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THERE OUGHTA BE A LAW: WHAT CORPORATE SOCIAL RESPONSIBILITY CAN TEACH US ABOUT CONSUMER CONTRACT FORMATION

Colin P. Marks[*]

I. INTRODUCTION

Long before the ALI decided to tackle the issue of contracts in a consumer context, there existed heated academic debate over how consumers enter into and are bound to contracts with standard terms. Judge Easterbrook's opinion in the famous, or infamous depending on your viewpoint, case of *ProCD v. Zeidenberg*[1] became a lightning rod for criticism and critique, though issues of consumer assent pre-date the opinion. In that opinion, in the name of economic efficiency, Judge Easterbrook adopted an approach to contract formation which has since been labelled the "rolling contract" approach.[2] Under this approach, consumers who make purchases in-store or over the phone have not yet consummated the contract despite having tendered payment. Instead, when a form comes later with the terms and conditions, this later form is viewed

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[1] ProCD, Inc. v. Zeidenberg (hereinafter *ProCD II*), 86 F.3d 1447 (7th Cir. 1996).

[2] John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 35 (2012). *See also* Nika Aldrich, *Unplugged: The Music Industry's Approach to Rolling Contracts on Music Cds*, 6 CHI.-KENT J. INTELL. PROP. 280, 281 (2007) ("Contracts such as these, that allow acceptance of the terms after the money changes hands, are often called 'rolling contracts.'").

as the offer which is accepted by consumers when they fail to return the product within a stated time period.[3] At its heart, *ProCD* requires only adequate notice of the terms and a reasonable opportunity to review and reject them.

The opinion has received an avalanche of criticism, and yet the concept has found traction in the common law.[4] Other courts, many times with little explanation or analysis, began to adopt the rolling contract approach.[5] As commerce pivoted into the digital age, online vendors found it was no longer necessary to send terms later, as they could simply use the adequate notice concept to make terms available on their website, either through a link or through some more active step, such as clicking on an "I agree" button. Thus, *ProCD* helped set the stage for a jump from actual assent to terms to simply notice of terms to make them binding. Today online vendors of goods and services pack their websites full of terms mostly favorable to them, knowing that so long as a court finds that there was notice of the terms, they will likely be upheld, assuming it ever even gets to that point, as the mere presence of the terms may dissuade a customer from even bringing suit.

It is against this backdrop that the Restatement of Consumer Contracts has promulgated Section 2 which explicitly adopts *ProCD*'s rolling contract approach as well as the concept of adequate notice for online terms.[6] This understandably has made a number of consumer advocates concerned, as this approach appears to give more power to the powerful businesses who drafted the terms at the expense of the consumers. Consumer advocates claim that the adoption of Section 2 in its current form is not justified either as a matter of contract law, or as a restatement of a majority of courts. Many point to the Restatement (Second) of Contracts section 211(3) which grants courts the ability to evaluate the

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[3] *ProCD II*, 86 F.3d at 1450–53.

[4] *See* Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 983 (10th Cir. 2014) (discussing Washington courts' approval of rolling contracts); Schnabel v. Trilegiant Corp., 697 F.3d 110, 121 (2d Cir. 2012) ("The conventional chronology of contract-making has become unsettled over recent years by courts' increased acceptance of this so-called 'terms-later' contracting.").

[5] *See, e.g.*, Schnabel v. Trilegiant Corp., 697 F.3d 110, 124 (2d Cir. 2012) (accepting the validity of a rolling contract); James v. McDonald's Corp., 417 F.3d 672, 678 (7th Cir. 2005) (same); M.A. Mortenson Co. v. Timberline Software Corp., 140 Wash. 2d 568, 578–79 (2000) (same).

[6] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2 (AM. LAW INST., Tentative Draft, (April 18, 2019).

reasonable expectations of the parties when enforcing standard terms,[7] and fear that adoption of Section 2 in its current form would indicate to judges that they no longer have such discretion. Defenders of Section 2 state that the reporters have correctly adopted a rule in line with the traditional approach of Restatement projects, i.e. to discern a majority rule. At its heart, however, this debate is about whether we should continue to allow judges more freedom to enforce or not enforce standard terms in contracts, or whether the law has now moved to the adoption of a law and economics approach to standard terms. The rolling contract approach is undoubtedly a product of law and economic thinking, and under this approach, enforcement of standard terms is needed for efficiency in the market place. If a business abuses the forms, the market will react and businesses will have to adjust their forms to remain competitive. Rather than take a side in this debate, in this article I advocate the subject matter of Section 2, i.e. contract formation with consumers involving standard terms, is a subject best left to a legislative solution.

Using the literature on Corporate Social Responsibility, I draw particularly on the business management literature to show that businesses have three primary responsibilities: to make money, to follow the law, and to act ethically. When acting ethically is at odds with making more money, even businesses that wish to act ethically will feel pressure to act unethically. In such a situation, regulation is necessary to place all competitors on an equal playing field so that the ethical companies will feel free to act as they wish without fear of losing a competitive advantage. I posit that the choice on how to present terms is just such a situation. Attempting to insert multiple pages of terms favorable to the business in a way the business knows is unlikely to grab the attention of the consumer is unethical, particularly when the same business is only presenting it in such a way as to avoid losing a sale. In other words, if given the choice between making a sale but not including all of these terms, and presenting pages of terms that need to be individually initialed and likely losing the sale, most companies would probably choose the former. It is only through a rolling contract that they get to have it both ways. Thus, a legislative response, akin to the Magnusson-Moss Warranty Act,[8] would be the

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[7] RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 2012).

[8] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, PUB. L. 93-637, 88 Stat. 2183 (1975).

best response, as it would add clarity to the rules of contract formation, but also could provide for punitive measures to discourage violations.

II. THE RESTATEMENT'S CONTROVERSIAL SECTION TWO

The Restatement of Consumer Contracts has been a controversial project since its inception. Some have argued that the project is unnecessary as there is no separate law of consumer contracts. Others have argued that the project is more appropriate for a Principles of Law project than for a Restatement. Substantively, the project has also drawn criticism from both consumer and business advocates. Consumer advocates have argued that some of the sections, in particular section 2 which addresses standard terms, favor businesses and subject consumers to terms and conditions that they never truly assented to.[9] Business advocates have argued, among other things, that the draft Restatement favors consumers once litigation commences by strengthening claims of unconscionability and permitting the introduction of normally inadmissible parol evidence.[10] As Professor Adam Levitin nicely summed up:

> But the real issue is that for consumer advocates, the Restatement is a bad project because it would bind all consumers to contractual terms that they do not agree with or even know about. In contrast, the concern for business groups is that the Restatement gives that small subset of consumers who litigate somewhat stronger tools. These tools aren't strong enough to change the balance of

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[9] *See, e.g.*, Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to Be Bound by Its Terms*, PROPUBLICA (May 20, 2019), https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click ("At the heart of consumer advocates' objections to the Restatement is a section that substantially weakens in the consumer context a core concept of contract law — that a contract requires a "meeting of the minds," with each party assenting to its terms. Instead, the Restatement requires businesses only to give customers notice of the contract terms and an opportunity to review them.").

[10] Fred H. Miller, *Expert Analysis: A Critique of ALI's Consumer Contracts Restatement*, 22 CONSUMER FIN. SERV. L. REP. 18 (2019), *available at* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/05/FMiller-Article-in-22CFSLR18.pdf.

> power, but they are enough to be a pain for businesses, specifically a jettisoning of the parol evidence rule (i.e., it doesn't matter what the written contract says, the salesman's representations are admissible evidence) and a contract defense of deception that will apply to some contracts where [statutes addressing unfair or deceptive acts or practices] would not (again, you've gotta worry about the sales rep's communications).[11]

Basically, the Restatement of Consumer Contracts has something for everyone to hate and has presented a rare instance where consumer and business advocates are in agreement over their objection to the project (though for different reasons).

Rather than assail the entire project, this article focuses primarily on Section Two of the draft Restatement and its treatment of standard terms. This is not to say that other sections are unobjectionable, but the purpose this article is to demonstrate that certain corporate behaviors are better addressed through legislation than left to the markets. Section Two represents an adoption of a law and economics approach that would largely let the market correct abuses of how terms are presented. Though other sections may also be relevant, Section Two represents a very direct example of the sort of corporate behaviors that legislation is suited to address.

A. Section Two's Adoption of Standard Terms

Standard terms and conditions are so ubiquitous that many consumers have become anesthetized to their presence, assuming they notice them at all. Common provisions in such terms and conditions include limitations on liability, waivers of express and implied warranties, class action waivers, forum selections clauses, choice of law provisions, and arbitration provisions.[12] Though

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[11] Adam Levitin, *Podcast on ALI Consumer Contracts Restatement*, Credit Slips: A Discussion on Credit, Finance, and Bankruptcy (May 16, 2019), https://www.creditslips.org/creditslips/2019/05/podcast-on-ali-consumer-contracts-restatement.html.

[12] *See* Colin Marks, *Online and "As Is"*, 45 PEPP. L. REV. 1, 25 (2018) (discussing the various damage limitation and warranty disclaimer clauses that impact consumer rights); Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of the Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 644–45 (2007) (discussing the various terms that come after the purchase and the different judicial approach to enforcement of these terms); Jean

businesses want their terms and conditions to apply to the contracts they enter into with consumers, they know that it is not practical to read out loud these provisions to consumers prior to the transaction, or to include all of them on the outside on the product. For in-store purchases, the solution has been to include standard terms and conditions in the box or package, which can be read by the consumer at home. For online transactions, the solution is even easier – simply put the terms on the website and inform the consumer that they are agreeing to these terms and conditions either by using the website or by purchasing a product. Both of these forms of assent have faced challenges by consumers with varying degrees of success. Section Two accepts both of these forms of assent, though the comments make clear there are caveats.

