FAA, not until relatively recently has the Supreme Court insisted upon and clearly defined the FAA's application to the states. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁵¹ the Court found that the FAA was an appropriate extension of Congress' power under the Commerce Clause.⁵² The Court next concluded that the FAA indeed applies to state as well as federal courts in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁵³ In *Moses H. Cone*, the Court developed the principal that the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate."⁵⁴ Additionally, the Court found that the FAA applied not just to the federal courts, but to state courts as well.⁵⁵ The Supreme Court reiterated its general principle that arbitration agreements are enforceable in both state and federal courts in *Southland Corp. v. Keating*.⁵⁶ In *Southland*, the Supreme Court held that section 2 of the FAA (mandatory enforcement) was applicable in both state and federal courts.⁵⁷ Additionally, *Southland* foreclosed any state legislative attempt to undermine the enforceability of arbitration agreements.⁵⁸

Recall that in *Prima Paint*, the Court explained that the FAA was an appropriate extension of Congress' Commerce Clause powers.⁵⁹ Later, in *Allied-Bruce Terminix Cos. v. Dobson*,⁶⁰ the Court questioned what Congress meant by the

50. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

51. 388 U.S. 395 (1967).

52. *Prima Paint*, 388 U.S. at 405 (citing H.R. REP. NO. 68-96, at 1 (1924); S. REP. NO. 68-536, at 3 (1924)).

53. 460 U.S. 1 (1983).

54. *Moses H. Cone*, 460 U.S. at 25 n.32.

55. *Id.* at 26 n.34 ("Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court.").

56. 465 U.S. 1 (1984).

57. *Southland*, 465 U.S. at 12.

58. *Id.* at 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

59. See *supra* notes 51-52 and accompanying text.

60. 513 U.S. 265 (1995).

phrase "involving commerce" as used in section 2 of the FAA.⁶¹ The Court studied that section's mandate that "[a] written provision in . . . a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable."⁶² The Court found that the phrase "involving commerce" means "affecting" interstate commerce, which not incidentally is the broadest reach of Congress' Commerce Clause.⁶³ Thus, over the years the Supreme Court has concluded that the FAA applies to the states, and such application is an exercise of the furthest extent of the Commerce Clause.

IV. THE APPLICABILITY OF STATE CONTRACT LAW TO DETERMINE WHETHER A VALID AGREEMENT TO ARBITRATE EXISTS, DESPITE THE FAR-REACHING INFLUENCE OF THE FEDERAL ARBITRATION ACT

While the enforceability of arbitration is federally mandated, determining whether a *valid and recognizable* contract to arbitrate exists is the realm of state contract law.⁶⁴ Indeed, on a number of occasions the Supreme Court has indicated that state law should govern formation and revocation questions.⁶⁵

61. *Allied-Bruce*, 513 U.S. at 272-73 (asking "whether [the] Act used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy").

62. 9 U.S.C. § 2 (1994).

63. *Allied-Bruce*, 513 U.S. at 273-74.

64. *Southland*, 465 U.S. at 10. Section 2 of the FAA provides: "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added).

65. *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (noting that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"); *Allied-Bruce*, 513 U.S. at 281.

[Section] 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (quoting 9 U.S.C. § 2 (1994)); see also *Doctor's Assocs.*, 517 U.S. at 686-87 (con-

For example, in *First Options of Chicago, Inc. v. Kaplan*,⁶⁶ the Court held that the issue of whether a valid agreement to arbitrate was formed should be determined by application of state law.⁶⁷ In *First Options*, the Court noted that “[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”⁶⁸ The appropriate state law “would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.”⁶⁹

It is therefore clear that state contract law governs whether a valid agreement to arbitrate exists, and thus the party seeking to avoid arbitration may call upon applicable state contract law principles.⁷⁰ In such a case, a consumer may argue that 2-207 prevents the recognition of an arbitration clause sent along with a product, as the U.C.C. is adopted as state law. It bears noting, however, that there are defined limits which the party seeking to avoid arbitration must observe in seeking to invalidate an arbitration agreement.⁷¹ *Allied-Bruce* cautioned that while states may regulate arbitration provisions under contract law,

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.⁷²

In addition, courts and legislatures may not single out arbitration provisions for treatment distinct from treatment of “regular” contracts.⁷³

cluding that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [section] 2”).

