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ROLLING CONTRACTS

Robert A. Hillman

INTRODUCTION

It is a great honor for me to participate in this symposium on the occasion of Professor Joseph Perillo's retirement. Joe has been a leader in the field of contracts for almost forty years, and I have benefited greatly from reading his influential articles and books and listening to his presentations at conferences. Having written a leading treatise on contracts, Joe has made it easy for participants in this symposium to pick a topic related to Joe's work. In short, he has written insightfully about virtually every aspect of contract law, including standard-form contracts, a subject I address in this paper. Specifically, this essay discusses how contract law should treat the problem of what some have called rolling contracts—contracts where purchasers, often consumers (on whom I shall focus here), see the terms after paying for goods.

Despite lots of notoriety and spilled ink over the general issue of standard-form contracts, contract law has responded effectively to the problem by following Karl Llewellyn's conception to enforce bargained-for terms and conscionable boilerplate provisions, while barring egregious terms. The foundation for this approach is the widely accepted fact that, for a number of reasons, consumers typically do not read their standard forms. Instead, consumers give their "blanket assent" to conscionable standard terms.

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2. See infra notes 10-50 and accompanying text.
3. See infra notes 13-18 and accompanying text.
4. See infra notes 30-50 and accompanying text.
The issue of "rolling contracts" involves one method of presenting standard forms to consumers. In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time. Rolling contracts therefore involve the following contentious issue: Are terms that arrive after payment and shipment, such as an arbitration clause, enforceable?

Theorists and judges generally have analyzed this problem by determining when the contract is formed. Most reason that the contract is formed either when the consumer orders and pays for the goods and the seller ships them, or when, after delivery, the prescribed "accept or return" time expires. If the former, the new terms that arrive after formation of the contract are proposals for additions to the contract that do not become part of the contract. If the latter, the new terms become part of the contract because the consumer has had the opportunity to read the terms before formation of the contract.

Although courts and commentators focus on the time of contract formation, this analysis actually yields little fruit. First, the formation analysis is supposed to depend on when the parties intended to form their contract, but few parties think about this technical question, so the issue has little real-world relevance. Second, even if the time of contract formation is accessible, it does not tell us very much. Assuming contract formation occurs at the time of payment and shipment, the postponed terms could still become part of the contract, for example, if the consumer agreed, at this time, to delegate the duty of providing reasonable terms to the seller. The terms could also become part of the contract if the consumer, after having an opportunity to read the terms, accepted them as a contract modification agreement. Assuming contract formation occurs after


6. These are essentially the facts of Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997).

7. "It appears that at least in part, the cases turn on whether the court finds that the parties formed their contract before or after the vendor communicated its terms to the purchaser." Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1338 (D. Kan. 2000); see also Sajida A. Mahdi, Comment: Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods, 96 Nw. U. L. Rev. 403, 404 (2001).

8. See infra notes 51-60 and accompanying text.
the time for return has expired, courts could still bar the terms, for example, based on the theory that the consumer never expressly agreed to them.

Notwithstanding the confusion, I will argue that rolling contracts should not be a difficult issue. Let's go back to Llewellyn's view that people fail to read their form contracts and that bargained-for terms and conscionable terms should constitute the contract. This approach should be employed to resolve the problem of rolling contracts because people do not read the terms of these contracts either. In fact, it is rather curious why analysts believe so much should turn on the question of whether the seller makes the terms available before or after contract formation when these writers also believe that consumers do not read their standard forms either way. Instead of focusing on when the terms are available, the question should be whether the terms are conscionable.

Part I of this article argues that contract law correctly has adopted Llewellyn's conception of standard-form contracting. Part I explains more fully the current legal approach to rolling contracts and the confusion created by focusing on the issue of when contract formation occurs. Part II also argues that Llewellyn's approach resolves the problem of rolling contracts. Because people do not read the terms of rolling contracts, these terms should be treated exactly like any other standard terms. This approach affirms the benefits of rolling contracts for both parties and curbs potential excesses resulting from the consumer's failure to read standard forms.

Because the debate about whether rolling-contract terms should be enforceable focuses in large measure on consumer perceptions and practices—Do they read the boilerplate? Do they expect to be legally bound to it? When do they believe a contract is formed?—I decided, in a modest way, to investigate consumer understanding. I presented my first-year contracts class of 102 students with a questionnaire containing nine questions. My students filled out the questionnaire on their first day of law school, in short, while they were still more like consumers than lawyers. The full questionnaire appears in the appendix. I discuss results, as applicable, in the footnotes.

