

2017

My Favorite Case to Teach: A Literal “Gateway” for Students to Learn Contract Formation, Contract Terms, and Legal Realism

Daniel Keating

Follow this and additional works at: http://openscholarship.wustl.edu/law_journal_law_policy

 Part of the [Commercial Law Commons](#), [Contracts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Legal Education Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Daniel Keating, *My Favorite Case to Teach: A Literal “Gateway” for Students to Learn Contract Formation, Contract Terms, and Legal Realism*, 53 WASH. U. J. L. & POL'Y 055 (2017), http://openscholarship.wustl.edu/law_journal_law_policy/vol53/iss1/11

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

My Favorite Case to Teach: A Literal “Gateway” for Students to Learn Contract Formation, Contract Terms, and Legal Realism

Daniel Keating*

INTRODUCTION

I am now convinced that my favorite case to teach is Judge Frank Easterbrook’s opinion in *Hill v. Gateway 2000, Inc.*¹ That case was decided almost twenty years ago and I included it in the first edition of my Sales casebook when it was published in 1998.² In what it is now its sixth edition, I still include *Gateway 2000* in the assignment on the process of sales contract formation. I do so because the case offers a wonderful mix of both narrow and broad issues for any student learning Article 2 under the Uniform Commercial Code (UCC or the Code).

Before categorizing and explaining these narrow and broad issues, I need to add a separate and more personal reason for why I love to teach this case. Frank Easterbrook was a faculty member at the University of Chicago Law School when I was a student there in the mid-1980s. Although I never took a course from him, his brilliance as a teacher, scholar, and jurist was legend among my classmates. Nevertheless, I disagree with his decision in *Gateway 2000*. When I was a law student in my early twenties, I never would have imagined that I would someday be in a position where I could confidently disagree with someone whose intellect I respect so much.

* I would like to thank the following people for helpful comments on an earlier draft of this Essay: Adam Badawi, Scott Baker, Greg Barton, Bill Barrett, Michael Greenfield, David Lander, Sandy Meiklejohn, Russell Osgood, and Joe Russell.

1. 105 F.3d 1147 (7th Cir. 1997).

2. DANIEL L. KEATING, SALES: A SYSTEMS APPROACH 40–44 (1998).

Of course, just because I disagree with Judge Easterbrook “confidently” doesn’t mean that I am right.³ My disagreement, however, does allow students to think hard about who they think is right, based on their reaction to Judge Easterbrook’s opinion, my questions, and the words of UCC Article 2. Through the years, there are always some students who hate it when they find a case included in the casebook that is “wrong.” As one student once put it, “[t]he UCC is confusing enough. Can’t you just include cases that you agree with?” Well, mostly I do. Even still, I include *Gateway 2000* in my casebook and in my course because of the excellent lessons that it contains for students both about the substantive law of the sales of goods, and about larger policy issues involving legal realism that are just as important for students to see.

The facts of *Gateway 2000* are mercifully simple. As Judge Easterbrook puts it so succinctly in the very first paragraph of his opinion:

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within thirty days. Are these terms effective as the parties’ contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer’s assent?⁴

The term at issue in this case is an arbitration clause that was included in Gateway’s list of terms, located in the box containing the computer. The customers, Rich and Enza Hill, waited more than thirty days after delivery to complain about the computer’s performance. They sought to sue Gateway in federal court as a racketeer under Racketeer Influenced and Corrupt Originations Act

3. If nothing else, I do have some company regarding my disagreement with the case. A Westlaw search of the case indicates that twenty-six different cases have cited or discussed the case with “negative treatment.” See, e.g., *Klocec v. Gateway*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (declining to follow *Hill v. Gateway*’s claim that section 2-207 cannot apply in a case involving just one form); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1070 (R.I. 2009) (noting various other courts that reject *Hill v. Gateway*’s view of section 2-207 and the timing of contract formation).