Section Two states:

> § 2. Adoption of Standard Contract Terms
>
> (a) A standard contract term is adopted as part of a consumer contract if, after receiving reasonable notice of the standard contract term and a reasonable opportunity to review it, the consumer signifies assent to the transaction.
>
> (b) When a standard contract term is available for review only after the consumer signifies assent to the transaction, the standard contract term is adopted as part of the consumer contract if
>
> > (1) the consumer receives reasonable notice regarding the existence of the standard contract term before signifying assent to the transaction, and
> >
> > (2) the consumer has a reasonable opportunity to terminate the transaction after the standard contract term is made available for review, and does not exercise that power.
>
> (c) If the consumer signifies assent to the transaction, a contract exists even if some of the standard contract

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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, 758 ("Terms for digital products–hardware, software, or content–may pop up during installation, and the customer may have to click "I agree" to get access to a product already paid for and received.").

terms are not adopted. In such case, the terms of the contract are those adopted under subsection (a) or (b), along with any terms supplied by law.

Subsection (a) addresses assent after notice of terms and so covers most website agreements. Subsection (b) addresses "cash now, terms later" contracts, such as when a consumer buys a product in-store, and returns home to find additional terms and conditions, such as a limitation on damages, on a form in the box. I will address these in reverse order below.

1. The Rolling Contract Approach to Standard Terms

Subsection (b) essentially adopts the "rolling contract" theory of contract formation made famous by Judge Frank H. Easterbrook in *ProCD v. Zeidenberg*.[13] In that case Matthew Zeidenberg bought ProCD's product, "Select Phone" which was a CD-ROM disk containing over 95,000,000 telephone listings compiled by ProCD at a local store.[14] The package included a "Single User License Agreement" prohibiting the purchaser from copying the software other than for personal use which would also appear on most screens before the listings could be accessed.[15] The license further noted that if Zeidenberg did not agree to the terms of the license, he should "promptly return all copies of the software . . . to the place where [he] obtained it."[16] Zeidenberg subsequently incorporated under the name Silken Mountain Web Services, Inc. and in contravention of the license, made his own database using the ProCD listings available over the internet.[17]

ProCD sued to enjoin Zeidenberg, claiming he was in violation of the license agreement.[18] The district court found for Zeidenberg, concluding that the contract for the software was formed in the store, and that the additional terms of the license agreement were mere proposals that could be ignored by Zeidenberg either under section 2-207(2) or as a modification under section 2-209,

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[13] *ProCD II*, 86 F.3d 1447 (7th Cir. 1996).

[14] ProCD, Inc. v. Zeidenberg (hereinafter *ProCD I*), 908 F. Supp. 640, 644–45 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

[15] *Id.* at 644–45.

[16] *Id.* at 645. The software box itself also made reference to the license on the outside in small print but did not give any details. *Id.*

[17] *Id.* at 645–46.

[18] *Id.* at 646, 649–50.

both of which would require Zeidenberg's express consent.[19] On appeal, Judge Easterbrook, writing for the court, questioned the district court's conclusion that the contract was accepted in the store.[20] Instead of analyzing the case under U.C.C. section 2-207, as the district court had, the Seventh Circuit relied on U.C.C. section 2-204 as the guiding principle for an approach in which the terms which came later were the actual offer.[21] Under this section, the appellate court found that the vendor or seller is the master of its offer and can choose to invite acceptance by conduct, such as by using the product.[22] Judge Easterbrook noted the many advantages of permitting standard term agreements to be enforceable, such as the saved time and expense of trying to describe all of the terms on the outside of a box,[23] and held that so long as the buyer is given an opportunity to review and reject the offer, such contracts are enforceable.[24] Zeidenberg had been given notice of the license agreement, continued to use the software, and so the court found he was bound by the license agreement's terms.[25]

In *ProCD* there had at least been notice prior to the purchase that additional terms would apply,[26] but just over seven months after *ProCD* was decided, the Seventh Circuit, in another opinion authored by Judge Easterbrook, made clear that prior notice was not required. In *Hill v. Gateway 2000, Inc.,*[27] Rich and Enza Hill purchased a Gateway computer over the phone.[28] The Hills were never alerted to any additional terms that were coming with the computer,[29] but once it arrived, inside the box were a list

[19] *Id.* at 654–55.

[20] *ProCD II*, 86 F.3d at 1452.

[21] *Id.* Easterbrook summarily dismisses its application stating, "Our case has only one form; UCC section 2-207 is irrelevant." *Id.* Of course, section 2-207 applies to confirmations as well, so the implication that the lack of multiple battling forms would somehow preclude application of 2-207 is in error.

[22] *Id.* at 1452–53.

[23] *Id.* at 1451.

[24] *Id.* at 1453.

[25] *Id.* at 1452–53. The court of appeals went on to address the district court's alternative finding that the contract was preempted by federal law and found that the copyright did not preempt ProCD's contract claim. *Id.* at 1454–55.

[26] *ProCD II*, 86 F.3d at 1449–50.

[27] Hill v. Gateway 2000 Inc., 105 F.3d 1147 (7th Cir. 1997).

[28] *Id.* at 1148.

[29] *Id.*

of additional terms, including an arbitration clause, which purportedly governed the parties' agreement unless the Hills returned the product within 30 days, which the Hills did not do.[30] The Hills eventually sued Gateway for civil RICO violations and Gateway invoked the arbitration clause.[31] The district court refused to uphold the clause finding that the Hills were not given adequate prior notice of the terms.[32]

On appeal, the Seventh Circuit, citing to the *ProCD* decision, vacated and remanded, finding that the terms of the contract that came in the box were fully enforceable.[33] Judge Easterbrook rejected the notion that *ProCD* should be limited to software sales,[34] or that *ProCD* required notice of the coming terms on the outside of the box, though he found the Hills were made aware of the terms through advertising.[35] Easterbrook held that the central question was one of contract formation:

> The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed—in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers "yes," for merchants and consumers alike.[36]

Thus, under *ProCD* a vendor is the "master of the offer" and can transform in-store consumer transactions from the point of contract formation into some sort of preliminary step that eventually leads to the real offer – the standard terms that come later.[37]

This rolling contract approach represented a departure from the traditional approach to in-store and over-the-phone

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 1150–51.
[34] *Id.* at 1149.
[35] *Id.* at 1150. Easterbrook also dismissed the notion that the *ProCD* decision turned upon UCC section 2-207, erroneously dismissing the provision as irrelevant because there was only one form involved.
[36] *Id.* at 1150.
[37] *Id.* at 1149.

purchases.[38] Normally one would treat the product on the shelf as a mere solicitation of an offer.[39] The customer would then make the "offer" to purchase the product at the advertised price, and the vendor would accept, typically by processing payment.[40] With the

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[38] *See* Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 4 (2006) (discussing a brief history of rolling contracts, with terms being presented by the seller over time); 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 (2004) (referring to rolling contracts as "steamrolling" terms onto the consumer); Robert Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) ("In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time.").

[39] *See* RESTATEMENT (SECOND) OF CONTRACTS § 26 (AM. LAW INST. 2012) ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). *See also* Craft v. Elder & Johnston Co., 38 N.E.2d 416 (Ohio App. 1941) ("Thus, if goods are advertised for sale at a certain price, it is not an offer and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer. So a published price list is not an offer to sell the goods listed at the published price.") (quoting Williston on Contracts, Vol. 1, par. 27, page 54); Ford Motor Credit Co. v. Russell, 519 N.W.2d 460, at 463 (Minn. App. 1994) (holding that the general rule is an advertisement of goods is not an offer, but merely an invitation to bargain even if the good is offered for a certain price).

[40] *See* Steinberg v. Chicago Medical School, 371 N.E.2d. 634, 639 (Ill. 1977) ("Although in some cases the advertisement itself may be an offer (*see* Lefkowitz v. Great Minneapolis Surplus Store, Inc., 251 Minn. 188, 86 N.W.2d 689 (1957)), usually it constitutes only an invitation to deal on the advertised terms. Only when the merchant takes the money is there an acceptance of the offer to purchase."); Crocker v. New London W. & P. R. Co., 24 Conn. 249, 262 (1855) (holding a discounted purchase price of a train ticket was a mere proposal that did not create a binding contract because there had not been an actual acceptance by the ticket office); O'Keefe v. Lee Calan Imports, Inc., 262 N.E.2d 758, 759 (Ill. App. 1970) ("It is quite possible to make a definite and operative offer to buy or to sell goods by advertisement, in a newspaper, by a handbill, or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. Neither the advertiser nor the reader of his notice understands that the latter is empowered to close the deal without further expression by the former. Such advertisements are understood to be mere requests to consider and

contract fully formed, U.C.C. section 2-207 would label any later terms a "confirmation" of the contract with additional terms that, as between a merchant and a consumer, would be a mere proposal for addition to the contract.[41] As such, a consumer would need to expressly assent to the additional terms to be bound.[42] A similar result would apply at common law.[43] So if the product being purchased was, for instance, a concert ticket, the contract would be

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examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.") (quoting Corbin on Contracts § 25 (1963)).

[41] *See* U.C.C. § 2-207(2) (AM. LAW INST. & UNIF. LAW COMM'N 2012) ("The additional terms are to be construed as proposals for addition to the contract."); Klocek v. Gateway, Inc., 104 F. Supp.2d 1332, 1341 (D. Kan. 2000) (holding under Kansas law that if at least one party is not a merchant additional terms are mere proposals and require express assent in order to bind the buyer, even if he keeps the product longer than 5 days). *But see* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (holding that later received terms were assented to by the buyer through conduct of keeping the product for over 30 days).

[42] *See* Quality Wood Designs, Inc. v. Ex-Factory, Inc., 40 F.Supp.3d 1137, 1145 (D.S.D. 2014) (stating that in transactions involving a non-merchant, the non-merchant must assent to any terms offered after the initial purchase); McCaulley v. Nebraska Furniture Mart, Inc., 838 N.W.2d 38, 46 (Neb. App. Ct. 2013) (finding a non-merchant had to manifest assent to additional terms because "[t]he plain language of the [Nebraska] Legislature in § 2–207(2) makes a distinction between contracts entered into between two merchants and contracts entered into where at least one of the parties is a nonmerchant."); Klocek v. Gateway, Inc., 104 F. Supp.2d 1332, 1341 (D. Kan. 2000) (rejecting the "vendor is the master of the offer" analysis in *ProCD* and holding under the statutory interpretation where one party is not a merchant, an express manifestation of assent is required to make the terms binding).