I. THE LEGAL TREATMENT OF STANDARD-FORM CONTRACTS

Needless to say, most of our transactions involve standard forms. The nature of standard-form contracting should be familiar to anyone

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9. For a discussion of whether consumers should be protected in rolling contracts situations because the goods are in their hands and "inertia" is on the side of sellers, see infra notes 80-82 and accompanying text.

10. See W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971) [hereinafter Slawson, Democratic Control] (asserting that likely 99% of all contracts consist of standard forms).
whose head is not buried in the sand. An agent of the seller presents a pre-printed form to the consumer that includes a few blanks for the parties to fill in. The seller is familiar with the form, having spent lots of time and money using and rewriting it. On the other hand, the consumer is not very interested in the seller's form. Typically the consumer does not have much time to study the form, nor the resources to shop for terms, a search that would usually prove fruitless anyway. In addition, the consumer could not understand most of the language even if she did read the form. The consumer also believes correctly that the seller's agent is not going to bargain over the boilerplate. Moreover, the consumer assumes nothing will go wrong with the product but, should it be defective, the seller will remedy the problem. Finally, the consumer expects the law to protect her from


15. E. Allan Farnsworth, Contracts 296 (3d ed. 1999) (“Sometimes basic terms relating to quality, quantity, and price are negotiable. But the boilerplate—the standard terms printed on the form—is not subject to bargain. It must simply be adhered to if the transaction is to go forward.” (citation omitted)).

16. See Rakoff, supra note 11, at 1221. As a general matter, 98 out of 103 students (95%) “expect[ed] the seller to stand behind its product if something goes wrong.” Infra Appendix, survey question 5. However, only 39 out of 103 students (38%) “expect[ed] the seller to stand behind its product even if the terms say the seller will not be responsible.” Infra Appendix, survey question 6.
egregious terms. In short, the seller presents a form largely incomprehensible to the consumer on a take-it-or-leave-it basis, and the consumer has good reason not to read the form.

Standard-form exchanges obviously do not constitute the paradigm "bargain" of classical contract law with the parties on equal footing and each term separately negotiated. Yet standard forms benefit both sellers and consumers. By using the form for each transaction, sellers standardize risks and reduce bargaining costs. Moreover, sellers avoid costly litigation by crafting their form to accommodate various judicial interpretations. Sellers likely pass along some of these savings to consumers in the form of lower prices. Moreover, sellers can best determine the "particular set of terms that 'fits' the practical problems and needs that arise ... in carrying out the transactions," and therefore, produce the most efficient allocation of risks for both parties. Consumers also benefit from judicial decisions that weed out offensive clauses. In fact, because of the efficiencies and benefits of standard forms, it is not a reach to predict that the economy would come to a screeching halt without them.

Moreover, market forces may offer consumers some protection from overreaching sellers. Sellers may have the incentive to offer reasonable terms to establish good reputations and to increase their market shares. Most analysts, however, believe that competitors


18. See Rakoff, supra note 11, at 1179 & n.22 ("Virtually every scholar who has written about contracts of adhesion has accepted the truth [that consumers do not read their forms], and the few empirical studies that have been done have agreed."). My survey reinforces the empirical work. Only 24 out of 100 respondents (24%) indicated that they read the terms of rolling contracts. Infra Appendix, survey question 3. Nevertheless, 88 out of 103 students (85%) "expect to be legally bound to the terms." Infra Appendix, survey question 4.

19. See Farnsworth, supra note 15, at 296 ("Because a judicial interpretation of one standard form serves as an interpretation of similar forms, standardization facilitates the accumulation of experience."); Kessler, supra note 11, at 631-32; Rakoff, supra note 11, at 1222 (standard forms "promote efficiency within a complex organizational structure").


21. See Rakoff, supra note 11, at 1230.

22. Rakoff, supra note 11, at 1204. "[T]he is a central theme that runs through the old law and the new: contracts of adhesion, like negotiated contracts, are prima facie enforceable as written." Id. at 1176.


