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## Improving the Rolling Contract

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# Improving the Rolling Contract

## **Abstract**

This article addresses the increasingly common problem of buyers finding important contract terms inside the box of a newly purchased item instead of learning about them before or during purchase. The failure of courts to develop a satisfactory approach to deciding which contract terms sellers may provide after purchase is of great significance in light of the rapid proliferation of rolling contracts. In this article, Friedman proposes a mechanism that will ensure that sellers have the flexibility to defer presentation of some terms but that will also protect purchasers against the unfair imposition of unexpected and important terms arriving at a time when purchasers are very unlikely to read or act on them. The mechanism he proposes, which he refers to as Template Notice, is an intermediate form of disclosure that meets the pressing concerns of both buyers and sellers. It would require sellers to provide the following vital information before or during purchase: a brief and clear list or summary of terms that the buyer will not see until after purchase, a statement that the buyer will have the right to reject the terms and avoid the transaction, and a description of how to exercise that right. Template Notice is a reasonable and workable restriction on the ability of sellers to defer the disclosure of contract terms. Sellers would still be able to defer terms, but to a more limited extent than is currently permitted.

## **Keywords**

Contracts, Rolling contracts, Template notice, Sellers, Purchasers, Sales

## ARTICLES

### IMPROVING THE ROLLING CONTRACT

STEPHEN E. FRIEDMAN\*

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### INTRODUCTION

Courts and commentators have typically either embraced or rejected rolling contracts. This Article offers a third alternative: improving the rolling contract.

Courts have failed to develop a satisfactory approach for determining which contract terms sellers may provide after purchase—a failure of significance given the proliferation of rolling contracts. Courts enforcing rolling contracts have given sellers nearly unfettered ability to delay disclosure of contract terms.<sup>1</sup> Buyers now routinely find important contract terms, such as arbitration provisions and limitations on damages, inside the box of a newly purchased item instead of learning about the terms before or during purchase or order (as would be the case in a traditional contract).

In this Article, I propose a mechanism that will ensure that sellers continue to have needed flexibility to defer some contract terms, but that will also protect purchasers against the unfair imposition of unexpected and important contract terms arriving at a time when purchasers are very unlikely to read or act on them.

The proposal, which I refer to as “Template Notice,” is an intermediate form of disclosure that meets the pressing concerns of both buyers and sellers. It would not require sellers to provide the full text of all contract terms before or during purchase or order. It would, however, require sellers to do more than merely give notice that unspecified additional terms will be forthcoming. Sellers would be required to provide the following vital information before or during purchase or order: a brief and clear list or summary of important terms being deferred (but not the full text), a statement that the buyer will have the right to reject the terms and avoid the transaction, and a description of how to exercise that right. For

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1. See discussion *infra* Part I.

example, a potential purchaser of a computer placing an order over the telephone might be told by the sales representative that:

Inside the box with your computer there will be some additional contract terms. Among other things, those terms limit the time you would have to sue us if there is a problem, limit the damages you could be awarded, and require binding arbitration of any disputes between us. Those terms will be in the box and you can return the computer if they are not acceptable. You can also obtain them now if you would like through our website, or I will send them to you.

I choose the term “Template Notice” because the information provided at purchase or order should establish the overall form or template of the transaction. It recognizes the primacy of the purchase to the transaction, while also recognizing that the contract is not completely closed to new terms at that point. Sellers can and should be able to defer some terms until after purchase or order, but only to a more limited extent than is currently permitted. Template Notice provides an appropriate limitation on the ability of sellers to defer terms: sellers would have the flexibility to delay terms, but could do so only for terms that flesh out details of the information provided at purchase. Terms beyond the structure established at purchase or order could not be added “out of the blue.”

There are a number of reasons why Template Notice should be adopted as part of the rolling contract. First, Template Notice reinforces some of the justifications for enforcing rolling contracts. Second, Template Notice is fair to both buyers and sellers. Template Notice is a compromise—one that builds on existing practice and would be relatively easy to implement. Third, Template Notice would make assent to deferred terms more meaningful. Fourth, Template Notice makes sense given the structure and the rhythm of rolling contracts. Finally, Template Notice helps to clarify the contractual significance of documents and actions in the post-purchase period of a transaction.

In addition, Template Notice emerges from an application of the doctrines of unconscionability and reasonable expectations to the deferral of terms. As an unfortunate consequence of an approach to rolling contracts that focuses on the mechanics and timing of contract formation, these doctrines have largely been sidelined from the assessment of the unique aspects of rolling contracts. These doctrines could play a useful role if they were fully applied to the deferral of terms. That application need not, and in fact should not,

result in the end of rolling contracts. Instead, it would result in their improvement.

This Article proceeds as follows: In Part I, I provide a brief overview of the rolling contract. In Part II, I describe how the pre-purchase notice requirement articulated in early rolling contract cases has been reduced to a near nullity. In Part III, I present the arguments in support of Template Notice. Finally, in Part IV, I address how unconscionability and reasonable expectations could be adapted and applied to rolling contracts.

Before proceeding further, a brief note on terminology: Although the term “rolling contract” does not pass without objection,<sup>2</sup> given its widespread use I will employ that term in this Article. I will describe as “deferred terms” those terms that are presented after purchase or order and will use the phrase “deferral of terms” to describe the practice of presenting some contract terms after purchase or order.

### I. BRIEF OVERVIEW OF ROLLING CONTRACTS

Rolling contracts<sup>3</sup> are contracts formed over time, with the seller presenting the terms in batches. Some terms are provided before or during the purchase or order, while others are provided later. These transactions typically give the buyer a right to return a purchased item or cancel a purchased service to avoid the transaction.<sup>4</sup>

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2. Professor Jean Braucher has pointed out that the label “rolling contract” is a loaded one since it seems to take for granted that terms presented after purchase or order are part of the contract (a position with which Professor Braucher takes great issue). She would cast the issue as the enforceability of delayed terms. Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 757-58 (2004). Professor Peter Alces suggests that it is more accurate to describe the judicial acceptance of rolling contracts as giving rise to “checkerboard contract[s],” contracts that are formed under “a regime that relies on traditional contract doctrine when it suits and on practical considerations when it does not.” Peter A. Alces, *On Discovering Doctrine: “Justice” in Contract Agreement*, 83 WASH. U. L.Q. 471, 497 (2005).

3. We are probably nearly at the point when “rolling contract” no longer needs to be defined. Rolling contracts have, after all, made their way into the casebooks for the first-year Contracts course. *See, e.g.*, JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS 116 (4th ed. 2004); E. ALLAN FARNSWORTH ET AL., CASES AND MATERIALS ON CONTRACTS 222 (6th ed. 2001); BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 189, 190, 195 (2005); CHARLES L. KNAPP, PROBLEMS IN CONTRACT LAW 255, 259 (5th ed. 2003). The term “rolling contracts” has also apparently won its skirmish with the once-competing term “layered contracts,” a term previously used by some courts. *See Puget Sound Fin., LLC v. Unisearch*, 47 P.3d 940, 944 (Wash. 2002) (using the term “layered contracts” to refer to a contract where the full terms are disclosed after purchase); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000) (same). The Uniform Computer Information Transactions Act (“UCITA”) describes these contracts as both “rolling” and “layered.” UCITA § 202 cmt. 4, 7 U.L.A. pt. II, at 276 (2002).

4. *See generally* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) (describing the mechanics of rolling contracts).

Rolling contracts are premised on the idea that the contract forms, not at purchase or order, but only after the expiration of the “accept-or-return period.” In two highly influential decisions, *ProCD, Inc. v. Zeidenberg*<sup>5</sup> and *Hill v. Gateway 2000, Inc.*,<sup>6</sup> the Seventh Circuit Court of Appeals pushed back the time of contract formation to accommodate deferred terms. In *ProCD*, the court assessed the enforceability of license terms included inside a box of software. The buyer argued that since the contract formed when he bought the software, he was not bound by terms that were only visible after purchase.<sup>7</sup> The court rejected the premise that the contract had been formed at purchase. Instead, the court held that the seller had structured the transaction so that the failure to return the software during the accept-or-return period, and not the purchase, constituted acceptance.<sup>8</sup> Thus, the court found it unnecessary to consider whether the deferred terms became part of the contract under the “battle of the forms” provision of the Uniform Commercial Code<sup>9</sup> (“U.C.C.”) since the terms were part of the contract under basic principles of offer and acceptance.<sup>10</sup> In the court’s view, the return option not only compensated for the failure to disclose complete terms at the time of purchase, but also served as the very vehicle for enforcing the deferred terms.<sup>11</sup>

According to the court, by enforcing terms presented after purchase it was doing nothing new or even particularly noteworthy, and “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.”<sup>12</sup> The court did more than merely tolerate the tradeoff of a return option for disclosure at the time of purchase; it seemed to actually prefer the return option. After all, the court noted, the deferred terms can be read “in the comfort of home”<sup>13</sup> and “at [the buyer’s] leisure.”<sup>14</sup> The return option gives the buyer a “chance to make a final decision after a detailed review,”<sup>15</sup> presumably in contrast to forcing a consumer to read through contract terms under the time pressures inherent in most purchases. Further, the court noted that

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5. 86 F.3d 1447 (7th Cir. 1996).

6. 105 F.3d 1147 (7th Cir. 1997).

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

8. *Id.* at 1452-53.

9. U.C.C. § 2-207 (2005).

10. *ProCD*, 86 F.3d at 1451-53.

11. *Id.*

12. *Id.* at 1451.

13. *Id.*

14. *Id.* at 1452.

15. *Id.* at 1453.

full disclosure of all terms at the time of purchase would have required “microscopic type” or the removal of other more useful information (such as a description of what the software does).<sup>16</sup> Accordingly, the Seventh Circuit concluded that courts should treat standardized terms in shrinkwrap software licenses (an early species of rolling contract) no differently than standardized terms presented at purchase.<sup>17</sup>

The Seventh Circuit subsequently made clear that its approval of the deferral of terms was not limited to shrinkwrap licenses and that sellers in a variety of contexts could substitute such deferral for complete up-front disclosure of terms. In *Hill v. Gateway 2000, Inc.*,<sup>18</sup> the Seventh Circuit enforced an arbitration provision that had not been mentioned by the sales representative when the computer was purchased. The seller included the provision inside the box in which the purchased computer was shipped.<sup>19</sup> The seller of the computer used what the court characterized as the same sort of “accept-or-return offer” that had been used in *ProCD*.<sup>20</sup> The court rejected the plaintiffs’ arguments that the holding in *ProCD* should be limited to the context of that case.<sup>21</sup> Instead, as in *ProCD*, the court focused on the practical difficulties inherent in making full disclosure of all terms at the time of purchase.<sup>22</sup> Additionally, as in *ProCD*, the court was satisfied that the contract had not been formed until after the accept-or-return period expired.<sup>23</sup>

The influence of *ProCD* and *Hill* has been significant, in large part because those cases have set the terms of the debate and resulted in a focus on the timing and mechanics of contract formation. Rolling contracts are said by courts enforcing them to be premised on the “proposition that a contract is formed not at the time of purchase or earlier but rather when the purchaser either rejects by seeking a refund or assents by not doing so within a specified time.”<sup>24</sup> In contrast, courts refusing to enforce deferred terms tend to take the

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16. *Id.* at 1451.

17. *See id.* at 1449 (concluding that shrinkwrap licenses “are enforceable unless their terms are objectionable on grounds applicable to contracts in general” such as unconscionability).

18. 105 F.3d 1147 (7th Cir. 1997).

19. *See id.* at 1148 (describing the transaction at issue).

20. *Id.* at 1149.

21. *Id.* at 1149-50.

22. *See id.* at 1149 (discussing impracticability of cashiers or sales representatives reading several pages of legal documents to potential customers).

23. *Id.* at 1148-49.

24. *Higgs v. Auto. Warranty Corp. of Am.*, 134 Fed. App’x 828, 831 (6th Cir. 2005) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 431 n.43 (2d Cir. 2004)).

position that the contract was formed at purchase or order.<sup>25</sup> As the Oklahoma Supreme Court recently noted, whether a court enforces deferred terms is often based on that “court’s determination of when the contract was formed.”<sup>26</sup>

Additionally, as noted, both the *ProCD* and *Hill* opinions focused on the difficulties inherent in requiring sellers to make complete disclosure of all terms at purchase or order. Neither opinion contemplated the possibility of requiring something less than complete disclosure. These cases set up something of a false choice between the extremes of either requiring complete disclosure of the full text of all terms at purchase or requiring no disclosure of the substance of deferred terms. The possibility of an intermediate approach, such as Template Notice, apparently was not considered.

## II. DIMINUTION OF NOTICE AS AN ESSENTIAL ELEMENT OF THE ROLLING CONTRACT

### A. *Pre-Purchase Notice in Early Rolling Contract Jurisprudence*

The court in *ProCD* seemed to counsel that notice is a component of a proper rolling contract, observing that “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.”<sup>27</sup> However, the notice element in *ProCD* did not evolve into the type of notice I propose in this Article. Instead, in relatively short order, notice was reduced nearly to the vanishing point. This development has been made possible, I think, by the fact that the usual doctrines that might police the deferral of terms, such as unconscionability, have largely been absent from the discussion.<sup>28</sup>

Although *ProCD* indicated that a buyer should have notice that additional terms will be forthcoming, the court did not appear to contemplate a particularly robust notice requirement. The district court in *ProCD* described the “sole reference” to the license

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25. See, e.g., *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 765 (D. Ariz. 1993) (holding that contract was formed when seller agreed to ship the goods or, at the latest, when the goods were actually shipped).