66. 514 U.S. 938 (1995).

67. *First Options*, 514 U.S. at 944.

68. *Id.* at 944. One of the issues was whether the parties agreed beforehand that the arbitrability of the disputed occurrence was to be decided by a court or an arbitrator. *Id.*

69. *Id.*

70. *Id.*

71. See *Allied-Bruce*, 513 U.S. at 281.

72. *Id.*

73. *Doctor’s Assocs.*, 517 U.S. at 687 (noting that section 2 of the FAA prevents

V. WAS THE SEVENTH CIRCUIT CORRECT WHEN IT HELD THAT U.C.C. SECTION 2-207 DOES NOT APPLY?

In *Gateway*, the Seventh Circuit seemed to agree with the *ProCD* court that U.C.C. section 2-207 would not apply to the case at bar because there was "only one form."⁷⁴ *ProCD* deemed U.C.C. section 2-204 the appropriate provision.⁷⁵ However, courts in some states may reach a different conclusion using analogous facts. Other jurisdictions may find that section 2-207 is an appropriate provision to apply in such a setting.

U.C.C. section 2-207 sets out:

(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.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (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.

(3) 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.⁷⁶

Official Comment 1 to section 2-207 provides:

states from "singling out arbitration provisions for suspect status"; arbitration provisions must be placed "upon the same footing as other contracts" (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

74. *ProCD*, 86 F.3d 1447, 1452 (7th Cir. 1996).

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

76. U.C.C. § 2-207 (1977).

This section is intended to deal with two typical situations. The one is the written confirmation, *where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.*⁷⁷

Comment 2 to section 2-207 provides:

a proposed deal in which commercial understanding has in fact closed is recognized as a contract. Therefore any additional matter contained in the confirmation or in the acceptance . . . *must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms.*⁷⁸

Official Comment 2 speaks directly to the issue in *Gateway*. The strength of 2-207 is that once a court finds that a contract was formed at the point of the sale, any additional matters thereafter added are regarded as proposals for changes to the contract.⁷⁹ Recall that the *Gateway* court was unable to close the door on such an argument, conceding that a contract can be formed at the point of the sale.⁸⁰

At the outset, it should be noted that section 2-207's reference to "merchants" will likely make a difference in the consumer context. For example:

The Code assumes that transactions between professionals in a given field requires [sic] special and clear rules which may not apply to a casual or inexperienced seller. Because of the reasonable expectation of business knowledge, the duty owed [by] the merchant is higher than that of the nonmerchant. Thus, the same course of conduct which might establish a contract between merchants might be insufficient to evidence a consumer contract.⁸¹

Therefore, while the U.C.C. may speak at times of specific rules for "merchants," we can assume that those particular rules are

77. *Id.* Official Comment 1 (emphasis added).

78. *Id.* Official Comment 2 (emphasis added).

79. *See id.*

80. *See supra* notes 29-30 and accompanying text.

81. *Preston Farm & Ranch Supply v. Bio-Zyme Enters.*, 625 S.W.2d 295, 299 (Tex. 1981).

applied more strictly against merchants than they would be against consumers.⁸² Section 2-207 contains language pertaining to merchants, but in its entirety the provision applies to both merchants and non-merchants.

Under section 2-207, only a particular set of circumstances, noted in 2-207(2), remove additional terms from a contract between merchants—while a transaction involving a consumer would only regard such additions to the contract as “proposals.” The key language in 2-207(2) is “[t]he additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless. . . .”⁸³ The default rule of 2-207(2), therefore, is that additional terms are proposals for addition. Contracts between merchants are the exception. The import is clear: so far as consumers are involved, additional terms (such as the arbitration clause) sent along with a product after a completed contract are *automatically* considered “proposals for addition” to the contract.⁸⁴ Therefore, a correct application of 2-207 would find that the *Gateway* holding that the arbitration clause was part of the original contract is wrong.