4. *Gateway 2000*, 105 F.3d at 1148.

for mail and wire fraud.⁵ Gateway asked the district court to enforce the arbitration clause that was included among the terms in the box. The district court refused to do so, and Gateway appealed to the Court of Appeals for the Seventh Circuit.⁶ Judge Easterbrook disagreed with the district court and reversed, allowing Gateway to enforce the arbitration clause.

I. SUBSTANTIVE SALES OF GOODS ISSUES

For a sales of goods teacher, this is a fantastic case on the issue of sales contract formation. What makes it such a great case is that it reminds the students that oftentimes the question of contract formation is not so important in its own right. Instead, this is an example of a case where contract formation is important only to the extent that the timing of contract formation will dictate what the terms of the contract will be. That was clearly the situation in *Gateway 2000*, where timing rather than the existence of contract formation was the key issue. In *Gateway 2000*, it would have been difficult for either side to argue that there was no contract formation at all by the time the Hills voiced their complaints to Gateway about the computer. After all, Gateway had shipped the computer and the Hills had accepted and paid for the computer. If that is not at least a contract by conduct, then what would be?

The critical question around formation in *Gateway 2000* was not whether formation occurred, but when it occurred. The answer would then determine which terms would or would not be part of the sales contract. If the contract was not formed until the Hills failed to reject the computer within thirty days of delivery, then arguably all of the terms in the computer box would be binding on the Hills. On the other hand, if formation took place at an earlier point in time—for example, during the phone call when the Hills ordered the computer, or even at the point when Gateway shipped the computer—then probably the terms in the computer box would not govern this contract.

5. *Id.*

6. *Id.*

Whenever I cover this case in my Sales class, I begin by asking my students when, in their view, Judge Easterbrook believes that the sales contract in *Gateway 2000* was formed. This question is something of a warm-up for whoever I call on that day. That is because anyone who reads this opinion can readily see that Judge Easterbrook thinks that this contract was formed when the Hills failed to reject the computer thirty days following delivery of the computer. This is where I push the students a little harder: *If that is when Judge Easterbrook believes formation took place here, then what exactly did he view as the offer and acceptance in this case?*

Judge Easterbrook is not completely clear on this issue, but it is clear that he does not view the Hills' phone order as constituting an "offer" to purchase the computer. Instead, he seems to view Gateway's shipment of the computer as the offer (or perhaps a counteroffer to the Hills' offer to purchase?). He then sees the Hills' failure to return the computer within thirty days as an acceptance by default by the Hills. Interestingly, Judge Easterbrook does not cite UCC Article 2 for this view of what constitutes the offer and acceptance in this case. Instead, he cites his own previous opinion in the case of *ProCD v. Zeidenberg*,⁷ decided a year earlier, for the proposition that "terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product."⁸ He also cites a case involving consumers who are bound by terms printed on a cruise-ship ticket, *Carnival Cruise Lines, Inc. v. Shute*,⁹ even though cruises are not governed by UCC Article 2.¹⁰

I then direct my students to look at U.C.C. § 2-206(1)(b). That section says that "[u]nless otherwise unambiguously indicated by the language or circumstances, an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current

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

8. *Gateway 2000*, 105 F.3d at 1148.

9. 499 U.S. 585 (1991).

10. *Gateway 2000*, 105 F.3d at 1148–49. See U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 2014) (providing that UCC Article 2 applies to "transactions in goods").

shipment of conforming or nonconforming goods.”¹¹ Interestingly, Judge Easterbrook does not mention section 2-206(1)(b), not even to explain why it would not apply in this case. This is rather curious given that *Gateway 2000* does, after all, involve a “transaction in goods” that would normally be subject to the provisions of UCC Article 2.¹²

After my students have had a chance to read from section 2-206(1)(b) with their own eyes, I then pose this question: *Why couldn't it be said that pursuant to section 2-206(1)(b), Gateway's shipment of the computer and processing of the Hills' payment via credit card constituted an acceptance of the Hills' telephone offer to purchase the computer?* If Gateway made a “prompt promise to ship” during the phone call (which seems highly likely under the circumstances), why could it not be said that Gateway accepted the Hills' offer to purchase even before shipping the computer, at least according to the plain language of section 2-206(1)(b)? In the many years that I have taught this case, I have never had a student come up with a reason (or even a bad one!) why section 2-206(1)(b) would not apply to this situation. Nor have I ever had a student suggest why, if section 2-206(1)(b) does indeed apply, formation of the contract could have taken place any later than Gateway's act of shipping the computer to the Hills.