26. *Rogers v. Dell Computer Corp.*, 127 P.3d 560, 566 (Okla. 2005); see also *ILan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (observing that the difference in the outcome of cases depends on when courts determine the contract was formed).

27. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

28. See discussion *infra* Part IV.A.2 (reviewing the reluctance of courts to apply the doctrine of unconscionability to rolling contracts).

agreement that would have been visible before purchase of the software as a “disclosure in small print at the bottom of the package, stating that defendants were subject to the terms and conditions of the enclosed license agreement.”<sup>29</sup> For the Seventh Circuit, that reference was sufficient notice.<sup>30</sup> Given the particular facts of *ProCD*, that decision is understandable. The purchase in *ProCD* was of a database containing information from thousands of telephone directories and the provision at issue was a restriction on making commercial use of the database.<sup>31</sup> A reasonable consumer (particularly one as sophisticated as the defendant in *ProCD*)<sup>32</sup> with knowledge that the purchase was subject to a license agreement would likely expect the license to include such a term. The court’s reluctance to set a high notice standard may simply have been an unfortunate consequence of the fact that the particular provision at issue in *ProCD* was of a type that the buyer should have contemplated.<sup>33</sup> Instead, the court indicated that any term not requiring special notice (such as a warranty disclaimer that must be conspicuous)<sup>34</sup> was “covered” by the general notice of a license agreement.<sup>35</sup>

The Seventh Circuit subsequently further delineated the role of notice in rolling contracts. In *Hill*, the court found sufficient notice of a deferred arbitration clause based on some advertisements that vaguely referenced terms completely unrelated to the arbitration clause.<sup>36</sup> The arbitration clause was included in the packaging of a computer that had been ordered over the phone.<sup>37</sup> The court held that the buyers had notice at the time of the order that there would be additional terms.<sup>38</sup> This conclusion was based on a rather slender reed. According to the court, the computer manufacturer’s advertisements stated “that their products come with limited warranties and lifetime support” (although the advertisements

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29. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 654 (W.D. Wis. 1996), *rev’d*, 86 F.3d 1447 (7th Cir. 1996).

30. *ProCD*, 86 F.3d at 1453.

31. *Id.* at 1449.

32. The defendant formed and ran a corporation to resell the information from the database he purchased. *Id.* at 1450.

33. Additionally, the plaintiff-purchaser’s actions in making commercial use of the database hardly made him sympathetic to the court. See James J. White, *Contracting Under Amended 2-207*, 2004 Wis. L. REV. 723, 741 (2004) (noting that the ultimate outcome in *ProCD* was probably justified since “Zeidenberg was surely a naughty fellow who deserved to have his hands slapped”).

34. U.C.C. § 2-316(2) (2005).

35. *ProCD*, 86 F.3d at 1453.

36. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

37. See *id.* at 1148 (describing the circumstances of the computer purchase).

38. *Id.* at 1150.

presumably mentioned nothing about arbitration).<sup>39</sup> For the Seventh Circuit, the knowledge of the limited warranty and lifetime technical support imparted by these advertisements presumably triggered, or should have triggered, a number of questions in the minds of the purchasers: “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?”<sup>40</sup>

The court indicated that if the buyers had really been interested in finding the additional terms before purchase, they could have done so. The court stressed that the buyers could have asked the seller to “send a copy.”<sup>41</sup> However, the court failed to specify a copy of what. As the court observed, under the Magnuson-Moss Warranty Act,<sup>42</sup> the buyers could have requested a copy of the warranty.<sup>43</sup> But that warranty would not have included the arbitration clause at issue in *Hill*. The court’s solution—that the computer manufacturer would not have refused to send the complete terms—is a bit underwhelming since the buyers were not aware that there were any other contract terms to request.<sup>44</sup>

Additionally, the court noted that the buyers could have taken it on themselves to “consult public sources,” such as computer magazines and websites, to search out complete terms of the contract.<sup>45</sup> As with the alternative of requesting the terms from the manufacturer, a potential buyer would really have no idea what types of terms to look for or whether it was worth his or her time to make the effort in the first place. Further, locating the correct magazine or finding the correct terms on a website is often no easy feat.<sup>46</sup>

Whatever one might say about the significance of the notice of deferred terms in both *ProCD* and *Hill*, at least the notice was provided before the purchase was complete in both those cases. In

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39. *Id.*

40. *Id.*

41. *Id.*

42. 15 U.S.C. §§ 2301-2312 (2004).

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

44. The advertisement of “lifetime support” referred to by the court does not signal additional terms. Instead, most buyers would probably perceive the statement as promising technical support over the phone or Internet and would not suspect that any contract term would be needed to flesh out the promise. At any rate, the statement would be more likely to reassure than raise concerns.

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

46. There is also the problem that sellers typically reserve the right to change the terms at any time without notice, so there is no assurance that whatever terms a potential buyer finds will be the ones ultimately applicable to the buyer’s transaction. See *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 393 (Civ. Ct. 2001) (noting that these changes can happen before a purchaser has a meaningful chance to review the terms).

fact, both opinions stressed the importance of such notice being provided before purchase. The court in *Hill* noted while explaining its reasoning in *ProCD* that: “Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transaction costs of returning the package after reviewing its contents.”<sup>47</sup> This choice of whether to avoid the contract completely can only be made if notice of deferred terms is provided at or before purchase. Similarly, the court in *ProCD* noted that one of the terms the buyer agreed to “by purchasing the software [was] that the transaction was subject to a license.”<sup>48</sup> Notice of such license thus had to have been provided before the purchase was complete.

Although the notice in *ProCD* and *Hill* may have been weak, at least it came before purchase or order. As I discuss in the next Section, subsequent cases have further reduced the role of notice in rolling contracts.

#### B. *Reduction of the Role of Notice in Rolling Contracts*

Courts assessing rolling contracts subsequent to *ProCD* and *Hill* rendered the notice requirement even less substantial by largely ignoring the rationale of *ProCD* and *Hill* as it relates to the importance of pre-purchase notice. Such courts have been satisfied even if notice of deferred terms is provided after purchase. For instance, in *Schafer v. AT&T Wireless Services, Inc.*,<sup>49</sup> the plaintiff purchased cellular phone service over the telephone. The plaintiff challenged the validity of an arbitration clause that was contained inside a “Welcome Guide,” alleging that she had never received the Welcome Guide.<sup>50</sup> The court was unconcerned with the plaintiff’s claim that she had not received the Welcome Guide because, whether or not the plaintiff received the Welcome Guide, she had notice of it.<sup>51</sup> This notice was provided by a statement on the box in which the phone was shipped after the customer had already ordered the phone service.<sup>52</sup> While that notice was received before contract formation (at least as formation was viewed by the *Schafer* court),<sup>53</sup> pre-formation notice, as opposed to pre-purchase notice, does not serve the concerns outlined in *ProCD* and *Hill*. Indeed, despite the

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

48. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

49. No. Civ. 04-4149-JLF, 2005 WL 850459 (S.D. Ill. Apr. 1, 2005).

50. *Id.* at \*3.

51. *Id.* at \*3-5.

52. *Id.* at \*5.

53. *See id.* (noting that acceptance occurred by use of the telephone service).

*Schafer* court's heavy reliance on *Hill*,<sup>54</sup> *Hill* actually makes quite explicit that the language on a shipping box provided after purchase is irrelevant to the question of notice.<sup>55</sup>

*Schafer* is not the only court to disregard the rationale for pre-purchase notice. The Washington Supreme Court in *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*<sup>56</sup> ignored it as well. *Mortenson* involved the enforceability of a limitation on consequential damages that was included in a shrinkwrap license accompanying purchased software.<sup>57</sup> The term was provided with the purchased software along with a provision giving the buyer the right to return the product for a refund if the terms were not acceptable.<sup>58</sup> The court referenced the "notice on the outside" language of *ProCD*,<sup>59</sup> but seemed to ignore any requirement of pre-purchase notice. Instead, the court found that there had been sufficient notice of the license terms since the terms were in the shrinkwrap package, the manual, and the software protection devices.<sup>60</sup> Additionally, the license was mentioned on the first screen each time the consumer used the software.<sup>61</sup> But the problem with this analysis is the same as in *Schafer*: although the terms were provided before the point at which the contract was (in the court's view) formed,<sup>62</sup> neither the terms nor any notice of them were presented before purchase.

While cases like *Mortenson* and *Schafer* represent an inappropriate step away from the pre-purchase notice contemplated in *Hill* and *ProCD*, at least they acknowledge the notice component of a rolling contract. Other courts do not even mention the need for any notice, pre-purchase or otherwise, and instead focus only on the buyer's ability to return the product or cancel the service for a refund.<sup>63</sup>

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54. *See id.* at \*4-5.

55. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (observing that lack of notice of terms on a shipping box was immaterial since such notice would not have been seen before purchase).

56. 998 P.2d 305 (Wash. 2000).

57. *Id.* at 307.

58. *Id.* at 308.

59. *Id.* at 312-13.

60. *Id.* at 313.

61. *Id.*

62. *See id.* (stating that the buyer's "use of the software constituted assent to the agreement").

63. *See, e.g.*, *Westendorf v. Gateway, 2000 Inc.*, No. 16913, 2000 WL 307369 (Del. Ch. Mar. 16, 2000) (following rationale of *Hill* without mention of whether buyer had notice that additional terms would be involved in transaction); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998) (same); *see also O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003) (determining, without discussion of whether buyer had notice of additional terms before signing contract, that the arbitration agreement in a cellular telephone service plan was enforceable even though it was provided after service contract was signed); *Lozano v. AT&T*

*C. Insignificant Consequences for Failure to Provide Notice*

The notice aspect of rolling contracts is further weakened by the apparent lack of any significant consequences to a seller for failure to provide notice. The court in *Hill* raised, but did not fully address, what would happen if a seller were to attempt to disclose a term after purchase without any pre-purchase notice that the transaction would involve deferred terms: “Perhaps the [purchasers] would have had a better argument if they were first alerted to [the existence of deferred terms] after opening the box and wanted to return the computer to avoid the disagreeable terms but were dissuaded by the expense of shipping.”<sup>64</sup>

The court had no reason to fully meet the issue (since the Hills had the notice required by the court), but the court’s language indicates a high burden for a buyer seeking to argue that the seller should be penalized for not providing notice. The buyer would apparently have to establish that he read the term at issue, found the term disagreeable, and would have returned the good but for the shipping costs—a burden of proof that would severely limit the number of claims that could successfully be made.

Nor is it clear what remedy awaits a buyer who could meet this high burden. One might expect that the remedy would be non-enforcement of the term—the result that would flow from a finding of unconscionability<sup>65</sup> or from a finding that a term was beyond the reasonable expectations of the buyer.<sup>66</sup> However, the court’s dictum on this point indicates that the potential consequence to the seller would be minuscule: “What [would] the remedy be [if the buyer had no notice of the existence of additional terms until after purchase]—could it exceed the shipping charges?”<sup>67</sup> The question is, for the court, “interesting,” but is not addressed any further.<sup>68</sup>

In the balance of this Article, I explain why and how the notice aspect of rolling contracts should be restored and enhanced through Template Notice.

### III. ARGUMENTS IN SUPPORT OF TEMPLATE NOTICE

In this Part of the Article, I provide a number of arguments in favor of Template Notice. In Section A, I argue that Template Notice

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Wireless, 216 F. Supp. 2d 1071 (C.D. Cal. 2002) (similar).

64. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

65. See U.C.C. § 2-302(1) (2005).

66. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

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

68. *Id.*

enhances some of the justifications for enforcing rolling contracts. In Section B, I argue that Template Notice is fair to both buyers and sellers. I argue as well that Template Notice builds on existing practice and would be relatively easy to implement. In Section C, I argue that Template Notice would make assent to deferred standardized terms more meaningful. In Section D, I discuss how Template Notice makes sense given the structure and rhythm of rolling contracts. Finally, in Section E, I argue that Template Notice would help resolve the ambiguity over the contractual significance of post-purchase actions and documents that is inherent in rolling contracts.

A. *Template Notice Reinforces the Justifications for Rolling Contracts*

Perhaps the most straightforward argument in support of Template Notice is that it takes seriously two justifications in support of rolling contracts: first, that a buyer concerned about contract terms can opt to seek them out before purchase, and second, that a buyer unwilling to proceed with a transaction involving deferred terms can opt not to enter into the transaction in the first place. Template Notice reinforces both of these justifications.