[43] Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643, 646 (5th Cir. 1974) (discussing Mississippi's version of UCC § 2-207's rejection of the common law mirror image rule that changes additional terms of a proposed agreement into a counteroffer requiring assent by the opposing party); Steiner v. Mobil Oil Corp., 569 P.2d 751, 760 (Cal. 1977) (discussing "the traditional rule that, in order to create an enforceable contract, the parties must mutually assent to all essential terms of the supposed agreement."); Colin P. Marks, *Not What, But When is an Offer: Rehabilitating the Rolling Contract*, 46 CONN. L. REV. 73, 89 (2013) (stating that "the common law would not vary greatly from . . . . [U.C.C. § 207(2)] in situations involving non-merchants . . . . [T]he modification could not be unilaterally imposed upon the other party once a contract was formed and would additionally need to have consideration to support it (which is not required under the U.C.C.)").

formed on the spot, and any later arriving terms would be proposed amendments.[44]

The rolling contract approach rejects this construct, and instead favors the efficiency of allowing vendors to impose their terms after the initial assent to the transaction.[45] This approach has been widely cited and adopted by a number commentators[46] and courts.[47] Unfortunately, many courts adopting this approach

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[44] Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 979 (10th Cir. 2014) (holding that adding a later arbitration clause to a preexisting oral agreement required express consent by the opposing party in order to be a part of the original agreement); Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 99 (3d Cir. 1991) (holding that the UCC rejected the last shot rule and requires either an express assent to the additional terms or an analysis determining if the terms were assented to under 2-207); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (holding that terms received after the purchase of goods require a manifestation of assent by the buyer and mere retention of the good beyond a specified number of days did not equate to assent by failure to object).

[45] Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) (discussing the efficacy and practical considerations of not requiring a vendor to provide terms up front or to be read at cash register and actually make customers better off); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir.1996) ("A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance."); Defontes v. Dell, Inc. 984 A.2d 1061, 1071 (R.I. 2009) ("It is simply unreasonable to expect a seller to apprise a consumer of every term and condition at the moment he or she makes a purchase. A modern consumer neither expects nor desires to wade through such minutia, particularly when making a purchase over the phone, where full disclosure of the terms would border on the sadistic.").

[46] Richard A. Epstein, *ProCD v. Zeidenberg: Do Doctrine and Function Mix?*, in CONTRACTS STORIES 122 (Douglas G. Baird ed., Foundation Press, 2007) (defending Easterbrook's approach on intellectual grounds); Hillman [*Rolling Contracts*], *supra* note 38, at 744–45 (arguing that, because consumers don't read the terms regardless of when it was formed, the formation issue should not be a bar to rolling contracts and such contracts should instead simply be viewed for their conscionability). *See also* Andrew Vogeler, *Rolling Contract Formation and the U.C.C.'s Approach to Emerging Commercial Practices*, 30 J.L. & COM. 243, 243–44 (2012) (suggesting that the rolling contract theory is consistent with the policies underlying the U.C.C.); UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT, § 202 (2002).

[47] *See, e.g.*, Meridian Project Systems, Inc. v. Hardin Const. Co., LLC, 426 F. Supp. 2d 1101, 1107 (finding the rationale in *ProCD* "compelling" and recognizing that where a consumer had notice of an end user license agreement

and an opportunity to return the software if it did not agree to the terms, "[t]he EULA is not rendered invalid merely because [the consumer] purchased the Prolog software and then received the EULA after opening the package"); Sherr v. Dell, Inc., No. 05 CV 10097(GBD), 2006 WL 2109436, at *2–3 (S.D.N.Y. 2006) (recognizing that "[a]pprove-or-return contracts have been found to be enforceable in consumer transactions,"); Chandler v. AT&T Wireless Services, Inc., 358 F. Supp. 2d 701, 704 (S.D. Ill. 2005) ("By using her phone rather than canceling immediately, or no later than thirty days after her activation date, Chandler accepted the offered services and the terms and conditions under which they were offered. She had a clear mechanism and reasonable opportunity to reject them."); Davidson & Assocs., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164, 1178 (E.D. Mo. 2004) ("[T]he defendants had sufficient notice of the EULAs and TOU. It is true that the terms of the EULAs and TOU were not on the box, but the terms were disclosed before installation of the games and access to Battle.net was granted. The defendants also expressly consented to the terms of the EULA and TOU by clicking 'I Agree' and 'Agree.' . . . . Accordingly, the Court finds that the EULA and TOU are enforceable contracts under both Missouri or California law."); O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 515–16 (M.D. La. 2003) (approving of the approach taken in *Hill* and *ProCD*); Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1105–06 (C.D. Cal. 2002) (finding *Hill* to be instructive); I.Lan Sys., Inc., v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (agreeing "with those cases embracing the theory of ProCD," holding that that "clickwrap license agreements are an appropriate way to form contracts," and determining that "'[m]oney now, terms later' is a practical way to form contracts, especially with purchasers of software."); Mudd-Lyman Sales and Serv. Corp. v. United Parcel Serv., Inc., 236 F. Supp. 2d 907, 911–12 (N.D. Ill. 2002) ("The Court finds that Mudd-Lyman accepted the terms of UPS's limitation of liability through the breaking of the shrinkwrap seal and by its on-screen acceptance of the terms of the software license agreement. Mudd-Lyman was thereby provided with reasonable notice of UPS's limited liability and was given a fair opportunity to purchase higher liability."); Rinaldi v. Iomega Corp., No. 98C-09-064-RRC, 1999 WL 1442014, at *3 (Del. Super. Ct. Sept. 3, 1999) ("Analogous support for this Court's conclusion that the physical location of the disclaimer of the implied warranty of merchantability inside the Zip drive packaging does not make the disclaimer inconspicuous can be found in some cases from other jurisdictions."); Westendorf v. Gateway 2000, Inc., No. 16913, 2000 WL 307369, at *3 (Del. Ch. March 16, 2000) ("The 7th Circuit rejected that argument, however, and found the agreement enforceable as written. Judge Easterbrook, writing for the unanimous panel, noted '[b]y keeping the computer beyond 30 days, the [buyers] accepted Gateway's offer, including the arbitration clause.' Undeniably, plaintiff in the present case retained the computer and accessories for more than thirty days. The same rationale, therefore, applies to this plaintiff as in the case before the 7th Circuit.") (internal citations omitted); Stenzel v. Dell, Inc., 870 A.2d 133, 140

simply cite to *ProCD* with little explanation as to why the approach is appropriate.[48]

2. Assent to Standard Terms via Website

Subsection (a), on its face, appears very unoffensive. Essentially it affirms the very basic concept that, so long as a consumer is fairly presented with the terms, and given an opportunity to review the terms, they are assented to. Where this section becomes interesting is in the context of online contracts, which is addressed largely through the comments.

Assent to standard terms in online contracts can be passive or active, depending on the way they are presented. The most common method of presenting terms and conditions appears to be via "browsewrap" terms. Browsewrap terms are made available on the website somewhere and are accessible by a link. The placement of this link and its conspicuousness frequently become the basis of attacks on the enforceability of such terms. A typical browsewrap

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(Me. 2005) ("By accepting delivery of the computers, and then failing to exercise their right to return the computers as provided by the agreement, Stenzel and Gerber expressly manifested their assent to be bound by the agreement, including its arbitration clause."); Brower v. Gateway 2000, 246 A.D.2d 246, 250–51 (N.Y. App. Div. 1998) ("While *Hill* and *ProCD,* as the IAS Court recognized, are not controlling (although they are decisions of the United States Court of Appeals for the circuit encompassing the forum State designated for arbitration), we agree with their rationale that, in such transactions, there is no agreement or contract upon the placement of the order or even upon the receipt of the goods."); Levy v. Gateway 2000, Inc., 1997 WL 823611 (N.Y. Sup. Ct. Oct. 31, 1997) (holding that 2-207 did not apply as the contract formed once the plaintiff exercised the opportunity to accept the goods and accompanying terms); Defontes v. Dell, Inc. 984 A.2d 1061, 1071 (R.I. 2009) ("[W]e are satisfied that the *ProCD* line of cases is better reasoned and more consistent with contemporary consumer transactions."); M.A. Mortenson Co., Inc., v. Timberline Software Corp., 998 P.2d 305, 313–14 (Wash. 2000) (holding that shrinkwrap terms were sufficiently presented to the buyer and continued use of the product manifested assent to the terms).

[48] *See, e.g.*, M.A. Mortenson Co., Inc., v. Timberline Software Corp., 998 P.2d 305, 313–14 (Wash. 2000) ("We find the approach of the *ProCD, Hill,* and *Brower* courts persuasive and adopt it. . . ."); Brower v. Gateway 2000, 246 A.D.2d 246, 250–51 (N.Y. App. Div. 1998) (simply noting that *ProCD* and *Hill* were applicable). *See also* Friedman [*Improving the Rolling Contract*], *supra* note 38, at 11 (summarizing cases which focus on return policies rather than notice).

agreement will "contain a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of service."[49] Frequently, browsewrap agreements are nothing more than inconspicuous links at the bottom of the webpage which are passive in nature, in that there is no need to click separately to continue with a purchase.[50]

Specht v. Netscape Communications Corp.[51] is an oft-cited example of a failure to put a reasonable consumer on inquiry notice.[52] In *Specht*, the plaintiffs downloaded "free" software from Netscape's website. The catch was that the software transmitted private information about the plaintiffs to Netscape,[53] and the plaintiffs sued for violations of federal law. Netscape moved to compel arbitration pursuant to a provision that was part of the terms in the license agreement.[54] These terms appeared on the webpage from which the plaintiffs downloaded the software,[55] but it was not located near the "download" button on the visible screen.[56] Instead, it was visible only if the plaintiffs continued scrolling down the webpage.[57]

On appeal, the Second Circuit court affirmed the district court and refused to enforce the arbitration provision due to the submerged nature of the terms.[58] The court stated:

> We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of

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[49] United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009).

[50] *See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 395 (E.D.N.Y. 2015) (delineating the nature of browsewrap by calling it "passive"); *see also* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548 (2014) (defining browsewrap as allowing "buyers to purchase without seeing a prominent hyperlink to the underlying terms").