24. Critics of regulation of standard forms generally posit the existence of a market for terms. See Hasen, supra note 13, at 426-27 (citing Posner, supra note 13, at 102-03); Schwartz & Wilde, supra note 13, at 660.
supply comparable terms. 25 Moreover, consumers obviously cannot search for terms if they do not read or understand them. 26 Analysts worried about overregulation of standard forms also contend that a minority of well-informed consumers provide incentives for sellers to write reasonable terms, 27 but little evidence supports this theory either. 28

Thus, standard forms present some sellers with the opportunity to take advantage of some consumers. The portrayal in the literature of sellers scheming to put unconscionable terms in their contracts at every opportunity goes much too far, but, obviously, under the scenario sketched above, sellers have a considerable advantage over consumers. 29 Fortunately, contract law has ample ammunition when sellers become too greedy. Although the evolved judicial strategy has many labels, the tools employed by courts largely reflect Llewellyn's idea that courts should presume express consumer assent to any negotiated terms and, so long as the consumer has had a reasonable opportunity to read the standard terms, courts should find tacit or "blanket" assent to conscionable standard terms. Courts should also be empowered to strike any "unreasonable or indecent" boilerplate. 30

Two of the most prominent judicial avenues for accomplishing these goals are the doctrine of unconscionability and section 211(3) of the Restatement (Second) of Contracts. The unconscionability principle authorizes courts to expunge contracts or terms in order to prevent

25. See Arthur Alan Leff, The Leff Dictionary of Law: A Fragment, 94 Yale L.J. 1855, 1931-32 (1985). Consumer perception may be different, however. Ninety-three out of 102 students (91%) believed that "some competitors offer better terms than others." Infra Appendix, survey question 8. In light of this, surprisingly, only 41 out of 101 students (41%) indicated that they shop for the best terms (other than price). See infra Appendix, survey question 9. Perhaps they are too optimistic that nothing will go wrong and that terms other than price are therefore unimportant. See Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 452-54 (2002).

26. See Hasen, supra note 13, at 428; Meyerson, Efficient Consumer Form, supra note 13, at 596-98; Rakoff, supra note 11, at 1231.

27. See Hasen, supra note 13, at 427-30; Rakoff, supra note 11, at 1226 n.190.

28. See Meyerson, Reunification, supra note 13, at 1270-71 ("Despite wishful commentary to the contrary, there is no evidence that a small cadre of type-A consumers ferrets out the most beneficial subordinate contract terms, permitting the market to protect the vast majority of consumers." (internal citation omitted)); cf. Cruz & Hinck, supra note 13, at 636 (arguing that the informed minority theory depends on mistaken assumptions).

29. See Eisenberg, Limits of Cognition, supra note 12, at 242-43 (characterizing form contracts as deliberately designed to prevent consumers from knowing their rights); W. David Slawson, The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms, 46 U. Pitt. L. Rev. 21, 44 (1984) [hereinafter Slawson, New Meaning] (writing that, in his own experience as a lawyer, his firm tried to draft form contracts "as one-sidedly in the interests of the corporate client as possible").

30. Llewellyn, supra note 11, at 370; see also K.N. Llewellyn, Book Reviews, 52 Harv. L. Rev. 700, 704 (1939) (maintaining that the presumption of assent does not apply to "utterly unreasonable clauses").
"oppression and unfair surprise." Courts generally find unconscionability either when the bargaining process is deficient or the substantive terms are oppressive, although the strongest and most persuasive cases involve both. For example, when a form contains impenetrable language or hidden terms that defeat the consumer's reasons for contracting, and the seller cannot justify the terms based on its needs, courts apply unconscionability. On the other hand, courts rarely upend terms simply because they heavily favor one party. In other words, the unconscionability principle follows Llewellyn's model of consumer assent to conscionable, albeit very favorable to sellers, boilerplate terms.

Section 211(3) of the Restatement (Second) of Contracts also reflects Llewellyn's formulation: "Where the other party has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." Under this section, the form's drafter must have reason to understand that the other party would have balked if she had known of the inclusion of the contested term. According to a comment, terms that frustrate the purpose of the deal, that are "bizarre or oppressive," and that conflict with bargained-for terms qualify for exclusion under the section. These are precisely the terms that are, according to Llewellyn, "unreasonable or indecent" and therefore not entitled to the presumption of enforceability under his "blanket assent" approach.