Enforcement of rolling contracts has often been justified by the fact that if buyers are really interested in the terms, they can obtain them before purchase. In *Hill*, for example, the court's decision to enforce an arbitration provision seemed premised largely on the idea that if the buyers had been interested in the full text of the deferred terms, the buyers could have and would have obtained them before buying their computers. The court in *Hill* noted that the buyers had three choices in this regard: (1) request the terms from the seller, (2) find them in magazines or on websites, or (3) wait and read them when the terms arrive with the computer.<sup>69</sup> The buyers in *Hill* knowingly passed up the opportunity to find the terms in advance of purchase and that decision seemed to justify, at least in part, the court's decision to enforce those terms.<sup>70</sup>

Similarly, in *Crawford v. Talk America, Inc.*,<sup>71</sup> the court enforced an arbitration provision that had not been provided or described at the time that phone service was ordered.<sup>72</sup> At the conclusion of the telephone conversation in which plaintiff ordered the telephone service, a third party verifier informed her that “[f]or complete

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69. *Id.*

70. *Id.*

71. No. 05-CV-0180-DRH, 2005 WL 2465909 (S.D. Ill. Oct. 6, 2005).

72. *Id.* at \*2-5.

information about [her] services,” the purchaser could go on-line or call the company’s toll free number.<sup>73</sup> The purchaser also received a notice after completing her order informing her that she could review full contract terms on-line or call or write the service provider if she had a question.<sup>74</sup> Despite the fact that the purchaser never received a hard copy of the terms, the court still enforced the arbitration provision.<sup>75</sup> The court’s holding was motivated in part by the fact that the buyer knew there were additional terms and could have sought them out.<sup>76</sup>

Because courts enforce deferred terms when a buyer could have found them before purchase, it seems reasonable to at least let the buyer know what to look for if the buyer chooses to try to find these terms. That is, basic fairness dictates that if courts are going to attribute to buyers any knowledge that they could have obtained by some effort, then buyers ought to at least have a hint as to what that knowledge involves. This is a function that Template Notice would serve well.

Perhaps more importantly, Template Notice gives the buyer the information needed to decide whether the types of terms at issue are important enough for the buyer to make the effort to seek out the details in the first place (especially since seeking out the terms requires more than simply looking through a single document). In other words, the computer purchasers in *Hill* might have deemed the exact details of the “limited warranty” or the “lifetime support” insufficiently important to research further. However, if the purchasers had known that there were terms that affected their right to sue in court, they may have thought it worthwhile to search out the details of such terms.

*Hill* is also premised on the notion that a buyer unwilling to proceed with a transaction that involves deferred terms can simply refrain from making the purchase in the first place. The court in *Hill* observed that consumers “browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions

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73. *Id.* at \*3.

74. *Id.*

75. *Id.* at \*4-5; *cf.* *Schlessinger v. Holland Am., N.V.*, 16 Cal. Rptr. 3d 5, 11 (Ct. App. 2004) (observing that even though passenger had not received her ticket with the relevant forum selection provision until after she had made payment for the ticket, she had “ample opportunity” to learn of the terms either through the cruise line’s website or from her travel agent).

76. *Crawford*, 2005 WL 2465909, at \*4.

costs of returning the package after reviewing its contents.”<sup>77</sup> The purchase thus serves as something of a threshold through which the buyer can decide whether or not to enter the transaction. However, this threshold function can only be served if potential buyers have notice of the existence of additional terms before purchase. Furthermore, this function can be much better served by requiring sellers to provide potential buyers with some indication of what these deferred terms will be, rather than merely requiring notice that there will be some unspecified deferred terms. The additional information provided by Template Notice would enable buyers to make better-informed decisions about whether or not to proceed with a transaction.

*B. Template Notice is Fair to Both Buyers and Sellers*

Because it addresses many of the concerns of those who oppose any deferral of terms, as well as the concerns of those who oppose requiring complete pre-purchase disclosure of contract terms, Template Notice represents a sensible middle ground that is fair to both buyers and sellers. Further, it builds on existing practice and would be relatively easy to implement.

*1. Concerns that deferral of terms is unfair to buyers*

A number of factors may negatively impact the likelihood that deferred terms will be read or acted on. These factors lead some commentators to describe rolling contracts as an “extreme version of an adhesion contract.”<sup>78</sup>

By the time a buyer actually sees the full terms, the buyer is already committed, both financially and psychologically, to the transaction. Professor Jean Braucher has compared the rolling contract, at least in some contexts, to the “bait and switch” sales tactic: both take advantage of the consumer’s investment of time and energy in a given transaction before the consumer is provided full information.<sup>79</sup> Professor Braucher has also noted that while it is certainly possible that only a small percentage of buyers read terms presented before

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77. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

78. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 249 (2002).

79. Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1853 (2000); cf. Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, 104 COM. L.J. 197, 226 (1999) (providing reasons why, as a practical matter, the option to return for a full refund may be “cost-prohibitive and unattainable”).

purchase, the phenomenon of “cognitive dissonance” may well decrease that percentage if terms are presented after purchase.<sup>80</sup> Cognitive dissonance has been described as a “form of selective perception in which actors give greater weight to evidence that confirms beliefs they already hold and lesser weight to contradictory evidence.”<sup>81</sup> Thus, a buyer is unlikely to attend to any evidence that might demonstrate that he or she had made a mistake that needs to be corrected. This would be especially so after the buyer has already paid for and taken delivery of a product or begun receiving a service.<sup>82</sup>

In addition, Professor, now judge, Robert Keeton noted that a lapse of time between payment and receipt of terms may decrease the likelihood that deferred terms will be read.<sup>83</sup> Professor Keeton observed, in discussing the making of insurance agreements, that:

the normal processes for marketing most kinds of insurance do not ordinarily place the detailed policy terms in the hands of the policyholder until the contract has already been made. In life insurance marketing, for example, the policyholder does not ordinarily see the policy terms until he has signed the application (his offer to contract with the company) and has paid a premium, and the company has approved the application and has executed and issued the policy. This often means a delay of weeks, and occasionally even longer, between making an application and having possession of the policy—a factor enhancing the policyholder’s disinclination to read his policy carefully or even to read it at all.<sup>84</sup>

This description applies neatly to rolling contracts as well.

A phenomenon referred to as the “endowment effect” may also work to reduce the likelihood that the buyer will read the deferred terms. The endowment effect “stands for the principle that people tend to value goods more when they own them than when they do not.”<sup>85</sup>

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80. See Braucher, *supra* note 2, at 765-66 (observing that after a consumer has paid for and taken delivery of a good, the effects of cognitive dissonance would likely be quite strong).

81. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1093 n.163 (2000) (citing LEON FESTINGER, *THEORY OF COGNITIVE DISSONANCE* (1957)).

82. See Braucher, *supra* note 2, at 765-66.

83. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 968 (1970).

84. *Id.*

85. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003).

Research in the field of marketing by Professor Stacy Wood provides some evidence that the endowment effect may reduce the likelihood that deferred terms in a rolling contract will be read. Professor Wood conducted a number of experiments to assess the effect of return policies in the context of “remote sales”—sales in which the buyer shops through the Internet, catalogs, or television home shopping networks.<sup>86</sup> Consumers are likely to regard remote sales, which involve a time lag between order and receipt of goods, as a “two-stage process involving separate order and keep-or-return decisions.”<sup>87</sup> Analysis of decision-making in remote sales is thus relevant to rolling contracts since many rolling contracts meet the definition of remote sales. Even rolling contracts made in an on-site retail environment have the same fundamental structure of a two-stage process: first, a decision to purchase, and second, a decision to “keep-or-return.”

Professor Wood’s experiments demonstrate that the endowment effect reduces the amount of deliberation that occurs in the “keep-or-return” decision in remote sales. These experiments compared the deliberation time between purchases with lenient return policies and those with more stringent return policies. The experiments revealed that a lenient return policy reduces the amount of deliberation time a buyer gives to a purchase at the time of order since the buyer knows that it will be easy to return the purchased item if the buyer is dissatisfied.<sup>88</sup> One would expect a corresponding increase in post-purchase deliberation time after the product is received. However, no such increase materialized in Professor Wood’s experiments.<sup>89</sup>

Professor Wood attributes this relative overall decrease in deliberation time to the endowment effect resulting from feelings of ownership in the ordered good<sup>90</sup>—feelings that may even arise at the time of order, before actual ownership or physical possession.<sup>91</sup> Thus, Professor Wood notes that in this two-stage process, “the consumers who cavalierly order a product because they know it is easily returned may fail to give sufficient deliberation to the decision to keep or return the product because of a sense of ownership and perceived

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86. Stacy L. Wood, *Remote Purchase Environments: The Influence of Return Policy Leniency on Two-Stage Decision Processes*, 38 J. MARKETING RES. 157, 157 (May 2001).

87. *Id.* at 159.

88. *Id.* at 167.

89. *Id.*

90. *Id.* at 158.

91. *Id.* (citing Sankar Sen & Eric Johnson, *Mere-Possession Effects without Possession in Consumer Choice*, 25 J. CONSUMER RES. 24, 105-18 (1997)).

value.”<sup>92</sup> Although Professor Wood addresses post-purchase deliberation over the good itself as opposed to deliberation over contract terms, it seems plausible that the same ownership effects she identifies would also decrease the time spent considering the contract terms provided after purchase or order.<sup>93</sup>

Template Notice responds to these concerns, at least partially, by moving the substance of deferred terms to a point before any investment in the purchased item or service occurs and before any feelings of ownership arise.

I should note that although there are arguably valid concerns that deferral decreases the likelihood that terms will be read or acted on, not everyone shares this opinion. For instance, Professor Robert Hillman has argued that deferral has no impact (or, possibly, even has a positive impact) on the likelihood that terms will be read.<sup>94</sup> For Professor Hillman, because consumers are unlikely to read standardized terms “under any circumstances, the particular time at which they could have read them should not control their legal treatment.”<sup>95</sup> Although Professor Hillman doubts that many buyers read standard term contracts regardless of when they are presented,<sup>96</sup> he indicates that deferral of terms may actually be preferable to disclosure before purchase or order: “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.”<sup>97</sup>

Unfortunately this debate has largely been academic. For the most part, courts have been unwilling to address the impact of deferral in a nuanced way. For instance, in *Bischoff v. DirectTV, Inc.*,<sup>98</sup> the court rejected an invitation to consider the impact of a lapse of time between the initiation of purchased television service and the presentation of contract terms.<sup>99</sup> Plaintiffs in *Bischoff* argued that such

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92. *Id.*

93. Cf. Roger C. Bern, “Terms Later” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 724-26 (2004) (observing that deferral of terms takes advantage of a buyer’s unwillingness to give up something the buyer already owns, thus forcing the buyer “to admit being tricked as to the deal’s real value, [and this] when coupled with the other cognitive defects, the inconveniences connected with return, and the cost of search for a replacement” make it very unlikely a buyer will ever read deferred terms).

94. Hillman, *supra* note 4, at 752-58.

95. *Id.* at 757.

96. *Id.*

97. *Id.*

98. 180 F. Supp. 2d 1097 (C.D. Cal. 2002).

99. *Id.* at 1105.

a lapse was a basis for distinguishing *Hill*, because in *Hill* the terms accompanied the purchased computers and thus were available at the same time the buyers took possession of the computers.<sup>100</sup> Instead of addressing the issue directly, the court focused on the “economic and practical considerations involved in selling services to mass consumers which make it acceptable for terms and conditions to follow the initial transaction.”<sup>101</sup> The court thus missed an opportunity to assess whether the endowment effect or other factors might make such a lapse of time significant. Other courts have also been unwilling to consider the impact that the deferral of terms may have on the likelihood that terms will be read or acted on.<sup>102</sup>

It is difficult to know for certain whether the deferral of terms decreases the likelihood that the buyer will in fact read or act on the terms. There is a reasonable argument that it does, and so Template Notice partially meets these concerns by pushing at least some additional disclosure to a time in the transaction when it is more likely to be noticed and when a buyer’s decision to proceed with the transaction is less encumbered by sunk time and costs. Even if deferral does not reduce the likelihood that terms will be read, Template Notice would still have the salutary effect of giving the buyer two opportunities to become aware of the deferred terms.

## 2. *Concerns that requiring pre-purchase disclosure is unfair to sellers*

The previous subsection focused on concerns over the deferral of terms and fairness to buyers. This Subsection, in contrast, focuses on concerns that requiring full disclosure of all terms before or during purchase would be unfair and unduly burdensome to sellers.

Whatever fault one might find with the reasoning in *ProCD* and *Hill*, it is difficult to dismiss entirely Judge Easterbrook’s observation that a seller required to place the entire agreement on a product’s packaging would have to use “microscopic type” or remove other, more useful information, such as what the purchased item does.<sup>103</sup> Similarly, there is also force in the court’s statement in *Hill* that:

Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations . . . had to read the four-page statement of terms before taking the buyer’s credit card number, the droning

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100. *Id.*

101. *Id.*

102. See discussion *infra* Part IV.A.2 (discussing courts’ reluctance to seriously evaluate the charge of procedural unconscionability in the context of deferred terms and rolling contracts).

103. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450-51 (7th Cir. 1997).

voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.<sup>104</sup>

Template Notice does not entail complete disclosure of all terms. It would not require microscopic text or a lengthy reading of terms. It would instead require only summary notice of the most important terms.

Template Notice also addresses concerns that complete pre-purchase disclosure would overwhelm the buyer. As Professor Hillman observes, “by increasing the information available to consumers, the early display of terms may add to the problem of information overload.”<sup>105</sup> Professor Hillman’s concern is that the likelihood of reading may in fact go down if we require sellers to disclose all information at once.<sup>106</sup> Template Notice responds to this concern by calling for selective, but not fully comprehensive, early disclosure.