[51] Specht v. Netscape Commc'n Corp., 306 F.3d 17 (2d Cir. 2002).

[52] *Id.* at 32.

[53] *Id.* at 20–21.

[54] *Id.*

[55] *Id.* at 25.

[56] *Id.* at 23–25.

[57] *Id.*

[58] *Id.* at 40.

> those terms. The SmartDownload webpage screen was printed in such a manner that it tended to conceal the fact that it was an express acceptance of Netscape's rules and regulations. Internet users may have, as defendants put it, "as much time as they need[ ]" to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's-length bargaining.[59]

In so holding, the court distinguished other cases in which "there was much clearer notice . . . that a user's act would manifest assent to contract terms" and were thus enforceable.[60]

The primary problem with browsewrap agreements is the passive way in which consumers assent. Even when browsewrap terms are on the same page as a "checkout" button, they have been held unenforceable when they were inconspicuous[61] or otherwise failed to put the consumer on notice that the purchase was subject to the terms and conditions.[62] Despite deficiencies in browsewrap,

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[59] *Id.* at 32 (internal citations and quotations omitted).

[60] *Id.* at 33–35.

[61] *Berkson*, 97 F. Supp. 3d at 396 (calling attention to prominence as a requirement to put consumers on notice of browsewrap terms and conditions and listing numerous cases on both district and appellate levels holding such terms are invalid if they are inconspicuous); Long v. Provide Commerce, Inc., 200 Cal. Rptr. 3d 117, 126 (Ct. App. 2016) (describing the browsewrap terms at issue in the case as "simply too inconspicuous to meet [the Specht] standard"). In fact, the Ninth Circuit has even held that *conspicuous* hyperlinks may be unenforceable. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1178–79 (9th Cir. 2014) ("[W]e therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.").

[62] *See* Lee v. Intelius Inc., 737 F.3d 1254, 1261–62 (9th Cir. 2013) (upholding the trial court's denial of a request to compel arbitration because the defendant failed to provide adequate notice of the arbitration clause to the consumer); *Berkson*, 97 F. Supp. 3d at 395 ("For an internet browsewrap contract to be binding, consumers must have reasonable notice of a company's 'terms of use'

there is evidence that they are still used by a majority of online vendors.[63] However, other forms of online agreements have also emerged that are more conspicuous. Two other forms of agreement that are less passive are "banner wraps" and "sign-in wrap."

Banner wraps are a newer form of agreement.[64] These appear on a banner when a user first visits a website, sometime at the top or bottom of the viewable screen, but they can also appear across the page, obstructing the view of some of the page's content.[65] These have recently become a popular way to inform users that the webpage's owner uses cookies or that there is a privacy agreement, but they can also reference other terms and conditions.[66] Banners can be passive, such as when they just appear at the bottom of the page, or active such as when the user is required to hit "I agree" to make the banner disappear.[67]

Sign-in wraps are also less passive and appear to be gaining popularity among online vendors.[68] Sign-in wrap agreements typically require users to create an account with the online vendor. When the account is created, the user is notified "of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or checkout process."[69] When used in

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and exhibit 'unambiguous assent' to those terms.") (citing Specht v. Netscape Comm. Corp., 306 F.3d 17, 35 (2d Cir. 2002)).

[63] *See* Colin P. Marks, *Online Terms as in Terrorem Devices*, 78 MD. L. REV. 247, 284 (2019) ("So far, it has been established that the vast majority of the largest online sellers prefer to use browsewrap to make consumers aware of the terms and conditions that they are trying to impose, despite this being the least effective "wrap" method available.") (recognizing the common use of browsewrap despite its known deficiencies).

[64] *See id.* at 256 (establishing the relatively recent development of browsewrap).

[65] *See id.* at 256–57 ("[S]ome websites have resorted to a banner flashing across the screen [known as bannerwrap] which display the terms, presumably to avoid arguments that the web-site did not clearly present the online terms and conditions") (citing Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016).

[66] *Id.*

[67] *See id.* at 256 ("These banners appear at the bottom or top of the viewable page or are on display across the middle of the page, obscuring the content of the website.").

[68] Selden v. Airbnb, Inc., No. 16-CV-00933 (CRC), 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016) ("[M]any internet websites—including Airbnb during the relevant time period—now use 'sign-in-wraps.'").

[69] *Berkson*, 97 F. Supp. 3d at 397.

this way, sign-in wraps are more active than pure browsewrap agreements in that there is an initial notification, but thereafter, checkouts do not require the user to assent each time to the vendor's terms and conditions.[70] This type of sign-in wrap is used by Amazon.com, but other online vendors use it as well.[71] Another form of sign-in wrap is to simply have a notification next to the "check-out" button informing the user that by proceeding, user is binding themselves to the retailer's terms and conditions.[72]

Browsewrap, banner wrap and sign-in wrap are all varying forms of passive assent in that they don't necessarily require the user to explicitly assent to the terms and conditions. Two other forms of online assent that do require active assent are clickwrap and scrollwrap. Clickwrap agreements require a user to actually agree to the site's terms and conditions before proceeding.[73] A typical clickwrap agreement would present in the form of a box that must be checked by the user before proceeding, [74] and which informs the user that by checking the box, they are agreeing to the terms and conditions (whether they read them or not).[75] Thus the

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[70] Resorb Networks, Inc. v. YouNow.com, 30 N.Y.S. 3d 506, 512 (Sup. Ct. 2016) ("YouNow states that the website is designed so that a user is notified of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or login process. That could be characterized as a sign-in-wrap.") (internal citation omitted).

[71] *See* Marks, *supra* note 12, at 13 ("One form, [known as sign-in wrap] which Amazon.com requires, forces users to create an account and sign in before shopping.").

[72] *Berkson*, 97 F. Supp. 3d at 401 (describing typical qualities of an enforceable sign-in wrap agreement).

[73] United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) ("Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website."). *See also* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (highlighting the activity requirement (i.e. clicking a box) of the "clickwrap" designation and contending that "every court to consider the issue has held clickwrap licenses enforceable").

[74] *See* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (clearly defining clickwrap as requiring the consumer to utilize a checkbox indicating assent).

[75] *See id.* (clarifying that clickwrap "require[es] that the user manifest his or her assent to the terms").

user is in effect put on inquiry notice of the terms assented to.[76] Scrollwraps take the concept one step further by forcing the user to view the terms and conditions as part of the website's construction and design.[77] Instead of simply being presented with a box to check, the user would be presented with a pop-up box containing the terms and conditions, and a requirement that the user agree to these terms and conditions.[78] Due to the requirement of active assent, case law seems to suggest that clickwrap and scrollwrap agreements are generally enforceable.[79]

Despite the varying degrees of enforceability, the Restatement of Consumer Contracts blesses all manner of wrap agreements. Comment 4. to Section 2 provides:

> When the consumer manifests assent to the transaction, a consumer contract is formed. The consumer contract includes the core deal terms (those which, from the perspective of the consumer, characterize the bargain), as well as other standard and nonstandard contract terms reasonably available for review prior to manifesting assent. Some of these standard contract terms may be explicitly acknowledged by the consumer in the course of

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[76] *Berkson*, 97 F. Supp. 3d at 397. *See* Shacket v. Roger Smith Aircraft Sales, Inc., 651 F. Supp. 675, 690 (N.D. Ill. 1987) ("Inquiry notice exists where a person has knowledge of such facts as would lead a fair and prudent person using ordinary care to make further inquiries. Where the person does not take those added steps, he or she is chargeable with knowledge that would have been acquired through diligent inquiry."); RESTATEMENT (SECOND) OF CONTRACTS, § 19 (AM. LAW INST. 1981) (focusing on the "intent" and "conduct" requirements of contractual assent).

[77] *Berkson*, 97 F. Supp. 3d at 398.

[78] *See* Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 873 n.200 (2016) ("Clickwrap agreements are also referred to as click-through agreements. Scrollwrap agreements are another type of clickwrap agreement.") (citations omitted). *See also* Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010–11 (D.C. 2002) ("The contract is entered into by the subscriber clicking an 'Accept' button below the scroll box . . . . Neither is the use of a 'scroll box' in the electronic version that displays only part of the Agreement at any one time inimical to the provision of adequate notice.").

[79] Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 544 (2015) ("Clickwrap agreements are generally enforceable, standard form contracts that Internet users assent to merely by clicking an 'I agree' option.").

> manifesting assent to the transaction (see Illustrations 2-4). Other standard contract terms may not be explicitly acknowledged, but as long as the consumer receives reasonable notice of them, including reasonable notice that they are intended to be part of the transaction and that manifesting assent would constitute a legally binding adoption of those terms, and has a reasonable opportunity to review them, they are adopted when the consumer manifests assent to the transaction (see Illustrations 5-6).[80]

Illustrations 2-5 then give examples of scrollwrap,[81] clickwrap,[82] sign-in wrap,[83] and broweswrap[84] as all being enforceable against a consumer. This is despite there being case law to the contrary on various types of wrap agreements, particularly browsewrap. This has caused some consternation amongst many consumer advocates.

B . Criticisms of Section Two

Long before the Restatement of Consumer Contracts was drafted, significant controversy surrounded the rolling contract approach[85] as well as the use and abuse of online forms of assent that really amounted to nothing more than notice.[86] Rolling

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[80] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2, illus. 4 (AM. LAW INST., Tentative Draft, (April 18, 2019).

[81] *Id.* at illus. 2.

[82] *Id.* at illus. 3.

[83] *Id.* at illus. 4.

[84] *Id.* at illus. 5.

[85] *See, e.g.,* 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, 642 (2004) ("[*ProCD*] and its initial progeny, Hill v. Gateway 2000, Inc., however, have been deservedly and widely criticized, variously described as a 'swashbuckling tour de force that dangerously misinterprets legislation and precedent,' a 'real howler' that is 'dead wrong' on its interpretation of section 2-207 of the U.C.C., a decision that 'flies in the face of U.C.C. policy and precedent,' a 'detour from traditional U.C.C. analysis' 'contrary to public policy,' with analysis that 'gets an "F" as a law exam.'").