An important element of a 2-207 analysis is finding that Gateway accepted the Hills’ offer for purchase and mailed the computer with additional terms.⁸⁵ Notwithstanding the *Gateway* court’s acceptance of *ProCD*’s “vendor . . . master of the offer” language, the stronger argument is that Gateway accepted the Hills’ offer when Gateway mailed the computer. The Hills phoned Gateway and made an offer on a computer.⁸⁶ Gateway accepted that offer when it charged the Hills’ credit card and shipped the computer.⁸⁷ Section 2-207(1) explains that Gateway accepted the offer, even if it included additional terms with the shipment.⁸⁸ The analysis would then progress to 2-207(2), where we find that the additional terms are merely proposed additions to the contract. The Seventh Circuit, however, insisted

82. *Preston Farm & Ranch Supply*, 625 S.W.2d at 299.

83. U.C.C. § 2-207(2).

84. *Id.* § 2-207(1)-(2).

85. *Id.* § 2-207(1).

86. *Gateway*, 105 F.3d at 1149.

87. *Id.*

88. *See* U.C.C. § 2-207(1).

on a confusing analysis, muddying the waters and in the process refusing to believe that Gateway accepted anything. In the *Gateway* court's eyes, when the Hills called Gateway, they sat silently while Gateway made the offer.⁸⁹ The Hills did not actually accept the offer until a month after receiving their computer.⁹⁰ Until the Hills accepted Gateway's offer thirty days later, there was no contract.⁹¹

The Third Circuit, in *Step-Saver Data Systems, Inc. v. Wyse Technology*,⁹² held that additional documentation with a shipped product was a proposal for modification only.⁹³ In *Step-Saver*, the parties, both merchants, agreed over the telephone to the purchase of software, discussing price, shipping and payment terms.⁹⁴ The seller shipped the product.⁹⁵ However, printed on the package of the software was a "box-top license," which contained additional terms that the parties had not discussed when the order for software was placed.⁹⁶ The "box-top license" contained the statement, "[o]pening this package indicates your acceptance of these terms and conditions. *If you do not agree with them, you should promptly return the package unopened within fifteen days from the date of purchase and your money will be refunded.*"⁹⁷

Obviously, these facts are nearly identical to those found in *Gateway*, except for the fact that both parties in *Step-Saver* are merchants.⁹⁸ As we have seen, the Hills' consumer status works to their direct benefit under 2-207(2).⁹⁹

The *Step-Saver* court found that the parties had formed a

89. See *Gateway*, 105 F.3d at 1148-49.

90. See *id.*

91. See *id.*

92. 939 F.2d 91 (3d Cir. 1991).

93. *Step-Saver*, 939 F.2d at 108.

94. *Id.* at 95-96.

95. *Id.* at 96.

96. *Id.* The "box-top license" contained five terms, including a disclaimer of all express and implied warranties (except that the disks would be free from defects), a provision stating that the sole remedy to the purchaser would be return of a defective disk for replacement, and an integration clause, which provided that the box-top license would provide the final and complete expression of the terms of the parties' agreement. *Id.* at 96-97.

97. *Step-Saver*, 939 F.2d at 97 (emphasis added).

98. See *id.* at 94.

99. See *supra* note 84 and accompanying text.

contract with the initial order over the telephone¹⁰⁰ and discounted any argument that the buyer had expressly agreed to the additional terms.¹⁰¹ The court applied U.C.C. section 2-207, reasoning that "[t]he parties's [sic] performance demonstrates the existence of a contract. The dispute is, therefore, not over the existence of a contract, but the nature of its terms."¹⁰² The seller argued that regardless of how the contract was formed, the buyer was aware of the warranty disclaimer and that the buyer, "by continuing to order and accept that product with knowledge of the disclaimer, assented to the disclaimer."¹⁰³ The court found, however, that the buyer had never *expressly* agreed to the terms of the license, and it found that U.C.C. section 2-207 provides the "appropriate legal rules for determining whether such an intent can be inferred from continuing with the contract after receiving a writing containing additional or different terms."¹⁰⁴