### 3. *Template notice as an easy to implement extension of current practice*

Template Notice is not an academic theory divorced from reality. A similar approach is already being implemented in the context of transactions contained within a single document. It is not unusual for courts assessing standardized contracts contained in a single document to give weight to notice provisions that the seller placed at the beginning or on the front of an agreement. For instance, in *Lucido v. Dolphin Cruise Lines, Inc.*,<sup>107</sup> the court enforced a provision that limited a cruise passenger’s time to sue to one year.<sup>108</sup> The court found that the passenger’s ticket “reasonably communicated” the provision because there was a clear warning on the face of the multi-

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

105. Robert A. Hillman, *On-Line Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 850 (2005); cf. Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN. ST. L. REV. 105, 302 (2004) (“Information disclosure may be used in perverse ways. First, by means of ‘information overload’—the likelihood of a legal document being read in its entirety by a franchisee is inversely proportional to the length and complexity of the document”).

106. See Hillman, *supra* note 105, at 849-50 (describing reasons why required disclosures may be ineffective or counterproductive). An official comment to Section 211 of the Restatement makes a similar point to bolster its regime of general enforcement of standardized terms, noting that such enforcement frees sellers and consumers “from attention to numberless variations and [enables buyers to] focus on meaningful choice among a limited number of significant features: transaction type, style, quantity, price, or the like.” RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

107. No. Civ. A. 95-2560, 1996 WL 15734 (E.D. Pa. 1996).

108. *Id.* at \*3-5.

page ticket that pointed out and summarized the term at issue, stating that: “Attention is particularly drawn to . . . Articles 19 and 20 which limit the periods in which notification of claim is to be made and suit commenced. Failure to comply with those limitation periods will result in the loss of your rights.”<sup>109</sup> The language thus drew “special attention to the time limit and its consequences.”<sup>110</sup> Other courts have also found contract provisions were meaningfully communicated, at least in part, by virtue of a special reference to them on the face of or near the beginning of a contract.<sup>111</sup>

The point of purchase is the contextual analogue to the face of a document or the space near the signature line—it is the point at which attention is most closely being paid to the transaction by the potential purchaser. It is thus the appropriate time for Template Notice to be given. As I noted earlier in the Article, it would not be difficult for a telephone sales representative to provide this notice<sup>112</sup> or for a seller to place such notice on product packaging.<sup>113</sup>

Template Notice would impose a minimal burden on sellers. A seller would not be required to highlight all the deferred terms, only the important ones. The universe of terms, the enforceability of which sellers are truly concerned with, is probably not very large, consisting of such provisions as arbitration provisions and limitations on damages, warranties, or the time within which suit may be brought.<sup>114</sup>

It might also first appear that requiring some description of the terms is more of a burden than simply requiring notice that an additional form is coming. Professor Randy Barnett notes that in the

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109. *Id.* at \*1.

110. *Id.* at \*3.

111. *See, e.g.,* *Lowe v. Air Jamaica, Ltd.*, 755 F. Supp. 1013, 1017 (S.D. Fla. 1990) (explaining that the front of a ticket provided notice that the terms should be read carefully along with a statement that the “passengers [sic] attention is further directed to Clause 5 which sets forth limitation periods in which notification of claim is to be made and suit commenced”); *Tateoasian v. Celebrity Cruise Servs., Ltd.*, 768 A.2d 1248, 1251-52 (R.I. 2001) (stating that the notice clearly set forth that the contract provisions included limits on time in which suit may be brought).

112. For some suggested language that the sales representative could read, see *supra* pp. 102-03.

113. There would, to be sure, be situations where Template Notice is not practicable. In such situations, the result need not be automatic non-enforcement but could instead be a heightened scrutiny of the substance of the term. *See* discussion *infra* Part IV.A.

114. I do not advocate in this Article for a particular “test” to be used to determine which terms should be disclosed through Template Notice and which should not, though an appropriate standard might be that notice must be given of any type of term that, if fully explained, would be of interest to a reasonable buyer at purchase. As a practical matter, the number of terms would be relatively small. The matter may best be left to evolving commercial practice and judicial determinations.

latter case, all that would be necessary is for a telephone representative to tell a buyer that “the form will follow in the box.”<sup>115</sup> Professor Clayton Gillette, however, has raised some concern that merely notifying a buyer that additional terms will be on the way will more likely give rise to “buyer agitation than buyer enlightenment.”<sup>116</sup> Professor Gillette conceives of a conversation after a telephone sales representative informs a buyer that there will be additional terms included with the ordered item when it arrives going something along the following lines:

“Customer: What terms? What are they?”

Operator: They will be included in the box.

Customer: Well, wait a minute, can’t you tell me what they are?”<sup>117</sup>

Professor Gillette argues that at this point the representative will have the choice of either “dron[ing] through pages of terms” or simply restating that the terms will be included.<sup>118</sup> The option I propose—notification of additional terms with some description of key provisions—is a third alternative. The “extra” information provided anticipates the inquisitive buyer Professor Gillette imagines, providing select information without inundating the buyer or putting an excessive burden on the seller.

### C. *Standardized Terms, Blanket Assent, and Rolling Contracts*

Assent to deferred standardized terms would be more meaningful with Template Notice. Template Notice corrects for the fact that deferred terms are separated both physically and chronologically from the key terms of the deal and from the moment of purchase.

Some preliminary discussion of assent to standardized terms in general may prove helpful. A logical place to start any such discussion is with Karl Llewellyn’s influential statement on the topic:

Instead of thinking about ‘assent’ to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may

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115. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 643 (2002).

116. Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 *WIS. L. REV.* 679, 687 (2004).

117. *Id.* at 687 n.30.

118. *Id.*

have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.<sup>119</sup>

Llewellyn's scholarly work has been "enormously influential with courts and commentators"<sup>120</sup> and his conception of blanket assent "dominates contemporary judicial treatment of standard-form provisions."<sup>121</sup>

However, blanket assent should not cover quite so much in rolling contracts as it does in other types of standardized contracts. In a typical standardized contract of the type presumably envisioned by Llewellyn, we might be comfortable concluding that a buyer signing a document is giving blanket assent to standardized terms because the buyer has the ability to easily see the scope of the terms to which assent is being given. A buyer with a document in hand has an immediate ability to read it, and to the extent the buyer foregoes that opportunity, it may be appropriate to consider the buyer as having assented to unread terms in that document. Similarly, a buyer with a document in hand can see how many standardized terms are in front of him or her (two paragraphs? fifteen pages?) and can at least get a sense of the scope of that to which he or she is giving assent. Additionally, a buyer has the option to generally skim through the document, and to look at the headings or for any conspicuous text. In such a situation, a mere check that the terms are not "unreasonable or indecent"<sup>122</sup> may be enough.

In a rolling contract, although the buyer has the ability to obtain the terms before purchase, he or she can only do so with some effort (such as contacting the manufacturer or searching the Internet). Similarly, the universe of terms is not so readily evident at the time of purchase since a buyer has little sense of the extent of standardized terms involved. Template Notice addresses the differences between more traditional standardized contracts and rolling contracts. By requiring notice of the subject matter of deferred terms at purchase, a buyer is given some opportunity, albeit imperfect, to understand what he or she is getting into. Template Notice makes up for the imposition of barriers of time and effort between the buyer and the standardized terms in rolling contracts.<sup>123</sup>

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119. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

120. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1206 (1983).

121. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 461 (2002) (describing Llewellyn's theory of "blanket assent" and recognizing its importance in modern jurisprudence).

122. See LLEWELLYN, *supra* note 119, at 370.

123. One scholar has noted that there may be differences in the way in which

Professor Barnett argues that to the extent buyers would be surprised to learn of additional terms, requiring sellers to notify buyers that additional terms will follow the purchase or order is “more likely to lead to manifestations of assent that reflect the subjective assent of the parties than a contrary rule requiring no disclosure.”<sup>124</sup> As he explains, unsophisticated buyers may be unlikely to know that sellers are permitted to provide terms after purchase “and for this reason are unlikely even to ask whether such will occur.”<sup>125</sup> Accordingly, providing disclosure that additional terms are coming may serve to make the decision to proceed with a purchase mesh more closely with actual assent to such deferred terms.<sup>126</sup>

But why stop at merely requiring disclosure that some unspecified terms are coming? If the goal is to make it more likely that the buyer really means to assent to terms the buyer may not read, it seems prudent to also let the buyer know what types of terms are at issue. Such a rule would help secure more meaningful assent. For example, a party who knows that the agreement contains a “dispute resolution clause” and does not make an effort to seek out such a term before purchase can probably more appropriately be deemed to have assented to a reasonable arbitration clause than could a buyer who only knew that more terms of an unspecified type were forthcoming.

Template Notice thus secures more meaningful assent to standardized deferred terms.<sup>127</sup>

#### *D. Assent and the Rhythm of the Rolling Contract*

Courts enforcing rolling contracts locate assent primarily at post-purchase contract formation. But as a practical matter, rolling contracts are not back-loaded in this way. Most of the real decision-making, especially in consumer purchases, likely occurs at purchase or order. This is not to say that the contract is or should be closed to all new terms at purchase or order. But given that deferred terms arrive when the buyer is unlikely to be focused on the transaction, and given that the act of keeping a good or not canceling a service is

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terms presented on paper and terms presented on the Internet are perceived by potential buyers and that courts should take those differences into account. See Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1332 (2005) (comparing the buyer’s ability to see significant terms in a contract when flipping through a paper document versus scrolling through computer screens).

124. Barnett, *supra* note 115, at 642.

125. *Id.*

126. *See id.*

127. A rolling contract “purist” might, at this point, argue that assent occurs only after the accept-or-return period lapses. I address the question of when assent occurs in a rolling contract more fully in the next subsection. See discussion *infra* Part III.D.

a fairly weak signal of assent, some mechanism is needed to limit the scope of deferred terms. Given the primacy of the purchase in the transaction, the information provided at purchase should serve as the general form or skeleton of the contract—deferred terms may be added, but only to flesh out the details.

Decisions of courts enforcing rolling contracts are premised on the idea that nothing of contractual significance, other than the making of an offer, occurs until the accept-or-return period, and that the heavy lifting of decision-making and assent occurs after purchase.<sup>128</sup> Given this premise, virtually any term, whether an arbitration clause or a provision that an additional \$10,000 is owed,<sup>129</sup> may be included among the deferred terms since a seller can make any offer it pleases. The buyer can always simply say “no” by returning the good or canceling the service.<sup>130</sup> That conception, however, is not realistic and has been problematic from the start. Even the examples cited by the *ProCD* court in support of its contention that transactions in which the “exchange of money precedes the communication of detailed terms” involve transactions in which some agreement was formed when the money was paid.<sup>131</sup> The first example provided by the court was the purchase of an insurance policy. The court describes these transactions as ones in which the buyer typically meets with an insurance agent with whom he or she discusses “the essentials” (such as premium amount, coverage, and so forth) and pays a premium.<sup>132</sup> Although additional terms are sent later, such a policy typically takes effect on the payment of that first premium, as the *ProCD* court itself notes.<sup>133</sup> Thus, at the time of purchase and before receipt of additional terms, “the essentials” are agreed upon and a contract is in force. Insurance policies are also particularly bad proof of the propriety of a relatively unfettered right to add more terms since such policies are frequently subject to policing under the doctrine of reasonable expectations to prevent the imposition of unexpected terms.<sup>134</sup>

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128. See discussion *supra* Part I.

129. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (explaining that upon opening a package and finding a term that demands payment of another \$10,000, a buyer can avoid forming a contract by simply returning the package).

130. *Id.*

131. *Id.* at 1451.

132. *Id.*

133. *Id.*

134. See *infra* Part IV.B.1 (discussing the reasonable expectations doctrine and its application to insurance contracts).

The second example in *ProCD*, the purchase of an airplane ticket,<sup>135</sup> also indicates that the buyer's decision-making is heavily front-loaded. The court describes a purchaser calling an airline or travel agent, getting a price, reserving a seat, and making a payment. The court noted that there will likely be additional terms on the ticket when it arrives and that the use of the ticket constitutes acceptance of those terms. According to Judge Easterbrook, the buyer may reject the terms "by canceling the reservation."<sup>136</sup> As with the purchase of an insurance policy, the purchase of the airline ticket is front-loaded. Decisions as to price and destination are made at purchase and, especially in the case of a non-refundable ticket, very little decision-making remains to be done afterwards. To say that what happens at purchase is merely part of the offer stage seems quite unrealistic.

In fact, *ProCD* itself was ambivalent on when the agreement occurred in the software sale at issue in that case. Although the court spoke in terms of acceptance occurring only after the use of the software,<sup>137</sup> earlier in the opinion the court alluded to the possibility that some agreement was made at the time of purchase, noting that "one of the terms to which [the buyer] agreed by purchasing software is that the transaction was subject to a license."<sup>138</sup>

And as I have argued more fully in an earlier Article,<sup>139</sup> even if we accept the argument that in a rolling contract *the* contract is not formed until after the accept-or-return period expires, some contract is formed at purchase or order.<sup>140</sup> Whether or not the contract is technically consummated at purchase or order, the buyer is most fully focused on the transaction at that point. To consider which terms may be deferred without reference to the circumstances of the purchase, as though the purchase and deferral of terms are independent of one another, is not appropriate.