[86] Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 B.Y.U. J. PUB. L. 1, 18 (2012) ("The idea is that by 'browsing' the site, the user enters a contract, but this legal consequence need

contract theory has been attacked by numerous commentators on various grounds such as the analysis under the U.C.C.,[87] the economic assumptions the approach makes,[88] moral grounds[89] and fairness grounds.[90] Professor Roger Bern has written a sweeping criticism of the approach, arguing, among other things, that it "fails to protect the reasonable expectations of buyers while at the same time protecting the unreasonable expectations of vendors, thus abandoning the only moral justification for courts to enforce promises."[91] This is particularly troublesome when one considers that consumers are unlikely to attempt to unwind their deals after the fact. As one commentator has observed:

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not be brought to the user's attention either before or after browsing, and although the courts insist that some 'notice' be given of the existence of the terms supposedly incorporated into this contractual arrangement, courts may not require the terms to be located anywhere very conspicuous.").

[87] *See* Bern, *supra* note 85, at 642–43, n.5 (collecting criticisms); John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 47–48 (2012) ("Either this highly sophisticated court did not understand the contract formation sections of the U.C.C., or it chose to ignore them."); Shubha Ghosh, *Where's the Sense in* Hill v. Gateway 2000*?: Reflections on the Visible Hand of Norm Creation*, 16 TOURO L. REV. 1125, 1134 (2000) ("Even though Judge Easterbrook concludes that § 2-207 is inapplicable because the provision governs the situation when there are two opposing forms from the offeror and the offeree, not one as in the *Gateway 2000* case, this view has been expressly rejected.").

[88] *See* Bern, *supra* note 85, at 716–42 (characterizing Easterbrook's "Terms Later" approach as ignorant of human nature and economic reality); Ghosh, *supra* note 87, at 1139 (questioning the efficacy assumptions at the heart of the rolling contracts approach).

[89] *See id.* at 642–53 (arguing *ProCD* lacks "moral sanction").

[90] *See id.* at 643–44 ("[N]otwithstanding Easterbrook's window dressing of economics, a rule sanctioning 'terms later' contracting increases . . . distributional unfairness by systematically redistributing wealth from consumers to vendors."); Jean Braucher, *supra* note 12, at 757 (asserting rolling contracts should more accurately be labeled as "steamrolling" as they attempt to pile on undesirable terms).

[91] *See* Bern, *supra* note 85, at 644. I myself have argued that the rolling contract approach would only be appropriate where the parties anticipated an ongoing relationship with the seller such that additional terms were expected. Colin P. Marks, *Not What, But When is an Offer: Rehabilitating the Rolling Contract*, 46 CONN. L. REV. 73, 114–115 ("Transactions that envision ongoing services may very well be understood to involve more than a simple in-store payment and thus justify delaying the offer.").

> American customers might shop carefully, but they rarely retract a deal after the sale has been closed. This gives the seller an unfair advantage within our cultural context because the customer doesn't get the bad news about the license until after comparison shopping is complete and the purchase is made.[92]

Apart from these problems, others have noted that the rolling contract approach is actually a departure from traditional contract doctrine, arguing that *ProCD* "rushes to cut away the broader historical context and foundational principles" of contact law.[93]

It has been argued that this loosening of contract law has opened the door to the online assent forms that are now so prevalent, and which the Restatement of Consumer Law blesses.[94] Professors Robin Kar and Margaret Radin, in recognizing the movement from a traditional contract in the 1880s to one chock full of standard term boilerplate today, have argued that the modern "contract" formed through assent is really a form of "pseudo-contract."[95] They argue that courts should engage in a "shared meaning" analysis that is more consistent with traditional contract law.[96] Professors Preston and McCann have similarly complained about this shift in contract law, observing,

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[92] Cem Kaner, *Proposed Article 2B: Problems from the Customer's View*, UCC BULLETIN (Feb. 1997), at 1, 4; "[I]t is unrealistic to expect customers to return products under these circumstances, even if the terms are entirely unreasonable." *Id.* at 3. *See also* Braucher, *supra* note 12, at 767 ("[I]t is also only logical to believe that producers fought so hard for the right to make delayed disclosure because they do not want to compete on terms (or, for monopolists, lose sales from advance disclosure of unfavorable terms) and therefore hold them back until customers would find it cognitively challenging, time-consuming, and otherwise costly to reverse transactions.").

[93] Preston & McCann, *supra* note 86 at 8; William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099, 1109 (2004) ("Once it enters into a contract with the buyer, the vendor cannot unilaterally change the terms of the contract—not even when allowing the alternative of ending the contract.").

[94] *See* Preston & McCann, *supra* note 86, at 16–19.

[95] Robin B. Kar & Margaret J. Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1139–42 (2019) ("[Courts] assume that pseudo-contractual text should be enforced as 'contract' with minimal requirements of 'assent.'").

[96] *Id.* at 1166.

> [c]onsumers are entering into contracts on such a regular basis that it is no longer a significant event to assent to an agreement, as it may have been before products and services became so available through the Internet. And beyond the sheer number of contracts, the lack of formalities in contract acceptance online further strip the consumer of awareness she may have had in traditional paper contracting where the parties might drive to a meeting-place, thumb through documents, and apply a physical signature.[97]

Given the negative reaction online contracting has received, it is not surprising that critics of the Restatement of Consumer Contracts have complained that Section 2 will further destroy meaningful assent.[98]

Consumer advocates in this camp have pointed to the Restatement (Second) of Contracts § 211(3) as providing courts with the freedom to only enforce standard terms that are within the reasonable expectations of the parties.[99] Indeed an amendment was proposed at the May 2019 annual meeting aimed at explicitly incorporating this standard into Section 2. Though the amendment failed to garner a majority of support, the debate was vigorous and the vote was by no means a landside. Without an explicit nod to

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[97] Preston & McCann, *supra* note 86, at 27–28.

[98] *See* Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to Be Bound by Its Terms*, PROPUBLICA (May 20, 2019), https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click ("At the heart of consumer advocates' objections to the Restatement is a section that substantially weakens in the consumer context a core concept of contract law — that a contract requires a "meeting of the minds," with each party assenting to its terms. Instead, the Restatement requires businesses only to give customers notice of the contract terms and an opportunity to review them.").

[99] RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 2012) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."); *id.* at cmt. e. ("Apart from government regulation, courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it."); *id.* at cmt. f ("Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.").

the reasonable expectations test, consumer advocates fear the Restatement will stifle the development of the law which is still in its infancy when it comes to online contracting. Professor Nancy Kim has summarized the evolution of the law and the negative effect the proposed Section 2 would have as follows:

> The beauty of the common law is that it usually self-corrects when it goes too far. Recent cases addressing electronic adhesive contracts have a more sophisticated and nuanced discussion of what meets the standard of "reasonable notice," reflecting an understanding that the context and format in which a contract is presented matters. . . . Some courts have started to question whether a manifestation of assent is enough to show consent to all the terms, showing signs of requiring specific assent to important, rights-altering terms like mandatory arbitration or recurring fee provisions. . . . In other words, recent cases seem to be swinging the pendulum back toward reasonable expectations, or at least away from unconsented-to terms. . . . The [Restatement of Consumer Contracts] would forcibly stunt the development of the law of consumer contracts at this very dynamic period, and it would do so by endorsing an approach which runs counter to the common law of contracts. More alarming, it would extend the application of this errant strand of law, which was developed for a particular type of consumer contract in a particular environment and apply it to all consumer contracts.[100]

Apart from the perceived doctrinal weaknesses in the approaches adopted in the Restatement of Consumer Contracts, critics have also been quite critical of the methodology. [101] Professor Gregory Klass attempted to recreate the empirical study relied upon by the Reporters regarding whether courts treat stand-alone

[100] Nancy S. Kim, *The Proposed Restatement of the Law of Consumer Contracts and the Struggle Over the Soul Of Contract Law*, JURIST – ACADEMIC COMMENTARY (June 2, 2019), https://www.jurist.org/commentary/2019/6/nancy-kim-contracts-restatement.

[101] *See id.* (noting objections to both the methodology used and the Reporters' interpretation of the cases relied upon).

privacy policies as contract terms.[102] He found fundamental methodological flaws in the study, as well as widespread misreading of cases, leading him to conclude that of the forty cases relied upon, only fifteen were relevant to privacy-policy issues.[103] His conclusions drew the suspicion of another group of academics who likewise reexamined the empirical studies underlying the Restatements' proposed approach to contract modifications and clickwrap assent.[104] Similar to Klass, this group found that of the 89 modification cases, 63% were inapposite,[105] and of the 98 clickwrap cases, 46% were not relevant.[106] These problems led the group to announce that they lacked "confidence that the draft Restatement correctly and accurately 'restates' the law of consumer contracts."[107] Furthermore, it has been noted that even the existing case law addressing issues of online terms fails to address the myriad issues that can arise in a coherent manner.[108] In light of all of these concerns, Professor Budnitz summarizes the Restatement effort as follows:

> [T]here is a fundamental problem in trying to draft a restatement of the law of consumer contracts that includes online contracting. There are few cases in few jurisdictions that have dealt with issues of online contract formation; there is little uniformity of analysis and very few appellate-level cases. It is premature to issue a restatement of the law when there is no consensus among the courts on what the law is.[109]

The Reporters' and their defenders have primarily defended their approach to the Restatement project as consistent with the ALI's traditional approach. They claim that the Restatement simply reflects what courts are doing, which is to accept the

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[102] See Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45 (2019).

[103] *Id.* at 73–74.

[104] Adam J. Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REG. 447, 455 (2019).

[105] *Id.* at 455–56.

[106] *Id.* at 460–61.

[107] *Id.* at 466.

[108] Mark E. Budnitz, *Touching, Tapping, and Talking: The Formation of Contracts in Cyberspace*, 43 NOVA L. REV. 235, 265–71 (2019) (summarizing various issues raised when contracting in an online environment).