If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302.
33. See Hillman, supra note 32, at 32.
34. See Restatement (Second) of Contracts § 211 (1979), discussed in Rakoff, supra note 11, at 1191. Thus far, courts have applied the section mostly to insurance contracts. See Curtis J. Berger & Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 Colum. L. Rev. 289, 330 (1999)
35. See Berger & Berger, supra note 34, at 329; Rakoff, supra note 11, at 1191.
36. See Restatement (Second) of Contracts § 211 cmt. f (1979), discussed in Rakoff, supra note 11, at 1191.
37. Some courts have muddled application of section 211(3) by focusing on the signer's expectation. See James J. White, Form Contracts Under Revised Article 2, 75 Wash. U. L.Q. 315, 319 (1997).

State consumer protection law obviously also plays a role in policing standard forms. Most such laws require disclosure of information and bar deceptive practices.
Some analysts have advocated even more drastic regulation of standard forms. For example, Professor Rakoff would turn Llewellyn’s presumption of the enforceability of standard terms on its head by declaring such terms “presumptively (although not absolutely) unenforceable.” Essentially, Rakoff emphasizes the choice between enforcing terms created by one of the parties to the transaction and enforcing terms promulgated by the state: “[T]here is no reason to think that [standard] terms must be considered enforceable, or even prima facie valid, when they turn up in contracts of adhesion. The judicial solution may be better or worse than the drafter’s formula, but it clearly is an alternative.”

Rakoff finds fault with Llewellyn’s notion of “blanket” assent. Rakoff aptly criticizes Llewellyn’s analogy to a party “handing over a blank check.” The “blank check” characterization implies that consumers assent to whatever the seller drafts, whether reasonable or not. But Llewellyn’s conception of “blanket assent” is better read to mean only that, despite failing to read form contracts, users comprehend the existence of standard terms and agree to bind themselves to them, provided the terms are not unreasonable. Such assent is not unlike that of a consumer who accepts the various components of an automobile she is purchasing, so long as they are fit for their ordinary purpose, even though she has no knowledge whatsoever of these components. In both instances, the consumer


38. Rakoff, supra note 11, at 1176. Rakoff apparently would enforce standard terms only when the seller could establish that they are “important to the preservation of the ability of firms to initiate new enterprises and practices, and that such enforcement thereby contributes concretely to the functioning of business as a social force independent of governmental control.” Id. at 1242.

39. Id. at 1183. And further,

"[T]here is a logical gap between the proposition that mass distribution requires standardized terms, and the assertion that it requires even partial enforcement of adhesive terms... The requisite standardization can rest on terms stipulated by the common law, or by statute or regulation drafted for the purpose; nothing inherent in the concept of mass distribution requires that the drafting party’s terms must prevail.

Id. at 1208.

40. Id. at 1200.


[N]umerous studies [indicate] that consumers drastically limit their search for information about durable [products] like furniture and cars, and services such as those of general practitioners... [M]ost consumers for domestic appliances visit a single store, fail to consult advertising, use restricted price information, consider only one make, and employ perceptions of the manufacturer’s reputation and packaging rather than make evaluations of the product/service attributes to arrive at judgments of quality.

Id. (quoting Gordon R. Foxall & Ronald E. Goldsmith, Consumer Psychology for Marketing 31 (1994)). But see Eisenberg, Text Anxiety, supra note 14, at 309 (“The
impliedly has delegated to the seller the obligation of making reasonable selections. Given her druthers, the consumer might not have picked some of the particular parts or terms selected for her (others may have been superior). The "blanket assent" model accounts for the joint realities of market constraints and the host of factors that rationally lead consumers not to read their standard forms.

Rakoff also questions Llewellyn's assumption that sellers, better than judges, can determine the most efficient terms for the transaction. Sellers' experience and expertise do not persuade Rakoff: "The assumption of expertise may be wrong; a businessman who draws up a form may lack the information needed to identify the appropriate arrangement." In addition, sellers' personal interests, including defeating competition, may exert too much influence. Finally, sellers' drafters (usually lawyers) may overuse protective provisions in ignorance of the sellers' actual needs.

None of Rakoff's assertions seem overly persuasive. At least as between business people and judges, the former should be more capable of assessing the appropriate content of form contracts because business people inevitably gain understanding and experience through their day-to-day business activities. In addition, business people want to draft provisions that will minimize the costs of contracting in order to ensure the success of their company and, concomitantly, their careers. Moreover, lawyers, who are more and more frequently working in-house, play a more constructive role than Rakoff may be willing to admit. Finally, Rakoff downplays judges' limitations, such as lack of information, experience, and time.

same consumer who is willing to read simple narrative text that discloses a product attribute (such as a list of ingredients) is often unwilling to read the dense text that comprises a form contract.