It is similarly inappropriate, however, to conclude that a rolling contract is closed to any new terms and written in stone at the time of purchase or order. A typical purchaser of an airline ticket, for example, probably knows that there are terms beyond price and destination that will be printed on the back of the ticket. Buyers as a

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135. *ProCD*, 86 F.3d at 1451.

136. *Id.*

137. *Id.* at 1452.

138. *Id.* at 1450.

139. Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677 (2004).

140. *See id.* at 726-27 (discussing the possibility that at the time of purchase the buyer has agreed to at least receive the goods or begin receiving a service and the seller has agreed to proceed with the sale unless the buyer takes some affirmative action to prevent such sale).

class are likely to know that the contract is not truly closed to any new terms at the point of purchase or order, even if they may not have had this understanding a few decades ago. As one court noted in granting summary judgment enforcing deferred contract terms: “if this case had arisen in 1985 rather than 1997, I might have a different ruling.”<sup>141</sup> And from 1997 to the time of this writing, the prevalence of deferred terms has certainly only grown.

What then is the rhythm of the rolling contract? Professor Barnett argues that in rolling contracts the “manifestation of consent has two parts at two different times.”<sup>142</sup> This conception is far more useful than a focus on identifying a single moment of contract formation. But all moments of consent are not created equal. In a rolling contract we have the problem of matching assents of varying strengths given at varying times and in varying ways with terms of varying importance.<sup>143</sup> A consumer’s attention to the purchase is presumably most often greatest at the time of purchase, and the act of making the purchase or order is a strong and clear signal of assent.

In contrast, the act of not returning a good or canceling a service is, to say the least, a bit more ambiguous and can be characterized as “nominal assent.” Professor Gillette, while generally favoring enforcement of deferred terms, notes that to speak of actions such as opening a box or using a product “in terms of assent is to expand the meaning of that phrase beyond our normal discourse” since assent usually requires something “more explicit than opening a box or using a product that is accompanied (unknown or ignored by the buyer) by a recitation of obligations.”<sup>144</sup>

That what happens after the purchase or order can only uncomfortably be described as assent is demonstrated by language used by the Supreme Court in *Carnival Cruise Lines, Inc., v. Shute*,<sup>145</sup> a case in which the Court assessed the refusal by the Court of Appeals for the Ninth Circuit to enforce a forum-selection clause on a

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141. See *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305, 310 (Wash. 2000) (quoting statement of the trial court judge in the proceeding below).

142. Barnett, *supra* note 115, at 641.

143. The time factor thus exacerbates what Professor David Slawson identified, before the emergence of rolling contracts, as a flaw in Llewellyn’s theory of assent. See W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 37 (1984) (explaining that Llewellyn’s conception ignores “the transactional context. It rests on the implicit assumption that ‘specific assent’ and ‘blanket assent’ are the same and are distributed among different kinds of terms in the same way regardless of the context of the transaction. This is certainly not the fact”).

144. Gillette, *supra* note 116, at 681.

145. 499 U.S. 585 (1991).

passenger cruise line ticket.<sup>146</sup> *Shute*, which is one of the cases cited in *ProCD* as support for the proposition that payment of money often precedes full disclosure of terms,<sup>147</sup> articulated a test for whether to enforce choice of forum provisions on passenger cruise line tickets. Part of that test involves assessing whether the clause is fundamentally fair. The Court found that the provision at issue was fundamentally fair since there was no evidence that the cruise line “obtained [the passengers’] accession to the forum clause by fraud or overreaching.”<sup>148</sup> Even as the Court approved the forum selection clause, the Court apparently found itself unable to actually use the word “agreement” or “assent” to describe the manner in which the term became binding. Instead, the court settled on “accession.” That word choice is telling. At some level “accession” is a synonym for agreement, but the example used by a leading legal dictionary to illustrate the meaning is instructive: “the family’s accession to the kidnapper’s demands.”<sup>149</sup> Accession thus carries a connotation of “reluctantly giving into demands,” as opposed to voluntary and meaningful assent. Indeed, the Supreme Court has used the word “accession” to carry just that connotation in other contexts as well.<sup>150</sup>

Even if a buyer understands that a return period is available, a seller’s marketing practices may diminish the buyer’s appreciation that the return period includes an opportunity to review contract terms. In *Defontes v. Dell Computers Corp.*,<sup>151</sup> the court refused to enforce an arbitration provision included inside the box of a computer ordered over the telephone.<sup>152</sup> The court distinguished *ProCD* and other cases that enforced terms in rolling contracts because, although the seller in *Defontes* did offer a “total satisfaction [return] policy,” the policy was not sufficiently specific in informing the buyer that the computer could be returned based on the buyer’s “unwillingness to comply with the terms” included inside the box.<sup>153</sup> In other words, the buyer might have believed that he had the right to consider and reject the computer, but not the contract terms.<sup>154</sup>

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146. *Id.* at 589.

147. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

148. *Shute*, 499 U.S. at 595.

149. BLACK’S LAW DICTIONARY 14 (8th ed. 2004).

150. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 767 n.12 (1984) (discussing “accession to the demands of the distributors”); *see also Haynes v. State of Wash.*, 373 U.S. 503, 514 (1963) (describing “accession to police demands”).

151. No. C.A. PC-03-2636, 2004 WL 253560 (R.I. Super. Ct. Jan. 29, 2004).

152. *Id.* at \*7.

153. *Id.*

154. *Cf. ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (emphasizing that “acceptance of an offer differs from acceptance of goods after delivery”).

Despite the characterization of rolling contracts by courts enforcing them, the rhythm of the rolling contract is actually that of a front-loaded transaction in which the most significant decision-making with respect to the good or service and its terms occurs at purchase or order. Given this structure, Template Notice serves a number of useful purposes: it moves some information to a moment of focused assent and decision-making and it limits the scope of terms that will be deemed to have been agreed to through nominal assent. Perhaps most fundamentally, it uses the information provided at purchase as the basic structure for the overall contract. As I discuss later, this approach is already being used in the analogous context of assessing whether terms may be added pursuant to “change in terms” provisions in credit card agreements.<sup>155</sup>

#### *E. Clarifying Contractual Significance*

Ambiguity over the contractual significance of documents and actions that come after the purchase or order is inherent in rolling contracts. Template Notice would help resolve that ambiguity by bridging the separation between the time and manner in which the key terms of a rolling contract are presented and the time and manner in which the standardized terms are presented.

The obviousness of the contractual nature of a document is relevant to the enforceability of standardized terms. For example, Section 211 of the Restatement (Second) of Contracts provides that, with some exceptions, signing or otherwise assenting to a writing constitutes assent to all the terms contained in the writing, whether or not these terms are read.<sup>156</sup> Comment d to Section 211 qualifies that general rule. The comment notes that some documents may serve both contractual and other non-contractual purposes. When the party signing a document has reason to understand that such a document is obviously contractual in nature (the comment gives warehouse receipts and insurance policies as two examples of documents whose contractual nature is generally obvious), that party will likely be bound by the contract provisions contained therein.<sup>157</sup> However, the contractual nature of what might be called “dual use” documents is less clear. For instance, the comment indicates that

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155. See discussion *infra* Part IV.B.3.

156. RESTATEMENT (SECOND) CONTRACTS § 211(1) (1981) (providing that as long as requirements of the section are met, a party “sign[ing] or otherwise manifest[ing] assent to a writing . . . adopts the writing as an integrated agreement with respect to the terms included in the writing”).

157. *Id.* § 211 cmt. d.

baggage checks and parking lot tickets may simply appear to be identification tokens.<sup>158</sup> Buyers who lack reason to know of the contractual nature of these documents are not bound by terms printed on them.<sup>159</sup> The comment seems positively prescient in anticipating rolling contracts when it notes that “[d]ocuments such as invoices, instructions for use, and the like, *delivered after a contract is made*, may raise similar problems.”<sup>160</sup> It seems the drafters of the Restatement understood that anything coming to a buyer after purchase is prone to give rise to confusion as to its contractual nature.

Case law indicates some broadening of the importance of “contractual significance” in contracts formed in non-traditional ways. In *Specht v. Netscape Communications Corp.*,<sup>161</sup> the court refused to enforce purported contract terms on a web site.<sup>162</sup> A web site may display all types of information, some of which is contractual in nature and some of which is not. The Second Circuit in *Specht* used a test akin to comment d, although it did not make reference to Section 211 in reaching its decision. Persons downloading the software at issue in *Specht* saw on their computers a screen containing praise for the software and a “Download” button at the bottom of the screen. To reach the actual license terms at issue, a user would have to have scrolled down on the screen. The court found that the license was not binding since a reasonably prudent person downloading the software would not “have known of the existence of license terms.”<sup>163</sup> Instead, the plaintiffs’ “apparent manifestation of consent was to terms contained in a document whose contractual nature was not obvious.”<sup>164</sup>

Although *Specht* did not involve a rolling contract, many of the issues it raised are equally relevant to rolling contracts. A key point in *Specht* was that it really did not matter how clear the contract terms were since Internet users had no reason to be on the look-out for them. While the position of the scroll bar gave some indication that there may have been more text, that indication was insufficient notice of the contractual nature of such text.<sup>165</sup> In a rolling contract, the

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158. *Id.*; see also *Magliozzi v. P & T Container Serv. Co., Inc.*, 614 N.E.2d 690, 692 (Mass. App. Ct. 1993) (indicating that a “trash pickup ticket” was not sufficiently contractual in nature for term on its reverse side to be binding).

159. RESTATEMENT (SECOND) CONTRACTS § 211 cmt. d.

160. *Id.* (emphasis added).

161. 306 F.3d 17 (2d Cir. 2002).

162. *Id.* at 31.

163. *Id.*

164. *Id.* (citation and internal quotations omitted).

165. *Id.* at 31-32.

clarity of the text of the deferred terms is similarly of no consequence if a buyer has insufficient reason to suspect that contract terms he or she can do something about are contained on the pieces of paper received after purchase.

In *Campbell v. General Dynamics Government Systems Corp.*,<sup>166</sup> the court assessed the enforceability of an arbitration provision that was part of a new dispute resolution policy an employer had purported to introduce. The president of the company had sent all employees an e-mail that, among other things, described the policy. The e-mail urged employees to review the “enclosed materials”—a reference to the two hypertext links in the e-mail (one to a brochure describing the policy and one to a handbook containing the full policy).<sup>167</sup>

The court affirmed the trial court’s decision that the arbitration provision was not enforceable, at least as to the relevant federal claim at issue.<sup>168</sup> The court concluded after examining the “totality of the circumstances,” including “the method, content, and context of the communication,” that the employees were not given minimally sufficient notice that the new policy was a “contractual instrument,” the terms of which would be made binding by an employee’s continued employment with the company.<sup>169</sup> The court noted that although e-mail was widely used at the company and was a preferred method of communication in general, it was not ordinarily used by the company for personnel matters or to convey contract terms.<sup>170</sup> Thus, even though the text of the e-mail announced a new policy, the receipt of the e-mail did not “raise a red flag vivid enough” to let the employees anticipate a “legally significant alteration” to employment terms.<sup>171</sup> The court suggested that requiring employees to affirmatively respond to the e-mail by clicking a box on the screen would have helped put employees on notice of the contractual nature of the e-mail and linked documents.<sup>172</sup>

The court also looked to the “content of the communication,” which consisted of the text of the e-mail and the documents available by hyperlink. The court focused on the e-mail text, since such a focus mirrored the way in which the employer had presented the

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166. 407 F.3d 546 (1st Cir. 2005).

167. *Id.* at 548.

168. *Id.* at 555. The narrow question was actually whether the company’s communications had provided employees with sufficient notice such that their claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2004), could be subject to arbitration. *Id.*

169. *Id.* at 559.

170. *Id.* at 556.

171. *Id.* at 557.

172. *Id.* at 556-57.

communication. The text contained a “fundamental flaw”—it “did not state directly that the Policy contained an arbitration provision that was meant to effect a waiver of an employee’s right to access a judicial forum.”<sup>173</sup> If anything, the language of the e-mail downplayed the significance of the policy terms and their binding nature.<sup>174</sup> While explicitness was not absolutely required, it “would have gone a long way toward meeting the employer’s burden.”<sup>175</sup>

An analogy can be made between the e-mail in *Campbell* and the purchase phase of a rolling contract. Both serve to frame the transaction and both serve, in essence, as the gateway to the remainder of the contract. Both can either highlight or downplay the contractual significance of what is to come. Just as the e-mail in *Campbell* differed significantly in format from the material in the hypertext link, the pre-purchase disclosure in a rolling contract differs in format from the manner in which deferred terms are presented. The fundamental flaw in *Campbell* of failing to include notice of the arbitration provision in the text of the e-mail is replicated by a failure to include a similar notice at purchase in a rolling contract.

Although neither *Specht* nor *Campbell* involved rolling contracts, one court has applied the rationale of those cases to a rolling contract. In *Defontes v. Dell Computers Corp.*,<sup>176</sup> a case already discussed,<sup>177</sup> the court refused to enforce an arbitration provision that had been included inside the box of a computer ordered over the telephone. *Defontes* is significant in that it refused to enforce a rolling contract for a reason other than that a contract was formed at purchase or order.<sup>178</sup> Instead, the *Defontes* court refused to enforce the contract based on an application of the rationale of *Specht*.