[109] *Id.* at 476.

reality that consumers don't read their contracts.[110] Practitioner and ALI member Steven Weise has written a sweeping defense of the project in the ALI Advisor, claiming,

> [T]here has been a convergence of (i) court decisions applying the common law of contracts to the necessary elements for the formation of a contract in the context of an online contract with (ii) leading academic and bar association articles and reports on the same subject. The case law and these writings and reports come to the same result. The black letter of § 2 embraces this convergence and implements the collective approach of these decisions, articles, and reports.[111]

At the heart of the defense, however, is a blessing of court decisions that have taken a law and economics approach to consumer contracting. If the terms included are problematic, the market will adjust, but the current approach is deemed necessary to facilitate commercial activity.[112]

This article doesn't necessarily aim to choose sides in this debate, but rather offer up an alternate approach to dealing with standard terms: legislation. To demonstrate that legislation is the appropriate method for addressing standard terms, I look to what we can expect from businesses if the Restatement approach is adopted. In other words, if businesses are allowed to continue to

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[110] MacDougall, *supra* note 98.

[111] Steven O. Weise, *The Draft Restatement of the Law, Consumer Contracts Follows the Law*, ALI ADVISER (April 5, 2019), http://www.thealiadviser.org/consumer-contracts/the-draft-restatement-of-the-law-consumer-contracts-follows-the-law/.

[112] *See, e.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."); Caspi v. Microsoft Network, L.L.C., 323 N.J. Super. 118, 126 (N.J Super Ct. App. Div. 1999) ("Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole.").

pile boilerplate into every consumer contract, can we rely on them to refrain from overreaching under a general sense of ethics?

III. AN OVERVIEW OF APPROACHES TO CORPORATE SOCIAL RESPONSIBILITY

With different groups advocating for different approaches to the Restatement project, it is useful to reflect on whether we can count on corporations (and other business entities) to voluntarily adopt standards of disclosure without a legal obligation to do so. This requires a brief discussion of the concept of corporate social responsibility ("CSR"). This task is made more difficult by virtue of the fact that CSR means different things to different people. Some view CSR as limited to owing core duties to shareholders and to obey the law, while others believe corporations owe a broader duty to other stakeholders. These approaches are described below, followed by an overview of how business management academics view the topic. Ultimately, regardless of approach, the issue comes down to a tension between what is ethical and what is profitable.

A. Legal Scholarly Approaches

Legal academics can largely be split into two camps: shareholder primacy proponents and stakeholder model proponents. Shareholder primacy proponents believe that the corporation is in and of itself a good thing, and that the primary focus of the corporate managers should be to make a profit, within the bounds of the law. This approach to CSR is most often associated with the economist Milton Friedman who famously wrote:

> [T]there is one and only one social responsibility of business--to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.[113]

This approach does not advocate promoting profits for its own sake, but rather as part of the corporate directors' duties owed to

[113] Milton Friedman, CAPITALISM AND FREEDOM 133 (2d ed. 1982). *See also* Milton Friedman, *The Social Responsibility of Business*, in THE ESSENCE OF FRIEDMAN 36, 36–38 (Kurt R. Leube ed., 1987) [hereinafter Friedman, *Social Responsibility*].

the shareholders.[114] This approach is considered by many as the one that is followed by American corporate law.[115]

In contrast to the shareholder primacy model is the stakeholder model. Under this approach, the corporation owes its very existence to the state, and thus should be "tinged with a public purpose."[116] Under this view, corporations should act not just for the benefit of the shareholders but should also consider a larger group affected by the corporation to prevent "opportunistic exploitation by the firm and its shareholders."[117] Such stakeholders include employees, customers, the local community and can even encompass the global community particularly with regard to environmental concerns.[118] This approach does not require corporations to operate as eleemosynary institutions, but does expect good corporate citizenship.[119]

Though these two approaches help frame the CSR debate, they are not the only two theories of corporate purpose. Margaret M. Blair and Lynn A. Stout have proposed a team production theory which recognizes that corporate outputs are the result of the

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[114] *See* Colin Marks & Nancy B. Rapoport, Symposium, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269, 1279 (2009) ("This first approach, sometimes referred to as a shareholder primacy norm, is consistent with the property or contract model of the corporation, in which the corporation is viewed as the property of the shareholders, and the purpose of the corporation is predominantly to increase the shareholders' wealth."); Ritsa Gountoumas, *The Hybrid Approach: Balancing A Corporation's Economic Desires Against Its Social Responsibility*, 17 U.C. DAVIS BUS. L. J. 197, 199 (2017) ("[P]roponents of shareholder primacy and shareholder wealth maximization stand firm in their belief that the corporation's primary, and in fact, only, constituency is the shareholder, the "owner" of the business. Consequently, under this model, shareholder interests are prioritized and corporate managers are given the task of maximizing corporate profits in order to increase shareholder wealth.").

[115] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287–88 (1999) (noting that the derivative suit and shareholder voting rights seem to support this view).

[116] William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992).

[117] Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 447 (2010).

[118] *Id.*

[119] *See* Marks & Rapoport, *supra* note 114, at 1280 ("This approach is concerned with not just the shareholders but also the non-shareholder stakeholders—a broad stakeholder model.").

efforts of various possible groups including shareholders, executives, employees, creditors or the local community.[120] They argue that though corporate law gives special rights to shareholders, this is really a recognition that shareholders are in the best position to represent the rights of the other constituencies.[121] The corporate structure to them is really a mediated hierarchy under which directors serve the "joint interests of all stakeholders who comprise the corporate 'team.'"[122] An alternative approach proposed by Stephen M. Bainbridge is a director primacy approach.[123] This approach builds upon the "nexus of contracts" approach to contracts, and posits that, because consensus-based decision-making would be unworkable in a corporate setting, corporations must adopt an authority-based structure.[124] The board of directors fills this role. As he notes, "[t]he decision to enter into the set of contracts to which the corporation is a party is a decision made by the board or its subordinates acting pursuant to properly delegated authority. In this sense, the board *is* the nexus of the set of contracts among the factors of production making up the firm."[125]

Each of the theories described above, however, seek to define to whom the directors of a corporation primarily owe a duty. Shareholder primacy theorists appear to be the starting point, and the reactions to this approach vary, but many seek to explain why it is justified to act in the benefit of other constituencies. These approaches do not neatly define what social responsibilities are owed – for that we can find more guidance in the business management literature.[126]

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[120] Blair & Stout, *supra* note 115, at 250.

[121] *Id.* at 289.

[122] *Id.* at 288–89.

[123] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 554–60 (2003).

[124] *Id.* at 557.

[125] *Id.* at 559.

[126] *See* Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience"*, 42 VAL. U. L. REV. 1129, 1149 (2008) (noting how management literature defines four types of CSR); Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1647 n.54 (2006) (advising legal academics to look to management literature for guidance in defining CSR).

B. Business Management's Descriptive CSR

As I have written previously, the business management literature does a better job of trying to describe what social responsibilities are owed by corporations than the legal literature. One of the most seminal descriptive structures was a pyramid of social responsibilities put forth by Professor Archie Carroll.[127]

> In 1979, Carroll categorized CSR into four social responsibilities that businesses have to society: economic responsibilities, legal responsibilities, ethical responsibilities, and discretionary (sometimes called philanthropic) responsibilities. The first category, economic responsibility, represents the basic responsibility of a business to be profitable. The second category, legal responsibility, represents the responsibility of a business to operate within the framework of legal requirements. The third category, ethical responsibility, represents the "responsibility to do what is right, just, and fair." Though ethical norms are embodied in both the economic and legal responsibilities, this category embodies society's "expectations of business over and above [any] legal requirement." The final category, discretionary or philanthropic responsibility, represents society's expectation that a business should assume social roles above and beyond its economic, legal, and ethical responsibilities. This could include making contributions for "various kinds of social, educational, recreational, or cultural purposes."[128]

Carroll's last of these, philanthropic, has been somewhat controversial, which he himself has acknowledged, and some, including myself, have recast these responsibilities into just economic, legal and ethical.[129] As this article is primarily concerned with the

[127] *See* Aviva Geva, *Three Models of Corporate Social Responsibility: Interrelationships Between Theory, Research, and Practice*, 113 BUS. & SOC'Y REV. 1, 2 (2008) (calling Carroll's 1979 article on CSR a "foundational article on social performance."); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 167 (2005) (noting that Carroll's model of CSR is widely cited).

[128] Colin P. Marks & Paul S. Miller, *Plato, The Prince, and Corporate Virtue: Philosophical Approaches to Corporate Social Responsibility*, 45 U.S.F. L. REV. 1, 8–9 (2010).

[129] Marks & Rapoport, *supra* note 114, at 1274-82.

tensions between these three categories, I will not address the philanthropic any further.

The three categories of economic, legal and ethical are not mutually exclusive, and ideally a corporation can meet all three. It is when there is a tension that the legal approaches become most relevant, particularly when the economic is at odds with the ethical responsibility. Shareholder primacy theory would stress the economic and legal obligations, whilst approaches that advocate for a greater concern for stakeholders stress the ethical obligations.[130] The question often then becomes, so long as the corporation is profitable, should it eschew further profits in the name of doing what is ethical absent a legal obligation to do so?[131]

C. When Profit and Ethics Clash

Ideally the here responsibilities work together – corporations can make a profit while obeying the law and generally acting ethically. Scholars may dicker over whether the "ethical" obligations are just window dressing to increase corporate profits. Friedman argued as much, noting that if a corporation were to undertake some socially responsible action that helped the local community, it was really helping its own employees and itself, and thus should not be considered corporate social responsibility.[132] Most would agree that following the law is not an optional course of action, though this may or not be ethical, depending on the law.[133]

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[130] *See id.* at 1277-79 (distinguishing the economical focus of the shareholder primacy theory from the ethical focus of stakeholder-oriented approaches).

[131] *See* Williams, *supra* note 126, at 1635-36 (recognizing the increasing involvement of global companies going beyond what the law requires to effectuate CSR initiatives).

[132] Friedman, *Social Responsibility*, *supra* note 113, at 40-41.

[133] Reasonable people could debate, for instance, the ethics of immigration laws and prohibitions on hiring illegal immigrants. And some, including Judge Easterbrook, have suggested that responsible corporate managers should consider the nature of the regulation at issue, the punishment, and the chance of getting caught as part in deciding whether to follow a regulation or skirt. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) (citing Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1192–94 (1981).