The *Step-Saver* court, referring to 2-207(1), found that the license did not express a conditional acceptance which relied upon the purchaser's assent to the new terms.¹⁰⁵ Indeed, a close reading of 2-207(1) shows that if the license were a conditional acceptance reliant upon the purchaser's assent to the new terms, then there would be no proposal for modification.¹⁰⁶ Instead, the court concluded that the seller did not clearly express its unwillingness to proceed with the transaction unless additional terms were incorporated.¹⁰⁷ The *Step-Saver* court underwent a somewhat convoluted analysis to reach this conclusion. A later court, in *Arizona Retail Systems v. Software Link*,¹⁰⁸ considering a similar situation involving the same seller, bypassed this analysis and concluded that by "agreeing to ship the

100. *Step-Saver*, 939 F.2d at 98.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (citing *Mead Corp. v. McNally Pittsburgh Mfg. Corp.*, 654 F.2d 1197, 1206 (6th Cir. 1981)). The court found that "[i]t is undisputed that [the buyer] never expressly agreed to the terms of the box-top license, either as a final expression of, or a modification to, the parties' agreement." *Step-Saver* 939 F.2d at 98.

105. *Id.* at 103.

106. *See id.*

107. *Id.*

108. 831 F. Supp. 759 (D. Ariz. 1993).

goods . . . or, at the latest, by shipping the goods, [the seller] entered into a contract with [the buyer],"¹⁰⁹ thus leaving no room for 2-207(1) to impart a conditional acceptance. *Step-Saver* concluded that the license should have been treated as a written confirmation containing additional terms and that because the license would materially alter the parties' agreement, the terms would not become part of the agreement.¹¹⁰

Though *Step-Saver* involved two merchants, the foundational law used in arriving at the conclusion that U.C.C. section 2-207 dictated that the "box-top license" was an additional term is applicable in the *Gateway* context. *Gateway* involves similar facts in that the parties made the arrangements for sale over the telephone.¹¹¹ *Step-Saver* labeled this a contract.¹¹² Also important is the court's use of section 2-207 to find that any additional undiscussed terms that arrived with the products were proposals for modification.¹¹³ Section 2-207 could easily be used to produce the same result in *Gateway*. The *Step-Saver* court also disregarded any apparent argument that keeping the product equaled assent to the terms.¹¹⁴ Finally, *Step-Saver* and *Arizona Retail Systems* demonstrate that under the *Gateway* facts, *Gateway* took no action to lead a reasonable person to believe that its acceptance of the Hills' offer to purchase the computer was in any way conditioned upon the Hills' acceptance of the arbitration agreement. Of course the *Gateway* court would argue that *Gateway* accepted nothing. Because the Hills are consumers, subsection (3) of U.C.C. section 2-207 applies, and as such, "the terms of the particular contract consist of those terms upon which the writings of the parties agree, together with any supplementary terms incorporated under any provision of this title."¹¹⁵ In such a case, without clear assent to the new term of arbitration, it is arguable that the arbitration clause is a term upon which the parties did not agree, and as such it is not an

109. *Arizona Retail Sys.*, 831 F. Supp. at 765.

110. *Step-Saver*, 939 F.2d at 106.

111. *Gateway*, 105 F.3d at 1148; *Step-Saver*, 939 F.2d at 95-96.

112. See *Step-Saver*, 939 F.2d at 95.

113. *Id.* at 98.

114. *Id.* at 99.

115. U.C.C. § 2-207(3).

addition to the contract.¹¹⁶ It is unclear after reading *Gateway* if the arbitration clause was part of an integration clause; however, courts have applied U.C.C. 2-207 regardless of such integration clauses.¹¹⁷ Therefore, even if *Gateway* concerned an integration clause shipped with documents in the product box, the presence of the clause may not defeat application of U.C.C. section 2-207.