42. See Leff, supra note 11; Radin, supra note 23, at 1149 (relying on Lewis A. Kornhauser, Unconscionability in Standard Forms, 64 Cal. L. Rev. 1151 (1976)); see also Hanoch Sheinman, Contractual Liability and Voluntary Undertakings, 20 Oxford J. Legal Stud. 205, 209 (2000) ("[T]he phenomenon of standard contracts is sometimes interpreted as a counterexample to [the view that there is an important connection between contractual liability and voluntary obligation.] But . . . standard contracts are genuine contracts, provided that they are entered into freely and partly in order to incur an obligation.").


44. See Rakoff, supra note 11, at 1204; supra notes 38-39 and accompanying text.

45. Rakoff, supra note 11, at 1204.

46. See id.

47. See id. at 1205.

48. See, e.g., Kessler, supra note 11, at 631-32.

49. See Eisenberg, Limits of Cognition, supra note 12, at 242-43; Slawson, New Meaning, supra note 29, at 44. But see Rakoff, supra note 11, at 1204.

Assuming the appropriateness of Llewellyn's approach to form contracts, how can it inform the problem of rolling contracts? That is the subject of the rest of this paper.

II. ROLLING CONTRACTS

Although the appropriate legal resolution of rolling contracts is very controversial, the facts of rolling contracts cases are not complex. Hill v. Gateway 2000, Inc. decided by former law professor, Frank Easterbrook, is typical. The Hills ordered a computer from Gateway over the telephone and gave their credit card information as payment, and Gateway delivered the computer. When the computer arrived, the box contained a set of terms that would govern unless the Hills returned the computer in thirty days. The Hills used the computer for more than thirty days, became dissatisfied with its performance, and brought an action in federal court. One of the terms delivered to the Hills called for arbitration of disputes. Was the arbitration provision enforceable?

Easterbrook reasoned that Gateway's shipment of the computer and the terms to the Hills with the right to return the computer in thirty days constituted an offer, and the Hills' keeping the computer for more than thirty days constituted an acceptance. The contract, person of judges, legislators, or regulators, is only infrequently likely to do better than A and B on either the incentive or the information dimension.").


Id.; see also Uniform Computer Information Transactions Act, §§ 103(a), 111, 112(a), 112(e)3, 208, 209(a), 209(b) (2000) (explaining that in a "computer information transaction," a party is bound to conscionable terms that arrive after the party "becomes obligated" only if the party "manifests assent" after an "opportunity to review." The party must have the right to return the goods.)

52. 105 F.3d 1147 (7th Cir. 1997).


54. Hill 105 F.3d at 1148, 1150.
formed at the end of the thirty day period, therefore included the arbitration provision and Gateway's other terms.55

Among their arguments, the Hills apparently asserted that the contract was formed when they paid for the computer and Gateway shipped it and that section 2-207(2) of the Uniform Commercial Code applied to exclude all of the “additional” terms that followed contract formation, including the arbitration provision.56 Relying on his earlier opinion in ProCD, Inc. v. Zeidenberg,57 however, Easterbrook found that sellers such as Gateway could (and here did) condition contract formation on their customers’ perusal of the goods and the terms. Second, Easterbrook concluded that section 2-207 did not even apply to the Hill-Gateway dispute because their transaction involved only Gateway’s form, whereas section 2-207 applies to “battle of the forms” situations.

Easterbrook was plainly wrong about section 2-207’s applicability. Nothing in the text of the section limits it to transactions involving more than one form.58 Easterbrook also may have erred about the time of formation of the contract. Section 2-206(1)(b) of the U.C.C., which Easterbrook ignored, also applies to the Hill-Gateway facts: “Unless otherwise unambiguously indicated by the language or the circumstances . . . an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a

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55. Id. at 1150; see also M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000); Westendorf v. Gateway 2000, Inc., No. 16913, 2000 WL 307369 (Del. Ch. Mar. 16, 2000); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (App. Div. 1998); Levy v. Gateway 2000, Inc., 1997 WL 823611 (N.Y. Sup. Ct. 1997). Only 15 out of 98 students (15%) believed that a contract in the rolling contract setting was formed 30 days after the consumer received the computer. See infra Appendix, survey question 2. On the other hand, a total of 56 out of 98 students (57%) believed that a contract was formed when the consumer received the shipped computer or later. Id. Overall, question 2 reveals that the students had no firm perception about when a contract was formed, which supports the thesis that not much should depend on this.