Managers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The

What should corporate managers do, however, when maximizing profits clashes with what is ethical? Stakeholder primacy adherents would argue that, so long as the corporation is still profitable, it should do the ethical thing, regardless of the fact that it may minimize shareholder value, as that is but one of the interests that a corporation serves.[134] But the reality is that the current structure of the law encourages corporate directors to act primarily in the interest of stockholders, not stakeholders.[135] Furthermore, it is naïve to think a business will risk profits by engaging in conduct beyond what the law requires when competitors do not.[136]

In the past I have analogized this situation to professional sports and performance enhancing drugs (PEDs).[137] If a sport does

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penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.

Id.

[134] *See* Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 680 (2006) (identifying stakeholder primacy theory as "viewing corporate responsibility as a balance of the interests of all corporate constituents, even when that balance does not maximize profits."); *Id.* ("[M]any critics of the stakeholder theory misconceive this approach as an attempt to completely subordinate a corporation's profit-making concerns. Under the definition advanced here, the stakeholder theory advocates that corporations achieve a better balance of all interests, while underscoring the importance of corporations' willingness to subordinate or abandon their concerns for profit when appropriate."); Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 258 (2010) ("[S]takeholder theory rejects the idea of maximising a single objective, as one gets with shareholder primacy where the focus is all on maximising shareholder wealth. As a normative thesis, stakeholder theory holds to the legitimacy of the claims on the corporation by many different groups and people. Managers are obliged to deal transparently and honestly with all stakeholders, and ask: What will stakeholders think about the decision we are contemplating? They then should consider which stakeholders warrant or require consideration.").

[135] Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established By the Delaware Corporation Law*, 50 WAKE FOREST L. REV. 761, 781–82 (2015).

[136] Colin P. Marks, *Online Terms as* In Terrorem *Devices*, 78 MD. L. REV. 247, 288–89 (2019).

[137] *Id.* at 289.

not ban or police the use of PEDs, then a superior athlete who does not use PEDs may find their competitive edge has been lost to another athlete who does use PEDs.[138] The ethical athlete faces a choice: remain ethical but lose the competitive edge, and thus the money that comes with being a superior athlete, or use PEDs to regain their edge which was only lost due to the other athletes acting unethically. Or, to grab an example from recent headlines, Senator Elizabeth Warren's reversal on her approach to accepting super PAC money also illustrates how competitive pressures affect decision-making. Senator Warren originally pledged not to accept super PAC money, but found herself at a competitive disadvantage when all of the other Democratic primary contestants did accept such money.[139] Senator Warren's explanation could be the explanation of just about any corporate director facing the same choice: "'If all the candidates want to get rid of super PACs, count me in, I'll lead the charge,' she told reporters on Feb. 20 in Nevada when asked if she would disavow Persist PAC. 'But that's how it has to be. It can't be the case that a bunch of people keep them and only one or two don't.'"[140]

If paragon of corporate ethics such as Elizabeth Warren is forced to cave to such pressures, it is naïve to think a corporate manager won't as well.[141] What is needed is to change the incentive

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[138] *Id.*

[139] Alana Abramson, *Elizabeth Warren Condemned Super PACs. Now She's Benefiting From One*, TIME (Feb. 28, 2020 9:12 P.M.), https://time.com/5792563/elizabeth-warren-super-pac-support/ ("Massachusetts Senator Elizabeth Warren is receiving millions of dollars in help from the kind of outside money group she has repeatedly decried, underscoring the tough realities of a primary contest featuring two self-funded billionaires and a collection of rivals benefiting from political-action committee money.").

[140] *Id.* (quoting Senator Warren).

[141] Strine, *supra* note 135, at 788 ("Under the current legal rules and power structures within corporate law, it is naïve to expect that corporations will not externalize costs when they can. It is naïve to think that they will treat workers the way we would want to be treated. It is naïve to think that corporations will not be tempted to sacrifice long-term value maximizing investments when powerful institutional investors prefer short-term corporate finance gimmicks. It is naïve to think that, over time, corporations will not tend to push against the boundaries of whatever limits the law sets, when mobilized capital focused on short-term returns is the only constituency with real power over who manages the corporations. And it is naïve to think that institutional investors themselves will behave differently if action is not taken to address the incentives that cause their interests to diverge from those people whose funds they invest.").

structure so that acting ethically does not hurt the competitive position. Thus, when ethics and profit collide, the response that is most likely to force corporations to make the ethical choice is to mandate it by law.[142] As the Honorable Leo E. Strine, Jr., former Chief Justice of the Delaware Supreme Court has explained:

> It is more productive to take the legal rules and corporate power structure as it is, and to advance proposals that make sure that corporations operate in a way that encourages more responsible behavior and that maximizes long-term welfare, within the bounds of that structure. Doing so requires an understanding that strong and effective externality regulation is important, because the profit- pressure put on corporations by institutional investors is strong. Moreover, understanding the boundaries of the law is critical to protecting society, because stockholders will put pressure on corporate managers to seek as much profit as they can within the range of legally permissible conduct. With this awareness, people who wish to see for-profit corporations act in a manner that is aligned with the ordinary Americans whose capital they hold for generations will realize that it is necessary to figure out how to make sure that those who act as direct stockholders--institutional investors--invest and vote with these interests in mind.[143]

As explained below, contract formation in the context of consumer law is an area in which the public may wish corporations to act one way, but the incentives are not properly in place to make them do so.

IV. CSR, CONSUMER CONTRACTS AND THE NEED FOR LEGISLATION

The ways in which standard terms are presented to consumers, be it through rolling contracts or through the various online "wrap" agreements, present a situation in which ethics clashes with profits. As discussed below, ethically, consumers should not expect businesses to sneak terms into their contracts that defeat the reasonable expectations of the consumer. But

[142] *Id.* at 786–88; Budnitz, *supra* note 108, at 272–73.

[143] Strine, *supra* note 135, at 786–88.

businesses have little incentive to do more than the minimum required by law, as doing so could place them at a competitive disadvantage. A legislative response, akin to the Magnuson-Moss Warranty Act, could mandate the ethical disclosure of standard terms, add foreseeability to the businesses in how to present terms, create an equal playing field for all businesses, and protect the reasonable expectations of consumers.

A. The Ethics of Disclosing Standard Terms

Rolling contracts, and many forms of "wrap" agreements, suffer the same defect in that they hide terms that often adversely affect consumers rights. This is not to say that all such terms are bad – informing the consumer of extended warranty rights likely would be welcome by the consumer. Further, giving reasonable notice of the terms in a way that makes the consumers aware that their rights are curtailed could largely solve the problem,[144] but most rolling contracts and "wrap" agreements do not do so.

Rolling contracts have been attacked on their legal grounds, but they also fail as a moral and ethical matter. Easterbrook put forth that the approach was necessary as businesses couldn't possibly fit all of the terms they wanted on the package,[145] nor expect check-out clerks to read the terms, but this presents a false choice. Businesses can still provide terms, but would likely be limited to the most important ones and thus simply have to make a choice about what was worth putting on the package.[146] Businesses add the terms later because they can, not because they need to. As Bern has noted, the rolling contract approach "encourages vendors to strategically hold back information to create a setting in which they can act opportunistically,"[147] but such a rule fails to protect the reasonable expectations of consumers that once they buy something, the deal is done.[148] Bern summarizes,

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[144] John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 77 (2012).

[145] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449–51 (7th Cir. 1996).

[146] Preston & McCann, *supra* note 86, at 9 ("We believe the seven-by-nine-by three-inch box in which software is sold would provide plenty of space if the terms were limited to the reasonable number of terms necessary to protect intellectual property written in plain English.").

[147] Bern, *supra* note 85, at 739.

[148] *Id.* at 748.

> [Rolling contract] compels such buyers, contrary to their reasonable expectations, to give up the deals they thought they had made. While denying protection to reasonable expectations of buyers, it rewards the unreasonable expectations of vendors that buyers acquire no ownership rights when they pay for the goods, and that retention of goods by such buyers after they have had time to learn about the objectionable terms means the buyers are promising to accept and abide by them.[149]

Again, it is not per se to attempt to provide terms later, but it is unethical to try and unilaterally impose terms later that were never brought to the attention of the consumer when the contract was first being formed.[150]

Wrap agreements present a different challenge as, unlike rolling contracts, the terms are available to review prior to the consumer proceeding, but this does not mean that such terms are reasonable or even being presented in an ethical manner.[151] As noted, browsewrap agreements are the most susceptible to legal attacks as they require the least amount of active assent. Yet in a recent empirical review of the largest 113 retailers of goods, I found that over seventy percent were still using browsewrap, as opposed to only three percent using clickwrap.[152] The substance of the agreements is also often skewed against the rights of the consumers. Ninety-four percent of the businesses studied had a clause limiting liability; eighty-five percent had a clause disclaiming warranties; eighty-one percent had a choice of law clause; fifty-seven percent had a forum selection clause; thirty-five percent had an arbitration clause; thirty-four percent had a jury waiver; and thirty-four percent had a class action waiver.[153] Most telling, however, is that none of the retailers studied attempted to bind consumers to such

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[149] *Id.*

[150] Preston & McCann, *supra* note 86, at 33–34.

[151] Kim, *supra* note 100 (noting the lack of social responsibility the Restatement of Consumer Contracts encourages with regard to "wrap" agreements); Paul J. Morrow, *Cyberlaw: The Unconscionability / Unenforceability of Contracts (Shrink-wrap, Clickwrap, and Browse-wrap) on the Internet: A Multi-jurisdictional Analysis Showing the Need for Oversight*, 11 PITT. J. TECH. L. & POL'Y 1, 28 (2011).

[152] Colin P. Marks, *Online and "As Is"*, 45 PEPP. L. REV. 1, 30, 38 (2017).

[153] *Id.* at 39.

terms when products were bought in-store.[154] In other words, not only are businesses using the least noticeable form of "wrap" agreement to try and bind their consumers, but when faced with a choice in-store of presenting these terms (and possibly losing a sale) or living without the terms, they choose the latter.