Step-Saver found that merely keeping the product did not amount to an assent to the "box-top license."¹¹⁸ If a court chose to apply section 2-207, *Gateway* could argue that by keeping the computer, the Hills assented to the proposed new term. The *Gateway* court summarily answered this, with no reference to any supporting authority, announcing that "[b]y keeping the computer beyond 30 days, the Hills accepted *Gateway's* offer, including the arbitration clause."¹¹⁹ However, the law is anything but clear on the issue of assent, and therefore the issue of assent is not necessarily fatal to the Hills' action.

In *Coastal Industries v. Automatic Steam Products*,¹²⁰ the Fifth Circuit applied U.C.C. section 2-207 to a situation involving a telephone order followed by a delivery which contained additional terms.¹²¹ A key question in *Coastal* was whether keeping a product equaled assent to new terms. *Coastal Industries* ("Coastal") ordered four commercial steam pressing machines from Automatic Steam Products Corporation ("Automatic").¹²² Both parties agreed that arbitration was never discussed during negotiations or at the time of the telephoned oral purchase order.¹²³ One month later, Coastal received an invoice from Automatic which it paid in full.¹²⁴ Two months after the purchase order, the machines were delivered and put into opera-

116. *Step-Saver*, 939 F.2d at 102 n.36.

117. *Id.* at 106 n.51 (citing *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926 (9th Cir. 1979)).

118. *Id.* at 98.

119. *Gateway*, 105 F.3d at 1150.

120. 654 F.2d 375 (5th Cir. 1981).

121. *Coastal*, 654 F.2d at 377-78.

122. *Id.* at 376.

123. *Id.* Depositions indicated that no terms of sale other than "price, payment and delivery were addressed prior to the order." *Id.* at 376-77.

124. *Id.* at 377.

tion.¹²⁵ Soon after, Coastal determined that the machines supplied by Automatic failed to meet its requirements.¹²⁶ Automatic contended that Coastal's warranty claims were subject to arbitration.¹²⁷ Automatic had included an arbitration clause on the reverse side of the invoice which it had sent Coastal.¹²⁸ Included among the terms was a stated presumption that the buyer would assent to the terms in a number of ways, including "express acknowledgment, acceptance of delivery of the goods, or retention of the invoice without disavowal for five days after its receipt."¹²⁹ "The district court found that the invoice terms embodied the sales contract because Coastal accepted delivery of the goods, retained the invoice for more than five days after receiving it, and paid the invoice in full according to its tenor, thereby assenting to Automatic's invoice provisions."¹³⁰

The Fifth Circuit disagreed with the district court's understanding of the contract.¹³¹ As an initial matter, the parties could not agree whether the contract was formed upon the telephone order or whether the invoice constituted the contract.¹³² The court determined that the exact moment that the contract arose was immaterial, stating "[w]e need not decide the precise point at which the contract arose, however, because in any case the effect of an additional term is the same under [U.C.C.] Section 2-207."¹³³ The court determined that because both parties were merchants, U.C.C. section 2-207(2) was the applicable section.¹³⁴ The court went on to reason that under New York law, a proposal for modification represented a material alteration and, as such, required express assent.¹³⁵ The court noted

125. *Coastal*, 654 F.2d at 377.

126. *Id.*

127. *Id.*

128. *Id.* On the bottom of the invoice was the statement, "[t]his invoice constitutes the entire contract between the seller and the buyer. For terms see reverse side." *Id.*

129. *Coastal*, 654 F.2d at 377.

130. *Id.*

131. *Id.* at 378 n.4.

132. *Id.* at 378.

133. *Id.* at 378 n.4.

134. *Coastal*, 654 F.2d at 378 ("Within [U.C.C. section 2-207] are two sets of rules governing the operation of an acceptance containing additional terms, one which applies when both parties are merchants and another to be employed when one or both of the parties are nonmerchants.").