56. U.C.C. § 2-207(2) provides in part: “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 opinion is not entirely clear concerning the Hills’ argument based on the provision. Easterbrook discusses the section in the context of their distinction of ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), where, the Hills pointed out, the parties were merchants, the “unless” clause was not satisfied, and so the contested terms became part of the contract. The Hills therefore must have been claiming that, in their case, only the first sentence of Section 2-207(2) applied, and Gateway’s terms remained only proposals. For a discussion of the survey results on students’ perception of when a contract is formed in the rolling contract setting, see supra note 55.

57. 86 F.3d 1447 (7th Cir. 1996).

promised to ship or by the prompt or current shipment of conforming or non-conforming goods . . . .\textsuperscript{59}

Under the section, Easterbrook is correct only if the language or circumstances show unambiguously that the contract was formed after Gateway shipped the computer and the Hills kept it for thirty days. Although the parties could have structured their deal in this way, it is unlikely that they gave much thought to whether the contract technically was formed at the time of payment, on delivery of the goods, or thirty days after delivery.\textsuperscript{60} Instead, the parties were concerned with the mechanics of the transaction; meaning, how the Hills could order the computer, how Gateway would deliver it, when and how the Hills would receive the terms, and when it would be too late for the Hills to return the computer.

If the parties did not denominate a clear time of formation, section 2-206(b) appears to control so that the offer and acceptance (order and shipment) took place before the Hills received the terms. But so what? The time of formation of the contract does not clearly reveal whether the rolling terms become part of the contract.\textsuperscript{61} Even if the Hill-Gateway contract were formed at the time of shipment, the Hills’ use of the computer for more than thirty days could constitute an agreement to modify the contract to include Gateway’s terms.\textsuperscript{62} Under Section 2-209(1), an agreement does not require consideration to be enforceable and Gateway could certainly have made out a case that the Hills impliedly agreed to its “new” terms when they kept the computer. Alternatively, Gateway could argue that, upon payment, the Hills, who knew terms were coming, impliedly agreed to delegate to Gateway the right to establish the terms. Or the terms could become part of the contract on the theory that an implied condition in the contract was that the Hills agree to the terms that would follow. Conversely, although somewhat of a reach, even if the contract ripened thirty days after Gateway’s delivery, as Easterbrook found, a court could still bar Gateway’s terms on the theory that the Hills

\textsuperscript{59} Ghosh, supra note 58, at 1132-33 points out Section 2-206(1)(b)’s applicability.

\textsuperscript{60} Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); see supra note 55.

\textsuperscript{61} Cf. Step-Saver Data Sys., Inc. v. Wyse Tech., Inc., 939 F.2d 91, 98 (3d Cir. 1991) (“The [parties’] performance demonstrates the existence of a contract. The dispute is, therefore, not over the existence of a contract, but the nature of its terms.”). For that matter, attempts to label the transaction (e.g., option contract, sale on approval, etc.) should not help very much either, if the goal is to resolve the normative question of whether Gateway’s terms should be enforceable. For discussions of the appropriate label for the transaction, see Gateway Thread, supra note 53, at 1194 (statement of Thomas Joo) (option contract); id. at 1179 (statement of Mark S. Scarberry) (Gateway-Hill transaction was a “sale on approval” under sections 2-326 and 2-327, so that consumer buyers need only notify their sellers of their decision to return the goods and place them in the hands of a carrier).