Like the choice to use rolling contracts, businesses that choose to do business online could pick a "wrap" method that does a better job of informing consumers of terms to which they are agreeing and require more active assent.[155] Businesses choose not to do this because it could cost them a sale. Anything that slows a consumer down from the ultimate purchase may cost the business a sale, and so businesses choose to use less noticeable forms of assent to increase profits. In other words, the businesses that use browsewrap and even clickwrap know the terms are not adequately brought to their consumers' attention, but they have made a conscious effort to use these methods in exchange for increasing the likelihood of a sale.[156] Businesses seek to gain the financial

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[154] *Id.* at 29, 48.

[155] *See, e.g.*, Hancock v. American Tel. & Tel. Co., Inc., 701 F.3d 1248, 1257–58 (10th Cir. 2012) (approving clickwrap terms where technicians presented customers with printed copy of terms and gave customers opportunity to review those terms, customers had to agree to terms by clicking on "I Acknowledge" button on web application, which was presented on technician's laptop, before technicians proceeded with installation, and customer had to acknowledge through checkbox that he had "read, understand[s], and agree[s] to the content of the documents checked above."). *See also* Madelyn Tarr, *Accountability Is the Best (Privacy) Policy: Improving Remedies for Data Breach Victims Through Recognition of Privacy Policies As Enforceable Agreements*, 3 GEO. L. TECH. REV. 162, 192 (2018) (discussing online companies' choice to increase the level of notice given to consumers by "by forcing active assent in the form of a mandatory checkbox (known as a 'clickwrap agreement') or requiring the consumer to open the documents and physically scroll through the text before they are given the option to proceed with registration ('scrollwrap agreements'). The higher the level of notice a consumer is given, the more likely the contract is an enforceable agreement.").

[156] Colin P. Marks, *Online Terms as* In Terrorem *Devices*, 78 MD. L. REV. 247, 288 (2019). *See also* Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1283 (1998) ("[T]he owner of a Web site risks alienating virtual visitors if she forces them to first view all of the legal information that a cautious lawyer might recommend."); Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1351 (2011) ("A business may lose

benefits of the transaction while trying to avoid the consequences of using less noticeable forms of assent when they try to enforce these boilerplate clause – this is unethical. Ideally businesses would at the very least use clickwrap, but also include in the click an explicit notice of the major terms that negative affect consumers. This does not necessarily mean all of the gritty details, but at the very least some sort of description that the consumer, for instance, is agreeing to an arbitration clause.

B. Businesses Incentives and Disclosing Standard Terms

So why don't businesses use more explicit forms of assent? Why don't we see the more explicit warnings on the outside of packages? Why isn't clickwrap the default method of assent instead of browsewrap? Simply put, businesses are doing what they are incentivized to do.

Legally, there is little incentive for businesses to try and provide more notice of terms up front. At worst, a court might later decide, should a clause be challenged, that the clause was ineffective against that particular litigant.[157] But the business will not suffer a fine for having included the clause, or be discouraged from continuing to include the clause and present it in the very same way moving forward.[158] Further, even when a clause might be unenforceable, uninformed consumers won't know this. For instance, a business may license software online and use browsewrap terms located inconspicuously at the bottom of the initial page. One of

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customers if it asks them to sign contracts before processing relatively minor purchases.").

[157] *See e.g.* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1178–79 (9th Cir. 2014) ("[W]e therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice."); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000) (finding insufficient evidence that consumer had notice of shrinkwrap terms placed inside the product's box and insufficient evidence of assent to such terms).

[158] Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 171 (2017) ("[I]f the worst thing that will happen is that the term will get thrown out, there is no reason not to include it and hope for the best").

the terms may be a notification that it may share email and other personal data with associate companies. When a consumer calls to complain, the business representative can simply point to the clause, and the consumer, unaware that it was presented in an unenforceable way, may drop the complaint believing the clause is binding.[159]

Aside from the *in terrorem* effect that may benefit businesses from presenting terms in such a passive way, businesses also face competitive pressures not to do more than the law requires. Assume a business, based on a sense of ethics, decided to abandon browsewrap terms in favor of a scrollwrap agreement. Their website would be designed so that before checking out, the consumer would have to scroll through a lengthy agreement, and only upon reaching the bottom could the consumer agree. While such a decision would call the lengthy terms to the attention of the consumer, it also risks the buyer abandoning the transaction. What's worse, the consumer may now go to a competitor's site and make the purchase, even though the competitor is using the exact same terms but is presenting them through browsewrap. As discussed above, under such competitive pressures, businesses will feel compelled to do what their competitors are doing.

C. Legislature as a Response to Consumer Disclosure Abuses

The Restatement of Consumer Contracts blesses the continued use of rolling contracts and a variety of "wrap" terms despite their deficiencies in providing adequate notice to consumers or respecting their reasonable expectations. As discussed above, businesses cannot be expected to do more than the law is requiring under some vague sense of corporate social responsibility. But to be fair to businesses, foreseeability is required. Businesses need guidance on what terms are going to be enforceable and how they should be presented, but also need the assurance that they are on

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[159] *See* Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 25 (2002) (positing that the persistent use of unenforceable terms stems from sellers' knowledge that buyers typically believe the terms are enforceable); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence From the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 7 (2017) ("Consumers might be discouraged from claiming their rights through judicial procedure, given the in terrorem effect produced by the mere appearance of the unenforceable provision in the contract.").

an even playing field with their competitors. Rather than continue to rely on various court pronouncements that essentially legislate from the bench, stronger efforts should be made to ask for legislative, preferably on the federal level, guidance.[160]

A legislative approach would allow different interest groups to present information about the presentation of standard terms, but also about the enforceability of certain terms as well, which really lies at the heart of many court challenges.[161] I am not the only commentator who has observed that legislation is an appropriate alternative to a Restatement in the area. As Fred Miller has noted:

> [T]he determination of what restrictions on contract terms are appropriate seems to be a legislative task and not a judicial one. A legislature can conduct appropriate studies and legislate broadly. A judge only has a limited and particular set of facts before him or her, which typically leads to uncertainty about the application of any ruling on restrictions to other cases and scenarios. Moreover, unlike a judicial decision, a statute requires consensus and gives interested parties an opportunity to provide input.[162]

Of course, there may be concerns over whether such legislation is capable of being enacted in such divisive times. However, Congress has shown a willingness, even recently, to act when consumer abuse is suspected, such as with the enactment of the Consumer Review Fairness Act, which was signed into law in 2016, and which prohibits companies from having non-disparagement clauses in their contracts or terms of services with consumers.[163]

The details of such legislation are beyond the scope of this article, but the Magnuson-Moss Warranty Act could provide a good model for such legislation. The Magnuson-Moss Warranty

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[160] *See* Budnitz, *supra* note 108, at 272 (noting the advantages of uniformity that would result from federal legislation governing consumer contracts).

[161] Fred H. Miller, *Expert Analysis: A Critique of ALI's Consumer Contracts Restatement*, 22 CONSUMER FIN. SERV. L. REP. 18 (2019), *available at* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/05/FMiller-Article-in-22CFSLR18.pdf.

[162] *Id.*

[163] Consumer Review Fairness Act of 2016, Pub. L. No. 144–258, 130 Stat. 1355 (2016) (to be codified as amended at 15 U.S.C. 45(b)).

Act was enacted to address concerns that sellers' warranties were becoming too confusing for the average consumer.[164] In response to fears that what "[t]he bold print giveth and the fine print taketh away,"[165]the Act addresses these concerns in two ways: by setting out minimum informational standards associated with warranties;[166] and by providing substantive limitations on certain disclaimers when a warranty is given.[167] Importantly, the Act permits consumers to bring suit in state or federal court[168] and provides that a prevailing plaintiff can recover attorneys' fees.[169] As with many federal acts, the Magnuson-Moss Warranty Act provides broad rules but leaves specific guidance to the Federal Trade Commission, which can be found in the C.F.R.

Similar to the Magnuson-Moss Warranty Act, a federal act could set out minimum standards for how terms should be disclosed, both in store and online. Such legislation could make a failure to present terms in the appropriate way unenforceable, and could lead to actions by state attorney generals and the FTC. Importantly, putting this issue to the legislature would give consumer advocate groups and businesses alike the opportunity to debate what is really at the heart of this – the terms themselves. I would hope that beyond simply mandating how terms are presented, such legislation could be used to curb overreaching in areas of privacy, as well as in substantive and procedural rights that might run counter to the reasonable expectations of the consumer.

V. CONCLUSION

The Restatement of Consumer Contracts has been a controversial project, and one that may not even come to fruition. Consumer advocates and those representing business interests both have called for the project to either be terminated or

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[164] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

[165] H.R. REP. NO. 93-1107, at 22–29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7706.

[166] 15 U.S.C. § 2304(a), (e) (1975).

[167] Jonathan A. Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C. L. REV. 835, 851–52, 862, 869–72 (1977).

[168] 15 U.S.C § 2310(d)(1) (1975). *See id.* at § 2310(d)(3)(B) (1975) (describing federal jurisdiction threshold requirements, such as the amount in controversy must be at least $50,000).

[169] 15 U.S.C. § 2310(d)(2) (1975).

transferred over to a Principles project. Some, including myself in this article, argue that legislation is a better path. I see this project as highlighting one area in particular that may be federally regulated – standard terms.

The Restatement would bless rolling contracts and "wrap" agreements, though in fairness to the drafters, some important limitations are in place. However, the approaches adopted have been heavily criticized by consumer advocates and scholars. If the Restatement were to pass in its current form, it is foreseeable many more courts would adopt these approaches, which essentially means that we must rely on the businesses themselves to act more ethically in the way terms are presented. However, the structure of corporate law and competitive pressures make corporate social responsibility an unlikely protector of consumer interests. If we truly believe that businesses should provide better notice of standard terms, the best solution is through legislation.

A legislative approach has the advantages of robust debate and information gathering, but also would provide a uniform approach to these issues. Uniformity will help businesses and consumers alike in that businesses will get predictability and guidance on how to present terms, and consumers will be given fair warning of the transactions they are entering into. Such a solution could provide more teeth than the case-by-case adjudication that only invalidates one clause at a time. But beyond how the terms are presented, federal legislation would also present an opportunity to curb the worst tendencies of business to overreach.