135. *Id.* at 378-79 (citing *Marlene Indust. Corp. v. Carnac Textiles, Inc.*, 380

that “[b]y requiring evidence of an express agreement before permitting the inclusion of an arbitration provision into the contract, a court protects the litigant who will be unwillingly deprived of a judicial forum in which to air his grievance or defense.”¹³⁶ More importantly, the court concluded that Coastal had not made an express assent to the new term:

Indeed, Coastal simply retained and used the goods without comment, until it was apparent that the machines would not properly perform their functions. Coastal’s acceptance of the arbitration term was inferred by the court, though, from Coastal’s retention of the invoices and receipt of the machines, conduct which was specified by the invoice as a method of acceptance of the contract as a whole. We do not find Coastal’s conduct to be express acceptance of the arbitration clause.¹³⁷

Again, the facts of *Coastal* are somewhat different than the facts in *Gateway*, but important elements of law can be drawn from the decision in *Coastal*. Probably most important is the notion of assent, brought out in the context of U.C.C. section 2-207(2). While section 2-207(2) sets out rules for merchants, the “assent rule” is arguably useful for a consumer seeking to avoid arbitration under U.C.C. section 2-207(3). According to section 2-207(3), “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.*”¹³⁸ The “under any other provisions of this Act” language would likely lead to “assent” by “conduct” under U.C.C. section 2-204(1), which notes that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”¹³⁹ Indeed, *Gateway* utilized this reasoning in binding the Hills to the arbitration agreement.¹⁴⁰ We have

N.E.2d 239, 241-42 (N.Y. App. Div. 1978)).

136. *Id.* at 379.

137. *Id.* The court further noted that “[r]etention of the invoice or acceptance of the goods is not performance presupposing awareness of the arbitration clause, even though such action may be specified as a means of consenting to the contract as a whole.” *Id.* at 380.

138. U.C.C. § 2-207(3) (1995) (emphasis added).

139. *Id.* § 2-204(1).

140. See discussion *supra* note 30.

seen, however, that the rule of the U.C.C. is looser, or more favorable to consumers.¹⁴¹ Indeed, because the U.C.C. may be more strict with regard to merchant contracts, we can feel comfortable that because *Coastal* did not find assent, the facts in *Gateway* certainly would not require finding assent. In *Coastal*, the court rejected the district court's inference that receipt and use of the goods constituted assent to the arbitration clause.¹⁴² The Hills' behavior was the same—they received the computer from Gateway and used it for thirty days. How then, when the U.C.C. is understood to require a higher duty among merchants, could the same behavior by the Hills constitute acceptance of the additional proposals?

As an additional note, nothing in requiring assent to arbitration clauses runs counter to the Supreme Court's cautionary statements in *Doctor's Associates* or *Allied-Bruce*.¹⁴³ The arbitration provision in *Gateway* was not singled out for individual treatment; indeed, the U.C.C. is a generally applicable statute.

VI. IN A JURISDICTION THAT DOES NOT APPLY U.C.C. SECTION 2-207, DOES THE CONSUMER AUTOMATICALLY LOSE?

The *Gateway* court refused to apply section 2-207; instead, it relied upon its "vendor . . . master of the offer" reasoning.¹⁴⁴ However, even declining to use section 2-207, the Hills still have an argument that arbitration was not part of their agreement with Gateway.

In jurisdictions that have declined to apply U.C.C. section 2-207, the final inquiry is essentially the same—did the parties agree that arbitration was part of their contract? The Texas Supreme Court declined to apply section 2-207 in *Tubelite v. Risica & Sons, Inc.*,¹⁴⁵ noting that "section [2-207], commonly referred to as the 'battle of the forms' . . . applies only to contract formation."¹⁴⁶ In *Tubelite*, Risica, a subcontractor, received a price quotation from Tubelite for materials for a con-

141. See discussion *supra* note 76.

142. *Coastal*, 654 F.2d at 377, 379.

143. See *supra* notes 72-73 and accompanying text.

144. *Gateway*, 105 F.3d at 1149.

145. 819 S.W.2d. 801 (Tex. 1991).