\textsuperscript{62} See U.C.C. § 2-209 (2002).
never expressly agreed to them.\textsuperscript{63} There are still other possible permutations.\textsuperscript{64}

If the time of formation should not dictate the contract terms, what should? As with any standard-form contract context, courts should follow Llewellyn's model of enforcing bargained-for terms and conscionable boilerplate, and excising egregious terms.\textsuperscript{65} Put another way, courts should presume "blanket assent" to the terms consumers, such as the Hills, choose not to read, provided that the terms are not unfair in presentation or substance.\textsuperscript{66}

With respect to the arbitration clause in the Hill-Gateway dispute, this approach would require courts to focus on whether the term was procedurally or substantively unconscionable. Concerning procedural unconscionability, Gateway's method of sending the terms with the delivery of goods is not uncommon,\textsuperscript{67} cost efficient,\textsuperscript{68} and similar to many other types of terms-after-payment exchanges, including insurance transactions and travel tickets.\textsuperscript{69} Easterbrook correctly points out the senselessness and wastefulness of requiring Gateway's agents to read the terms over the phone because of the great unlikelihood that the Hills or anyone else would understand the terms or even listen.\textsuperscript{70} Further, other seller alternatives, such as shipping only after receipt of a signed contract, are also cumbersome and wasteful of time, especially in light of the failure of consumers to read their form contracts.\textsuperscript{71} Put simply, consumers clearly desire the convenience of ordering goods over the telephone, or this method of marketing would not exist. Finally, it should not be forgotten that Gateway affords consumers thirty days to read the terms and return the computer if they are not satisfied. This procedure allows

\textsuperscript{63} The definition of "agreement" in section 1-203 of the U.C.C. is the parties' "bargain in fact," which is a deeply contextual inquiry. See U.C.C. § 1-203.


\textsuperscript{65} See supra notes 10-30 and accompanying text.

\textsuperscript{66} See Hillman & Rachlinski, supra note 25, at 461-63.

\textsuperscript{67} Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

\textsuperscript{68} See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996).

\textsuperscript{69} Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 Farnsworth on Contracts § 4.26 (1990); Restatement (2d) of Contracts § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution . . . .").

\textsuperscript{70} Hill, 105 F.3d at 1149.

\textsuperscript{71} See, e.g., Gateway Thread, supra note 53, at 1165 (statement of Kenneth C. Kettering). Perhaps in the near future everyone will have easy internet access and sellers such as Gateway can simply post their terms.
consumers to study their forms in the quiet of their own homes, free from time constraints and agent pressure common in significant store purchases. 72 In fact, I am unaware of anyone persuasively arguing that Gateway's method of doing business is procedurally unconscionable and therefore should be barred.

As a general matter, arbitration provisions are not substantively unconscionable either, at least so long as the legal establishment continues to favor them as a dispute settlement device. As one commentator has stated, “[i]t’s hard to argue that an arbitration clause itself is unconscionable, given that Congress has declared that the national policy favors it.” 73

Despite arbitration’s current high standing, courts should be ready to step in when the particular facts suggest an arbitration clause’s bankruptcy, unfairness, and hence its substantive unconscionability. In fact, courts have done just that in the rolling contract setting. For example, in Brower v. Gateway 2000, Inc., 74 the court followed Hill v. Gateway’s analysis of contract formation and held that Gateway’s terms became part of the contract. However, the court also found that Gateway’s arbitration term was substantively unconscionable because it unreasonably favored Gateway. 75 Although the court approved of the arbitration provision’s requirement of arbitration in Chicago before the ICC, the provision also required Brower to pay “excessive costs” that “surely [serve] to deter the individual consumer from invoking the process.” 76 Further, “[b]arred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute.” 77

CONCLUSION

In sum, rolling contracts, as described above, should be treated no differently than other form contracts. Existing law’s presumption of “blanket assent” and policing of seller misconduct allows for an efficient and fair presentation of terms in both traditional and rolling contract settings.

The only difference between rolling contracts and paradigm standard-form transactions is whether consumers have the opportunity to read the terms before or after payment and delivery of

72. See generally Hillman and Rachlinski, supra note 25, at 447-50 (discussing social pressures on consumers not to read and discuss terms).
75. Id. at 574.
76. Id.
77. Id.
the goods. A good argument can be made that, if anything, the opportunity to read the terms at home creates more of a reason to enforce standard terms in the rolling contract context. But, if consumers generally do not read standard terms under any circumstances, the particular time at which they could have read them should not control their legal treatment. Consumers will purchase Gateway computers and ignore the terms regardless of whether they have the opportunity to see the terms before or after the computer is delivered.