The *Defontes* court distinguished *ProCD* and other cases that had enforced deferred terms. The key distinction was that, although the seller offered a “total satisfaction policy” pursuant to which the purchased computer could be returned, the policy was not sufficiently specific in informing the buyer that the computer could be returned based on the buyer’s “unwillingness to comply with the terms” inside the box.<sup>179</sup> The court noted that the “underlying reasoning of the *Specht* decision is particularly poignant to this

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173. *Id.* at 557.

174. *Id.* at 557-58.

175. *Id.* at 557.

176. No. C.A. PC-03-2636, 2004 WL 253560 (R.I. Super. Ct. Jan. 29, 2004).

177. See discussion *supra* Part III.D.

178. See *supra* notes 25-26 and accompanying text.

179. 2004 WL 253560, at \*7.

issue.”<sup>180</sup> According to the court, in *Specht*, the decision hinged on whether a reasonable Internet user would have known of the existence of the purported terms of the agreement. The court employed the “same logic,” determining that the relevant question in *Defontes* should be whether a reasonable purchaser would have known that returning the computer would have constituted rejection of those terms. The court held that a reasonable purchaser would not have known this.<sup>181</sup>

*Defontes* implicitly added another requirement to awareness of the contractual nature of a document: it is not enough that a buyer understand that a document is contractual in nature. The buyer must also understand that the contract terms at issue are “live”—that is, terms the buyer can still do something about by returning the product or canceling the service. Such a requirement is particularly important in rolling contracts where a buyer is far more likely to be presented with something referenced as “terms and conditions” than with something referenced as “proposed terms and conditions.”

In enhancing the obviousness of contractual significance, the sole focus should not be on the document in which the deferred terms are ultimately presented. It is easy enough for a seller to include a document containing only contract terms (excluding any instructions or other information that might distract from the contractual nature of the document) inside the shipping box. The seller could even print “THIS IS A CONTRACT” on the front for good measure.

Such a solution misses the point. It is not the particular form or appearance of the document on which the deferred terms are found that matters. What matters is whether the buyer will have sufficient reason to locate and read the document in the first place and to understand that the statement of “terms” is actually a statement of “proposed terms” which the buyer may accept or reject.

The segregation of boilerplate terms from key terms (such as price and product description) warrants special scrutiny. That separation, both in method and time, weakens a reasonable purchaser’s perception of the contractual significance of post-purchase documents and actions. In other words, the purchase or order gives rise to a sort of “mini” course of performance,<sup>182</sup> establishing the way

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180. *Id.*

181. *Id.*

182. A course of performance, at least under the Uniform Commercial Code, exists when a contract “involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other.” U.C.C. § 2-208(1) (2005). A course of performance “accepted or acquiesced in without objection shall be relevant to determine the meaning of the

in which terms are presented and accepted (or at the very least, providing a benchmark). In a traditional agreement with standardized terms, those terms are presented in the same way and at the same time as the key terms and all such terms are accepted by a signature or a purchase. In a rolling contract, however, key terms are likely presented in the context of the purchase or order and are presented orally or, if in writing, colloquially, before the buyer has taken possession of the goods or begun using a service. These key terms are typically accepted by the purchase or order. In contrast, the agreement's standardized terms are likely presented in densely written legalese and provided after the buyer takes possession of a purchased item or begins using a service. They are accepted by keeping the good or continuing with the service.

The break between key terms and standardized terms is typically so complete that the "Terms and Conditions" provided after the purchase or order are invariably not really the "Terms and Conditions" of the contract since they are quite unlikely to include such terms as product description or purchase price. Thus, the presentation of "pure" boilerplate, unadulterated by what a buyer might actually consider relevant contract terms, should be subject to special scrutiny. In other words, a buyer may only register "contract terms about which I can do something," when the buyer sees key terms, such as price.

The divide between the key terms and the standardized terms is quite large in rolling contracts. Template Notice provides a way of reducing that divide. It presents the deferred terms, albeit in an abbreviated form, at the time of purchase and in the same context as the key terms. It also makes clearer that deferred terms are not final but may be rejected by returning the product or canceling the service.<sup>183</sup> Finally, Template Notice would make clearer, in a larger sense, that the transaction is not complete at the purchase or order and that what is received and what happens afterwards may be "contractual in nature."

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agreement." *Id.*

183. Template Notice meets the objection of *Defontes* more squarely by putting a buyer on much stronger notice from the outset of the transaction that the act of keeping the goods will constitute acceptance of those terms and that the buyer does have the right to avoid the transaction if dissatisfied with the contract terms.

#### IV. BEYOND CONTRACT FORMATION: ADAPTING DOCTRINES USED TO ASSESS STANDARDIZED TERMS TO ROLLING CONTRACTS

The focus on the mechanics of contract formation that has largely dominated the analysis of rolling contracts to date has effectively sidelined other tools that might be used to assess the deferral of terms. In this Section, I discuss unconscionability and reasonable expectations. For each, I provide an overview, describe how the doctrine has been marginalized by courts assessing rolling contracts, and propose how these doctrines could be applied to the deferral of terms. Were courts to apply these doctrines, it would not spell doom for rolling contracts. It would instead result in the improvement of the rolling contract through the addition of Template Notice to these transactions.

##### A. *Unconscionability*<sup>184</sup>

###### 1. *Overview of unconscionability*

A term or a contract may be deemed unenforceable because it is unconscionable under both the common law<sup>185</sup> and the Uniform Commercial Code.<sup>186</sup> Unconscionability “has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>187</sup>

Unconscionability includes both a procedural aspect, which focuses on “deficiencies in the contract formation process,”<sup>188</sup> and a substantive aspect, which focuses on whether the challenged contract or term is “unreasonably or grossly favorable to one side.”<sup>189</sup> A party seeking to establish unconscionability must generally demonstrate both aspects,<sup>190</sup> although not necessarily to the same degree (that is,

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184. Much of what was said in the previous part of this Article is relevant here, as well, since Karl Llewellyn’s analysis of assent to standardized terms provides the foundation for unconscionability. See E. ALLEN FARNSWORTH, *CONTRACTS* §4.28 (3d ed. 1999) (noting that Llewellyn is credited with the authorship of U.C.C. § 2-302 (1) (2005)).

185. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

186. See U.C.C. § 2-302 (2005).

187. *Walker-Thomas Furniture Co.*, 350 F.2d at 449.

188. *Walther v. Sovereign Bank*, 872 A.2d 735, 744 (Md. 2005) (quoting 8 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 18.10 (4th ed. 1998)).

189. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999).

190. See, e.g., *Trend Homes, Inc. v. Superior Court*, 32 Cal. Rptr. 3d 411, 415 (Ct. App. 2005) (ruling that both procedural and substantive unconscionability must be present, but that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required); *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 474 (Mich. Ct. App. 2005) (“In order for a contract or

pursuant to a “sliding scale” approach, the “more substantively oppressive the contract term, the less evidence of procedural unconscionability is required and vice versa”).<sup>191</sup> A few courts appear to have been satisfied with substantive unconscionability alone, even in the absence of procedural unconscionability.<sup>192</sup>

2. *Formation and unconscionability: judicial reluctance to the serious evaluation of rolling contracts for procedural unconscionability*

Courts have generally been content to let the discussion of contract formation and of the practical difficulties of complete pre-purchase disclosure in *ProCD* and *Hill* insulate the deferral of terms from claims of procedural unconscionability. Prior to *ProCD*, at least two courts raised concerns (albeit in the context of a discussion of whether terms should become part of a contract under the U.C.C.’s “battle of the forms” provision)<sup>193</sup> about the structure of rolling contracts, noting that the time and energy a buyer invests in a purchase might work as a strong disincentive for the buyer to exercise a right to return a purchased item.<sup>194</sup>

Unfortunately, exploration of this line of analysis seems to have largely ended after *ProCD* and *Hill*. For instance, in *Brower v. Gateway 2000, Inc.*, decided shortly after *Hill*, the court rejected a claim that a contract involving deferred terms was a contract of adhesion and indicated that deferred terms should be treated like any other type of term:

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contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present.”); *see also* Jeffrey Mining Prod., L.P. v. Left Fork Mining Co., 758 N.E.2d 1173, 1180-81 (Ohio Ct. App. 2001) (stating that “[t]he unconscionability doctrine consists of two prongs: (1) substantive unconscionability . . . and (2) procedural unconscionability”).

191. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

192. *See, e.g.*, *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 58-59 (Ariz. 1995) (holding that despite the fact that “perhaps a majority” of courts have held that there must be at least some quantum of both procedural and substantive unconscionability, a claim of unconscionability can be established under Arizona’s version of the U.C.C. with a showing of “substantive unconscionability alone”); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574-75 (App. Div. 1998) (holding that procedural unconscionability is not always required for a finding of unconscionability).

193. U.C.C. § 2-207 (2005).

194. *See* *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 102 (3d Cir. 1991) (stating that the vendor may have been relying on the purchaser’s investment in time and energy in reaching a point in the transaction so as to prevent him from returning the item); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (stating that “purchasers often invest considerable time and money before ordering goods, and, therefore, are somewhat less likely to return goods once they arrive”).

While returning the goods to avoid contract formation entails affirmative action . . . and even some expense, this may be seen as a trade-off for the convenience and savings for which the consumer opted [by choosing to avoid on-site retail shopping]. That a consumer does not read the agreement or thereafter claims he or she failed to understand or appreciate some term does not invalidate the contract any more than such claim would undo a contract formed under other circumstances.<sup>195</sup>

In other words, rolling contracts are to be treated no differently than other types of standardized contracts.

*Hill* and *ProCD* seem to have put the “stamp of approval” on deferred terms even with respect to claims of procedural unconscionability (despite the fact that the issue of unconscionability was not raised in either of those cases).<sup>196</sup> For instance, in *O’Quin v. Verizon Wireless*,<sup>197</sup> the court enforced an arbitration clause in a terms and conditions pamphlet inside the packaging of a purchased telephone handset.<sup>198</sup> The court first noted that the provision was a part of the agreement, because opinions like *Hill* found nothing “overwhelmingly objectionable in the ‘money now, terms later’ approach to sales of consumer goods.”<sup>199</sup> Later in the opinion, the court rejected a claim of procedural unconscionability, noting (again with a citation to *Hill*) that courts have “countenanced some modicum of adhesionary terms, or evidence of procedural unconscionability in contract formation, in the name of economic efficiency.”<sup>200</sup>

Similarly, in *Stenzel v. Dell Inc.*,<sup>201</sup> the court rejected a claim that an arbitration agreement sent after a computer had been purchased was unconscionable. In response to the purchasers’ claim that the contract was procedurally unconscionable because it had not been freely negotiated, the court stated that there was “substantial case law on point to the contrary.”<sup>202</sup> The first case the court cited for this proposition was *Hill* and the remaining citations were to cases following the reasoning of *Hill* on contract formation.<sup>203</sup>

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195. 676 N.Y.S.2d 569, 573 (App. Div. 1998).

196. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (pointing out that no claim of unconscionability was asserted); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (unconscionability not discussed in the opinion).

197. 256 F. Supp. 2d 512 (M.D. La. 2003).

198. *Id.* at 516.

199. *Id.*

200. *Id.* at 517.

201. No. CIV-03-323, 2004 WL 1433657 (Me. Super. Ct. Mar. 11, 2004).

202. *Id.* at \*3.

203. *Id.*

The unconscionability of the deferral of terms was also apparently raised in *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*,<sup>204</sup> but the court refused the invitation to address the issue fully. *Mortenson* involved a limitation on consequential damages included as part of a shrinkwrap license that had not been presented to the buyer until after the purchased software had been ordered.<sup>205</sup> The purchaser challenged the limitation as procedurally unconscionable, arguing that “the license terms were never presented to [the purchaser] in a contractually meaningful way,”<sup>206</sup> an apparent reference to the fact that the license terms were not discussed or disclosed at the time of purchase. The court addressed the issue, however, by simply looking to factors that are more conventionally relevant to claims of procedural unconscionability: the provisions were not in fine print, the license was printed in capital letters on the diskette pouches and in the instruction manuals, and the buyer was a sophisticated purchaser.<sup>207</sup> The court simply did not address whether the deferral of the terms itself was procedurally unconscionable. This failure on the part of the court was probably due to the fact that the court had already, in a lengthy discussion, endorsed the deferral of terms with a return option as a valid way in which to form contracts.<sup>208</sup> In essence, the contract formation discussion took the wind out of the unconscionability argument.

### 3. *Applying unconscionability to the deferral of terms*

That the mechanics of offer and acceptance can be made to “work” in rolling contracts should not be the end of the analysis. Under both the U.C.C. and the common law, the unconscionability analysis assumes that a contract has been formed<sup>209</sup>—the fact of formation should merely begin the analysis. Procedural unconscionability is not limited to offer and acceptance, but instead “broadly encompasses a whole host of circumstances surrounding contract execution.”<sup>210</sup>

Key indicators of procedural unconscionability are whether there is a lack of voluntariness or a lack of knowledge of the provisions at

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204. 998 P.2d 305 (Wash. 2000).