146. *Tubelite*, 819 S.W.2d at 803 (citation omitted).

struction bid.¹⁴⁷ The bid made no mention of credit terms for late payment and expressly limited acceptance to the terms of the quotation.¹⁴⁸ Risica accepted the bid and sent a written notice to Tubelite asking that work begin on shop drawings for the materials.¹⁴⁹ Later, Tubelite sent an acknowledgment to Risica, stating "[a]cceptance hereof is expressly limited to acceptance of the terms and conditions appearing on the front and reverse side hereof."¹⁵⁰ The reverse side of the acknowledgment contained terms of interest for late payments.¹⁵¹ With each shipment, Tubelite sent an invoice containing a notation concerning the interest charges.¹⁵² However, Tubelite did not begin charging interest until almost one year later.¹⁵³ The subcontractor never objected to the interest provision, but it also never paid any assessed late charges.¹⁵⁴ Tubelite later filed suit, seeking to recover the outstanding principal balance and the interest.¹⁵⁵ The court held that Risica was not liable for any of the calculated interest charges.¹⁵⁶ The *Tubelite* court found that the contract between the parties "was formed at the time [the subcontractor] accepted Tubelite's offer and consisted only of those terms contained in [the original quotation]."¹⁵⁷ The court declined to apply U.C.C. section 2-207, reasoning that section 2-207 applies only when the acceptance contains different or additional terms.¹⁵⁸ The court rejected the argument that the "post contract formation conduct" of the parties gave rise to an implied agreement to pay interest.¹⁵⁹ The court found that the parties had not demonstrated a "mutual intention to contract,"¹⁶⁰ stating:

147. *Id.* at 802.

148. *Id.*

149. *Id.*

150. *Id.* (alteration in original).

151. *Tubelite*, 819 S.W.2d at 802.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Tubelite*, 819 S.W.2d at 803.

157. *Id.*

158. *Id.* at 803-04.

159. *Id.* at 804.

160. *Id.* (quoting *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enters.*, 625 S.W.2d 295, 298 (Tex. 1981) (citation omitted)).

Aquiescence to the contract by the party to be charged may be implied from his affirmative actions, such as when he continues to order and accept goods with the knowledge that a service charge is being imposed and pays the charge without timely obligation.¹⁶¹

The court concluded that Risica's failure to formally object to the unilateral addition of the late charge would not support a finding of implied modification of the existing contract.¹⁶²

In Texas, once a court determines that a contract has been formed, there is no place for the application of U.C.C. section 2-207.¹⁶³ The question then becomes whether the post-proposal conduct of the parties led to an implied acceptance of the new or additional term.¹⁶⁴ "Texas law recognizes an implied contract in which the parties form a contract based upon their acts and conduct."¹⁶⁵ It appears that an affirmative act on the part of the buyer is a determinative factor in finding an implied agreement to the proposed modifications. In *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*,¹⁶⁶ the Texas Supreme Court noted that merely sending invoices containing an interest charge was not evidence, standing alone, that an agreement to pay interest had been reached by the parties.¹⁶⁷ Furthermore, the party's failure to object to the unilateral interest charge was not sufficient to show acquiescence to the term.¹⁶⁸ As in *Triton Oil*, the *Tubelite* court held that the failure of the party to timely object to the unilateral charging of interest, *without some other affirmative act on its part*, is not sufficient to show acquiescence to the charge.¹⁶⁹

It appears, therefore, that if a court decides not to apply

161. *Tubelite*, 819 S.W.2d at 805 (citing *Preston Farm & Ranch Supply, Inc.*, 625 S.W.2d at 298).

162. *Id.*

163. *Id.* at 803.

164. *Id.* at 804.

165. *Hondo Oil & Gas Co. v. Texas Crude Operator, Inc.*, 970 F.2d 1433, 1437 (5th Cir. 1992) (citations omitted).

166. 644 S.W.2d 443 (Tex. 1982).

167. *Triton Oil*, 644 S.W.2d at 445-46.