Undoubtedly, Gateway and other similarly situated sellers bank on few consumers taking the time or trouble and bearing the expense of returning the goods, even if they do read the form and uncover provisions they do not like. Although annoying, return costs rarely should be significant. Accordingly, if consumers who read forms fail to return the goods it must mean that they do not value the cost of the terms very highly. As Professor White has put it, “[t]he cost of [unexpected]... terms to the offeree [the consumer] cannot exceed the cost the offeree would incur to reject the offer, or else the offeree would reject.” It also bears repeating that even if a consumer reads her form and keeps the goods, she will not have to abide by egregious terms.

Critics of rolling contracts may have two additional concerns with the analysis in this article. First, perhaps they are uneasy about the adequacy of current law’s policing of unconscionable terms. If that is their worry, they should expend their energy by urging lawmakers to beef up the protection of unconscionability and Restatement (Second) section 211(3), not by participating in a dead-end debate over when the contract was formed. Second, perhaps critics believe consumers should be able to bring class actions to aggregate their minor grievances that would not otherwise be heard because of the costs of

78. See Hillman & Rachlinski, supra note 25, at 480.
79. Professor Kenneth Kettering makes the point as follows: “The focus on the process by which the terms are communicated to the buyer before the buyer makes the final decision whether to consummate the purchase seems to me ultimately a red herring. . . . In most cases buyers will not bother to read or fathom the significance of the terms.” Gateway Thread, supra note 53, at 1165 (statement of Kenneth C. Kettering) (quotations omitted).
81. Of course, these consumers may be too optimistic that nothing will go wrong. See Hillman & Rachlinski, supra note 25, at 452-54. But that is one of the reasons why courts have the power to strike egregious terms.
82. James J. White, Autistic Contracts, 45 Wayne L. Rev. 1693, 1717 (2000). White also points out that the savings to business caused by courts honoring rolling contract terms greatly outweighs the cumulative cost of returning goods, mainly because costs of return are low and few consumers will want to avail themselves of the right. Id. at 1719-20.
bringing individual claims. Enforceable agreements to arbitrate short-circuit such class actions. If that is their concern, critics should fight to convince lawmakers to reverse the national policy favoring arbitration, at least in the consumer context, and to make arbitration clauses unenforceable in consumer contracts. If successful, and if the costs to consumers of arbitration actually do outweigh the benefits, this strategy would serve not just consumers involved in rolling contracts, but all consumers who are parties to standard forms.

APPENDIX

Contracts—Professor Hillman

(Questions 1 and 2 are based on the following scenario:)
You see an ad in the paper for a particular computer at a particular price from a reputable company, Gateway 2000, Inc. The ad mentions that the computer comes with a set of contract terms enclosed in the package. You call the phone number provided and order a computer. You give Gateway's agent your credit card number. Gateway ships the computer to you. You receive the packaged computer and open the package. You find a set of terms inside the package dealing with, among other things, the promised quality of the goods and your rights if the goods are defective. Another term allows you to return the computer within 30 days for a full refund. You keep the computer for more than 30 days.

1. Do you believe you have entered an enforceable contract with Gateway 2000, Inc.?
   Yes 99 No 3
2. If you believe you have an enforceable contract, when was it formed?
   a. When you call Gateway 0
   b. When you order the product 11
   c. When you give your credit card information 25
   d. When Gateway ships the computer 6
   e. When you receive the packaged computer 20
   f. When you open the package and see the set of terms 14
   g. When you have an opportunity to read the terms 3
   h. When you begin using the computer 4
   i. 30 days after you receive the computer 15
(For the following questions 3 through 7, assume you have purchased goods with terms included in the package dealing with,

83. Gateway Thread, supra note 53, at 1167 (statement of Jean Braucher).
84. Id.
among other things, the promised quality of the goods and your rights if the goods are defective.)

3. As a general matter, when goods are delivered to you, do you read the terms enclosed in the package before using the goods?
   Yes 24 No 76

4. Do you expect to be legally bound to the terms enclosed in the package?
   Yes 88 No 15

5. Do you expect the seller to stand behind its product if something goes wrong?
   Yes 98 No 5

6. Do you expect the seller to stand behind its product even if the terms say the seller will not be responsible?
   Yes 39 No 64

7. Do you expect the law to protect you from any oppressive (highly unfair) terms by refusing to enforce them?
   Yes 78 No 25

8. Do you believe some competitors offer better terms than others?
   Yes 93 No 9

9. Do you shop around before making a purchase, seeking the best contract terms (other than price)?
   Yes 41 No 60
Notes & Observations