205. *Id.* at 315.

206. *Id.*

207. *Id.*

208. *Id.* at 311-14.

209. See U.C.C. § 2-302(1) (2005) (providing that a court is to determine whether contract or provision of contract was unconscionable “at the time [the contract] was made”); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (explaining that the court should assess unconscionability as of “the time the contract is made”).

210. Carol B. Swanson, *Unconscionable Quandary: U.C.C. Article 2 and the Unconscionability Doctrine*, 31 N. M. L. REV. 359, 365 (2001).

issue.<sup>211</sup> Both of these indicators are potentially implicated in rolling contracts as they are presently structured. The decision to accept deferred terms may simply reflect the investment of time and energy in the transaction which creates an artificial pressure to proceed with the transaction. A buyer who might have balked at a particular provision presented before purchase may be willing to accept that same provision once the buyer becomes embroiled in the transaction.<sup>212</sup>

Lack of knowledge, too, is potentially at issue in rolling contracts. Among the factors considered in assessing procedural unconscionability is whether a transaction involves “the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract.”<sup>213</sup> But just as within a single document there are places in which terms may be placed to make them less obvious, the same is true of the rhythm of an overall transaction. That is, it may be possible to minimize a term’s impact by presenting it at a time other than purchase. The post-purchase period may be the equivalent of a single document’s fine print.<sup>214</sup>

A transaction may be structured so that the main terms simply overpower the standardized terms and minimize awareness of the standardized terms. One arguably analogous case is *John Deere Leasing Co. v. Blubaugh*.<sup>215</sup> In *Blubaugh*, the court found a lease provision unconscionable.<sup>216</sup> The provision at issue was on the back side of the lease in “very light-colored, fine print.”<sup>217</sup> Because the paper was thin, the darker print from the front page was able “to show through to the back, making it difficult to see the fine print.”<sup>218</sup> The resulting difficulty in reading the standardized terms was among the factors that led the court to find procedural unconscionability.<sup>219</sup> In *Blubaugh*, the key terms overwhelmed the standardized terms. A similar state of affairs exists in rolling contracts, where the front-

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211. *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1573 (D. Kan. 1986).

212. See discussion of cognitive dissonance and the endowment effect, *supra* Part III.B.1.

213. *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906-07 (Kan. 1976).

214. Cf. *Hillman & Rachlinski*, *supra* note 121, at 479 (observing that sellers doing business over the Internet have “avenues for tinkering with the presentation format of their electronic boilerplate” to discourage consumers from actually reading the terms).

215. 636 F. Supp. 1569 (D. Kan. 1986).

216. *Id.* at 1575.

217. *Id.* at 1571.

218. *Id.*

219. *Id.* at 1574.

loaded nature of the transaction serves to maximize what comes at purchase and minimize what comes later.

Template Notice enhances both voluntariness and knowledge in rolling contracts. Template Notice provides for disclosure of the substance of terms at a time when attention is likely being paid to the transaction and choice can be made freely, unencumbered by concerns over time and expense that have already been sunk into the transaction.

Additionally, a buyer proceeding with a transaction after receiving notice of the types of terms being deferred has willingly and knowingly put herself in the position of receiving full disclosure of the precise text of the terms only after purchase or order. The initial decision to proceed with the transaction is thus significantly better informed than it would have been had there been no notice of additional terms or only notice that some unspecified additional terms would be forthcoming.

In short, the pressure of procedural unconscionability analysis should result in sellers adopting Template Notice to avoid their transactions being deemed procedurally unconscionable, a finding that would put the substance of the terms under a scrutiny that they might otherwise escape. Fully exposing the current structure of rolling contracts (without Template Notice) to unconscionability analysis might result in some courts determining that rolling contracts are, as a class, sufficiently suspect that deferred terms be deemed unenforceable even if substantive unconscionability is present only to a comparatively small degree.<sup>220</sup> Sellers would thus face the choice of either accepting this heightened scrutiny of deferred terms or adopting Template Notice to alleviate judicial concern over the deferral of terms.

## *B. Reasonable Expectations*

### *1. Overview of reasonable expectations*

The reasonable expectations doctrine has two sources. It flows both from Section 211(3) of the Restatement and from judicial opinions assessing terms in insurance agreements. Some argue that these two strands have essentially merged.<sup>221</sup>

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220. Procedural and substantive unconscionability need not be present to the same extent. A larger degree of procedural unconscionability might offset a lesser degree of substantive unconscionability, and vice versa. See discussion *supra* Part IV.A.1.

221. See, e.g., Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L.

Section 211(3) reflects Karl Llewellyn's conception of assent to standardized terms.<sup>222</sup> It provides that generally signing or otherwise assenting to a writing constitutes assent to all the terms contained in the writing, whether or not these terms are read.<sup>223</sup> An exception to that general rule is provided in subsection (3), which states that "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 a part of the agreement."<sup>224</sup> However, parties to a contract "are not bound to unknown terms which are beyond the range of reasonable expectations."<sup>225</sup> Along with unconscionability, Section 211(3) represents one of the "most prominent judicial avenues" for dealing with standardized terms.<sup>226</sup>

Similarly, the doctrine of reasonable expectations has been invoked by courts in the context of insurance agreements, and protects against assent being deemed to have been given to terms that, even if not unconscionable, are still beyond the reasonable expectations of a party to the contract.<sup>227</sup> Professor Keeton, who first identified reasonable expectations as a principle underlying many cases involving insurance coverage (although he noted that it "surely . . . applies in other contexts as well"),<sup>228</sup> described it as follows: "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."<sup>229</sup> As a corollary, "insurers ought not to be allowed to use qualifications and exceptions from coverage that are inconsistent with the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved."<sup>230</sup>

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REV. 139, 152 (2005) (treating the Restatement's definition of unenforceable terms as merging into reasonable expectations).

222. See Rakoff, *supra* note 120, at 1199 (noting that Section 211 "reflects [Llewellyn's] work, not just in its black-letter formulations, but in almost every paragraph of its commentary as well").

223. RESTATEMENT (SECOND) CONTRACTS § 211(1) (1981) (providing that as long as the requirements of this section are met, a party "sign[ing] or otherwise manifest[ing] assent to a writing . . . adopts the writing as an integrated agreement with respect to the terms included in the writing").

224. *Id.* § 211(3).

225. *Id.* § 211 cmt. f.

226. Hillman, *supra* note 4, at 748.

227. For a brief summary of the reasonable expectations doctrine, see Burnham, *supra* note 221, at 153-56.

228. Keeton, *supra* note 83, at 967.

229. *Id.*

230. *Id.* at 968.

Although some jurisdictions have not adopted the reasonable expectations doctrine,<sup>231</sup> numerous other courts have adopted a variety of versions of the doctrine. Some courts have adopted reasonable expectations merely as a form of *contra proferentem*, deferring to the reasonable expectations of the insured only if the policy is ambiguous,<sup>232</sup> and others have applied it only where the agreement “contains a hidden trap or pitfall, or if the fine print purports to take away what is written in large print.”<sup>233</sup> In a third variation, referred to by one commentator as the “whole transaction” approach, reasonable expectations are enforced even if such expectations are created by insurers’ “marketing patterns and general practice,” and not just if such expectations are created by the language of the agreement.<sup>234</sup>

2. *Implicit rejection of the application of reasonable expectations to the deferral of terms*

The application of the doctrine of reasonable expectations to the deferral of terms was, at least arguably, implicitly rejected in dicta in *ProCD*.<sup>235</sup> After discussing the term at issue that restricted the use of the purchased database to non-commercial uses, the court went on to note that: “Ours is not a case in which a consumer opens a package to find an insert saying ‘you owe us an extra \$10,000’ and the seller files suit to collect.”<sup>236</sup> The simplest distinction between the license term and the \$10,000 term is that while the buyer in *ProCD* should

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231. See, e.g., *Ryals v. State Farm Mut. Auto. Ins. Co.*, 1 P.3d 803, 805 (Idaho 2000) (noting that the Idaho Supreme Court has rejected the concept of reasonable expectations); *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003) (rejecting doctrine of reasonable expectations under Michigan law). See generally Paul N. Farquhason, *Reasonable Expectations*, in 1 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 5.3(d)(1) (David Leitner et al. eds., 2002) (discussing jurisdictions not accepting reasonable expectations); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST L. J. 823, 834-38 (1990) (categorizing the jurisdictions that have not explicitly recognized reasonable expectations and describing the specific differences among them).

232. See, e.g., *Tsadilas v. Providian Nat’l Bank*, 786 N.Y.S.2d 478, 480 (App. Ct. 2004) (holding that because the arbitration provision added to the contract was clear, it was not necessary to ask about the plaintiff’s reasonable expectations), *appeal denied*, 832 N.E.2d 1189 (N.Y. 2005). See generally Thomas J. Rueter & Joshua H. Roberts, *Pennsylvania’s Reasonable Expectations Doctrine: The Third Circuit’s Perspective*, 45 VILL. L. REV. 581, 586-87 (2000) (describing opinions taking the *contra proferentem* approach).

233. *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982). See generally Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1469-72 (1989) (collecting and describing other cases adopting a similar approach).

234. *Ware*, *supra* note 233, at 1472-73.

235. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

236. *Id.* at 1452.

reasonably have expected the license term, he could not have reasonably expected a gigantic price increase. Instead of distinguishing the license term from the \$10,000 term on the basis of reasonable expectations, however, the court focused on contract formation as the answer to the dilemma, noting that a buyer seeing the demand for \$10,000 could “prevent formation of the contract by returning the package.”<sup>237</sup>

Reasonable expectations as a tool to police the deferral of terms was also implicitly rejected in *Davidson & Associates, Inc. v. Internet Gateway*.<sup>238</sup> *Davidson* involved the enforceability of license terms that were referenced on the packaging of the purchased software and were visible only after purchase.<sup>239</sup> Although the buyers framed their argument in terms of procedural unconscionability and a claim that the contract was one of adhesion, the language they used was that of reasonable expectations:

Defendants argue that the contract is adhesive because it fails to square with the reasonable expectations of the parties, as no average member of the public would expect to pay \$49.99 for a game and then be unable to use it when he or she gets home. Defendants also argue that no reasonable person would expect to be barred from installing the game he just bought unless he or she is forced to comply with an [End User License Agreement].<sup>240</sup>

The court rejected the argument without discussing reasonable expectations.<sup>241</sup>

### 3. *Applying reasonable expectations to the deferral of terms*

The doctrine of reasonable expectations has largely been restricted to the assessment of insurance agreements, but it has been used in other contexts as well.<sup>242</sup> When Professor Keeton articulated the concept of reasonable expectations he stated that the doctrine has applicability beyond the insurance context.<sup>243</sup> The rolling contract is an appropriate candidate for reasonable expectations. Rolling contracts share an important characteristic with insurance

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237. *Id.*

238. 334 F. Supp. 2d 1164 (E.D. Mo. 2004), *aff'd*, *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

239. *Id.* at 1169-70.

240. *Id.* at 1179.

241. *Id.* at 1178-80.

242. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1257 n.199 (2003) (collecting cases from contexts other than insurance in which the reasonable expectations doctrine was applied).

243. See Keeton, *supra* note 83, at 967.

contracts—they both involve a lapse of time between payment and receipt of terms. This characteristic of insurance contracts is one of the factors that led Professor Keeton to argue that insurance law ought to embrace reasonable expectations. That is, when Professor Keeton first articulated the concept of reasonable expectations he was not just describing; he was also prescribing.<sup>244</sup> Professor Keeton thought that insurance law ought to embrace reasonable expectations because the delay between signing an insurance agreement (and paying a first premium) and the receipt of the detailed policy is a “factor enhancing the policy holder’s disinclination to read his policy carefully or even to read it at all.”<sup>245</sup> Keeton’s description of insurance contracts applies equally well to rolling contracts where the purchase precedes full disclosure of standardized terms. In fact, insurance agreements are the first example given in *ProCD* in support of the proposition that transactions in which money precedes detailed terms are common.<sup>246</sup>

Of course, concluding that the reasonable expectations doctrine should be applied to rolling contracts does not answer the question of precisely how the doctrine should be applied. Given the functional primacy of the purchase in rolling contracts,<sup>247</sup> information at purchase should frame the expectations of buyers in rolling contracts. This emphasis on information presented at purchase reflects Professor Keeton’s view that a seller wishing to put a buyer on sufficient notice of what would otherwise be an unexpected term should do so “by calling it to the attention of a policyholder at the time of contracting.”<sup>248</sup> In the modified version of reasonable expectations for assessing the deferral of terms that I propose, the key inquiry would be whether, given the context of the transaction and the information provided at purchase, a buyer would reasonably think a transaction was open or closed to a particular type of term. It might be that some terms should be so expected under the circumstances (as was arguably true of the provision in *ProCD*) that a buyer would reasonably expect that type of provision. For the

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244. *See id.* (noting that insurance law is moving in the direction of reasonable expectations and that reasonable expectations is “a principle that insurance law ought to embrace”).

245. *Id.* at 968.

246. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996). Additionally, *ProCD* references Section 211, cmt. a of the Restatement as support for the proposition that standardized terms can be useful. *Id.* And Professor Hillman, who is generally supportive of rolling contracts, seems to consider Section 211 applicable to rolling contracts, as well. Hillman, *supra* note 4, at 757.