168. *Id.*

169. *Tubelite*, 819 S.W.2d at 805; see also *Amarillo Equity Investors, Inc. v. Craycroft Lacy Partners*, 654 S.W.2d 28, 30-31 (Tex. Ct. App. 1983, no writ) (holding that mere silence is not evidence of an implied agreement).

U.C.C. section 2-207, the party seeking to avoid arbitration needs to be prepared to demonstrate that its failure to object to the added arbitration clause is not equivalent to accepting the arbitration clause. *Tubelite* declined to apply 2-207, but it declined for the "right" reasons, finding that the contract had been formed at the time of the order.¹⁷⁰ Therefore, *Gateway's* refusal to apply 2-207 need not spell the end for the Hills. As *Tubelite* and *Triton Oil* both point out, there is another analysis even upon refusal to apply 2-207: Did the Hills actually assent to the new terms? The position of consumers is bolstered by the findings of these cases that a mere failure to object does not necessarily support a finding of assent to the additional terms (the arbitration provision).

In any event, it seems clear that the party seeking to compel arbitration has the burden of showing that the consumer agreed to arbitrate. Both federal law and state contract principles demonstrate that the proponent of any clause that effects a waiver of the other party's constitutional rights has the burden of proving both the existence of a valid agreement and that there was a knowing, intelligent and voluntary waiver.¹⁷¹

VII. CONCLUSION

Gateway declined to apply section 2-207. However, as we have seen, a different court might in fact apply 2-207 to the very same facts. Indeed, a number of courts find that a contract exists upon the ordering and delivery of a product, and then they proceed to analyze the case under 2-207 to determine if additional provisions are merely proposals for modification to the already existing contract. Under this perspective, a manufacturer might have a stricter burden in showing that the consumer somehow acquiesced to the additional terms.

But this is not the end of the story. Even those courts that refuse to apply 2-207 still embark on a detailed inquiry of whether the purchaser accepted the additional terms. In effect, these decisions work much like those that apply 2-207, for if it is determined that the purchaser did not agree to the terms either

170. *Tubelite*, 819 S.W.2d at 803.

171. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972).

expressly or by conduct, the additional terms are removed from consideration. Indeed, decisions where the purchaser did not assent to the additional terms are factually quite similar to *Gateway*.

Gateway, however, refused to apply 2-207 and instead concluded that the Hills accepted *Gateway*'s offer by keeping the computer for thirty days. The finding that *Gateway* in fact made an offer is unique and quite simply goes against a number of courts that find the contract formed when the product was actually purchased. This reasoning is then stretched to explain that there was not a contract in effect until the Hills kept the computer for thirty days. Certainly the Hills and most other consumers would feel that a contract is made when they telephone a company and place an order for a product, not thirty days after receiving the product in the mail. *Gateway* also dismissed the Hills' argument that *ProCD* should only apply to merchants; the reasonableness of that decision is beyond the scope of this Article. However, hidden between the lines of that pronouncement is a message that consumers do not deserve protection by the courts. As we have seen, the U.C.C. is more lenient toward consumers, but *Gateway* ignores this distinction between merchants and consumers. The *Gateway* decision effectively results in additional force for contracts of adhesion—which *Gateway* certainly involved. Judge Easterbrook reasoned that the consumer knew that the shipping box would contain additional terms. Therefore, each consumer now shares the burden of hunting for such additional terms before making a "purchase." The corporation has no burden to make the consumer aware of additional terms. This is clearly a disadvantage and a danger to consumers.

Arbitration, for all of its positives and negatives, equates quite simply to loss of a plaintiff's important and traditional judicial forum. The danger comes out of the understanding that a great number of plaintiffs might not be sophisticated enough to realize in advance that such an arbitration clause might be lurking inside of their product box. The Seventh Circuit complained that to require the company to explain additional terms over the phone would bore the listener. But is it not much less of a burden for a corporation to explain additional terms ahead of time than for each consumer to hunt and investigate exactly

what he or she may be getting into before making a mail-order purchase? In fact, the Seventh Circuit might be surprised by how many bored consumers would become quite attentive upon learning that their purchase would be delivered with an arbitration clause.

Mark Andrew Cerny