247. *See* discussion *supra* Part III.D.

248. Keeton, *supra* note 83, at 968.

majority of terms, however, and especially in consumer purchases, Template Notice could be quite useful in helping to define the scope of what is and is not an expected type of provision.<sup>249</sup> Sellers could still defer terms, but only those that would “fill in the blanks.” Terms could not be dropped in “out of the blue.”<sup>250</sup>

Although courts generally have resisted applying reasonable expectations to the deferral of terms,<sup>251</sup> there is some indication of the beginning of judicial unease with permitting sellers to add terms virtually without limitation. The response has been along the lines that I propose, with courts looking to the information provided at purchase or order to establish the form of the transaction and permitting only those terms that fill out the details. For instance, in *Reedy v. Cincinnati Bengals, Inc.*,<sup>252</sup> the court refused to enforce an arbitration agreement that had not been provided at the time of purchase.<sup>253</sup> *Reedy* involved the sale of “personal seat licenses” guaranteeing season ticket holders the ability to obtain a seat in a specific area of a sports stadium.<sup>254</sup> After making their initial payment, purchasers received a document with contract terms, including an arbitration provision.<sup>255</sup> Two of the defendants argued that the buyers of the seat licenses were on notice that there would be additional contract terms after purchase.<sup>256</sup> These defendants argued that the brochure, which was sent to prospective buyers, included a section of rules and regulations stating that after the buyers sent in the first installment of the purchase price, a contract would be forthcoming, and this “contract [would] outline all terms and conditions of the [seat license] agreement.”<sup>257</sup> The court rejected the defendants’ argument, noting that the statement in the rules and regulations did not put the buyers on notice of the arbitration

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249. As I indicated earlier, some provisions will be so inconsequential that no Template Notice of them need be given. See discussion *supra* Part III.B.3. Put another way, a buyer probably reasonably expects in every transaction some relatively minor contract terms.

250. I should clarify that Template Notice would only provide notice of reasonable terms of the types identified in a Template Notice disclosure. That is, if Template Notice indicated deferral of an arbitration provision, a buyer would be on notice of a typical arbitration provision, but not an unduly oppressive one. Template Notice would not immunize such oppressive terms from scrutiny—such unusual terms would have to be fully and meaningfully disclosed at purchase to have the possibility of being effective.

251. See discussion *supra* Part IV.B.2.

252. 758 N.E.2d 678 (Ohio App. Ct. 2001).

253. *Id.* at 680-81.

254. *Id.* at 680.

255. *Id.* at 681.

256. *Id.* at 684.

257. *Id.*

provision.<sup>258</sup> The court held that a reasonable buyer would not expect an arbitration term or any other term that materially alters the agreed upon contract.<sup>259</sup> Instead, a buyer would expect only terms that would fill in “open terms,” such as a term specifying the exact area of the stadium where the buyer’s seat would be located.<sup>260</sup> The court essentially used a reasonable expectations test to assess what types of terms, in the context of the transaction at hand, a seller could add to a transaction after purchase.

Cases dealing with the extent to which credit card issuers can modify or add new terms to the initial cardholder agreement pursuant to “change in terms” provisions also reflect a judicial instinct for placing some subject matter limitation on the deferral of some terms. Change in terms provisions, typical in credit card agreements, give the card issuer the right to amend or change parts of the original agreement. Several courts have grappled with what provisions are included within the purview of change in terms provisions, and the reasoning frequently employed is similar to that of the reasonable expectations doctrine.

For instance, in *Stone v. Golden Wexler & Sarnese, P.C.*,<sup>261</sup> the court assessed the enforceability of an arbitration provision in a credit card contract that had been added pursuant to a change in terms provision in the original agreement.<sup>262</sup> Two years after the cardholder opened the account, the credit card issuer mailed the cardholder a notice indicating that unless the cardholder-plaintiff opted out, the issuer would add an arbitration clause to the agreement. The issuer also mailed a “rejection coupon,” which the cardholder never returned.<sup>263</sup>

The court held that the arbitration provision was not enforceable.<sup>264</sup> The change in terms provision was not such that the cardholder “should have anticipated that the [issuer] would change

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258. *Id.*

259. *Id.*

260. *Id.*

261. 341 F. Supp. 2d 189 (E.D.N.Y. 2004).

262. *Id.* at 191-92. The change in terms provision was as follows:

Changes in Terms. We may amend or change any part of your Agreement, including the periodic rates and other charges, or add or remove requirements at any time. If we do so, we will give you notice if required by law of such amendment or change. Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change, whether or not the account balance included terms billed to the account before the change date and whether or not you continue to use the account.

*Id.* at 191.

263. *Id.*

264. *Id.* at 192.

the method and forum for resolving disputes.”<sup>265</sup> The change in terms provision and the surrounding sections of the agreement dealt with rates and “finance charges, credit limits, periodic statements, and membership fees,”<sup>266</sup> but there was “no mention of dispute resolution mechanisms.”<sup>267</sup> According to the court, there was simply “nothing [in the Customer Agreement that] suggest[ed] that [the cardholder] intended to give such unlimited power to [the issuer of the credit card] or that the law would sanction such a grant” to add an arbitration provision.<sup>268</sup> The court held that:

the terms discussed in the change in terms clause must supply the universe of terms which could be altered or affected pursuant to the clause. To hold otherwise would permit the [issuer] to add terms to the Customer Agreement without limitation as to the substance or nature of such new terms.<sup>269</sup>

An arbitration clause was simply beyond the bounds of what was contemplated by anything in the initial agreement.<sup>270</sup>

Other courts have similarly held that only provisions contemplated by the original agreement may be added, even if opportunity to cancel the credit card if the terms are not acceptable exists. For instance, in *Perry v. FleetBoston Fin. Corp.*,<sup>271</sup> the court assessed the enforceability of an arbitration provision that the credit card issuer sought to add to its existing cardholder agreement pursuant to a change in terms provision.<sup>272</sup> The plaintiffs, who were cardholders, argued that given the absence of any mention of dispute resolution in the agreement, “they did not reasonably expect that [the card issuer] could use its Change in Terms authority to add wholly new clauses regarding unanticipated subject-matter to the contract.”<sup>273</sup>

The court accepted the plaintiffs’ argument and refused to enforce the arbitration provision.<sup>274</sup> Although the court indicated that use of the credit card would have constituted acceptance of the arbitration term, the fact that the credit card holders did not exercise the right to opt-out did not make the arbitration provision a part of the agreement.<sup>275</sup> The original contract was quite detailed, containing

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265. *Id.* at 197.

266. *Id.* at 197-98.

267. *Id.* at 198.

268. *Id.*

269. *Id.*

270. *Id.*

271. No. Civ. A. 04-507, 2004 WL 1508518, at \*1 (E.D. Pa. July 6, 2004).

272. *Id.* at \*1-2.

273. *Id.* at \*2.

274. *Id.* at \*4.

275. *Id.* at \*4, n.4.

over thirty carefully worded clauses.<sup>276</sup> However, there was no mention of arbitration or any other forum for dispute resolution.<sup>277</sup> The court noted that “nothing in these terms would alert a consumer to the fact that [the credit card issuer] might later impose a term abrogating their rights to pursue disputes in a civil forum.”<sup>278</sup> The court distinguished between the ability of a card issuer to make small changes to “‘accommodate the unexpected,’” on the one hand, and “‘drastic changes’ which go beyond the scope of the provision providing for changes,” on the other.<sup>279</sup> The purported change was simply “beyond the range of reasonable expectation.”<sup>280</sup>

The court in *Sears Roebuck & Co. v. Avery*<sup>281</sup> also made use of the doctrine of “reasonable expectations” in refusing to enforce an arbitration provision. The original agreement included a change in terms provision stating that the card issuer has, “[a]s permitted by law, . . . the right to change any term or part of this agreement, including the rate of *Finance Charge* applicable to current and future balances. [The issuer] will send me a written notice of any such changes when required by law.”<sup>282</sup> The issuer subsequently attempted to add an arbitration provision to the agreement.<sup>283</sup> Despite a public policy favoring arbitration, the court held that the arbitration provision “did not fall within the universe of subjects included in [the] original cardholder agreement” since the original agreement included no terms about alternative methods or forums for dispute resolution.<sup>284</sup> According to the court, the cardholder’s reasonable expectation would not “include allowing [the issuer] to add a term not even hinted at in the original agreement.”<sup>285</sup> The court also indicated that allowing the issuer to change its agreement “would ignore the requirement of good faith implied in all contracts of adhesion.”<sup>286</sup>

Additionally, in *Maestle v. Best Buy Co.*,<sup>287</sup> the court assessed a change in terms provision that did not include any mention of a method or

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276. *Id.* at \*2.

277. *Id.*

278. *Id.* at \*4.

279. *Id.* (quoting *Allstate Drilling Co. v. Martinelli*, No. 02-5877, 2004 WL 253526, at \*3 (R.I. Super. Ct. Jan. 15, 2004)).

280. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981)).

281. 593 S.E.2d 424 (N.C. Ct. App. 2004).

282. *Id.* at 426.

283. *Id.* at 426-27.

284. *Id.* at 434.

285. *Id.*

286. *Id.* at 432.

287. No. 79827, 2005 WL 1907282 (Ohio Ct. App. Aug. 11, 2005).

forum for resolving disputes.<sup>288</sup> The court concluded that the cardholders “could not anticipate that appellants, let alone a new third party, would amend the agreement to add an arbitration clause, since the amendment provision referenced only changes to payments, charges, fees and interest.”<sup>289</sup> The court noted that “nowhere in the contract [wa]s there a clause addressing forums of dispute.”<sup>290</sup> Accordingly, the court held that the provision did not authorize the credit card issuer to add an arbitration clause.<sup>291</sup>

The cases just discussed—*Stone*, *Perry*, *Avery*, and *Maestle*—are all relatively recent and may be seen as representing a mini-trend of sorts.<sup>292</sup> These cases may reflect some desire on the part of courts to rethink the extent to which later terms can be added to agreements and to resolve the question by assessing whether a contract should fairly be deemed open or closed to a particular type of term.

Of course, an ongoing agreement like a credit card agreement differs from the types of transactions focused on in this Article. The credit card agreements are transactions completed before the addition of new provisions. On the other hand, the holder of a credit card clearly agrees that additional terms may in fact be added, while in a rolling contract a buyer may only have some vague “notice” that this may happen. This distinction may actually argue for a higher level of scrutiny of deferred terms in rolling contracts. Nevertheless, while rolling contracts are not precisely like credit card agreements, the fluid nature of the credit card transaction makes it at least a close cousin to the rolling contract. Courts that sense something less than savory about rolling contracts may find themselves looking to these

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288. *See id.* at \*5. The provision provided that “We may change or amend the terms of this Agreement upon fifteen (15) days prior written notice if required by law. Any change of amended fee, charge, interest rate, FINANCE CHARGE, ANNUAL PERCENTAGE RATE, or minimum payment amount . . . may be effective to both the outstanding Account Balance and future transactions.” *Id.* at \*6.

289. *Id.*

290. *Id.*

291. *Id.*

292. Some courts have taken a position contrary to these cases. Some of these courts have enforced provisions added under change in terms clauses, not because of contract law but because some state statutes explicitly authorize credit card issuers to make unilateral changes to the agreements regardless of the scope of the original agreement. *See, e.g.*, *Fields v. Howe*, No. IP-01-1036-C-1, 2002 WL 418011, at \*4-5 (S.D. Ind. Mar. 15, 2002) (finding Delaware statutory law permits unilateral addition of an arbitration agreement); *SouthTrust Bank v. Williams*, 775 So. 2d 184, 190-91 (Ala. 2000) (finding that Alabama statutory law allows for unilateral additions to cardholder agreements). Other courts have held that a general notice that any type of change could be made is sufficient to include an addition of an arbitration provision. *See, e.g.*, *BankOne, N.A. v. Coates*, 125 F. Supp. 2d 819, 830-31 (S.D. Miss. 2001) *aff'd*, 34 Fed. Appx. 964 (5th Cir. 2002); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 892-93 (Ill. App. Ct. 2003).

credit card cases to find some way to cabin the seller's ability to add terms to the contract.

If the version of reasonable expectations I discuss had been applied in *Hill*, for example, the court would likely have concluded that terms fleshing out the warranty or the parameters of "lifetime support" described in the advertisements were within the buyers' reasonable expectations.<sup>293</sup> Such terms would simply have been filling in the details. But the arbitration clause would likely have been deemed beyond the pale and would not have been enforced. Such a result reflects an appropriate balancing of the needs and interests of both buyers and sellers.

#### CONCLUSION

As rolling contracts continue to proliferate, it becomes ever clearer that simply treating deferred terms as though they were provided before or during purchase is, at best, a stopgap measure, not a viable or fair solution. Courts must reassess, as some courts are beginning to do, the nearly unfettered ability given to sellers to defer terms. Template Notice provides courts with a workable and principled mechanism for recalibrating the balance between buyers and sellers in rolling contracts. Template Notice should be a particularly attractive approach since it is a logical extension, but not upending, of tools courts have routinely used to police standardized contracts.

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293. For a full discussion of *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), see discussion *supra* Parts I and II.A.