Once students have opened their eyes to a path completely different from that taken by Judge Easterbrook for considering when contract formation took place, they can then appreciate the connection between the timing of formation and the determination of which terms will govern the contract. I ask the students at this point to assume, contrary to Judge Easterbrook's assumption about the timing of formation, that the contract was formed during the phone call in which the Hills placed their order for the computer and Gateway promised to fulfill it. After all, I remind the students, there did not seem to be any “unambiguous indicat[ion]” that it should be otherwise, to use the words of section 2-206(1)(b). In light of this new assumption about when contract formation took place, I ask my

11. U.C.C. § 2-206(1)(b) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

12. U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 2014) (“[u]nless the context otherwise requires, this Article applies to transactions in goods”).

students: *What would be the terms of the Hills' contract with Gateway?*

For this oral contract entered into over the phone, the only definitive terms would be the model of the computer, the price of the computer, and the approximate shipment date. That raises the question for students whether a contract with so few definitive terms can qualify as an enforceable contract at all. This is where U.C.C. § 2-204(3) comes to our rescue: “Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”¹³ Here we would seem to have a “reasonably certain basis for giving an appropriate remedy” even if all we know for certain are the price, the type of goods, and the delivery term.

But what about other terms—terms like “mode of dispute-resolution”? This is where UCC Article 2 provides gap-fillers for the parties, in situations where the parties have not specified a particular term by the time of contract formation. The UCC gap-filler for mode of dispute-resolution is litigation, not arbitration.¹⁴ Therefore, under this approach to the timing of contract formation, Gateway’s arbitration term would not become part of the contract.

Staying with my UCC-based approach to this case, I then suggest to the students that another possible way to consider this case is under U.C.C. § 2-207, the infamous “battle of the forms” section of Article 2. To his credit, Judge Easterbrook does mention section 2-207, although he summarily dismisses the possibility that it might apply to these facts. Pointing again to his own opinion in the *ProCD* case, Judge Easterbrook reiterates his point there that “when there is only one form, sec. 2-207 is irrelevant.”¹⁵ In response to this argument by Judge Easterbrook, I ask my students to read the first few sentences of Official Comment 1 to section 2-207. That Comment reads in relevant part: “This section is intended to deal with two typical

13. U.C.C. § 2-204(3) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

14. See, e.g., U.C.C. § 2-302(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014) (“If the court as a matter of law finds. . .”) (emphasis added).

15. *Gateway 2000*, 105 F.3d at 1150 (quoting *ProCD v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996)).

situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by *one or both* of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.”¹⁶

I point out to my students that, in order for section 2-207 to apply in *Gateway 2000* under the Official Comment 1 scenario, we have to assume that the offer and acceptance of this contract took place over the phone prior to Gateway’s shipment of the computer. Then we would have the necessary “agreement reached orally” referred to in Comment 1, followed by Gateway’s written confirmation in the form of terms in the box. If instead we assume that Gateway’s acceptance of the Hills’ offer to purchase the computer was Gateway’s act of shipping the computer rather than Gateway’s “prompt promise to ship,” then section 2-207 would not apply. That is because we would then lack the necessary oral agreement required under Official Comment 1 to section 2-207, and instead we would have to analyze the case solely under section 2-206. But note that even if section 2-207 does not apply in such a case, its inapplicability will not be for the reason given by Judge Easterbrook. Contrary to what he says about the scope of section 2-207 in his opinion, Official Comment 1 is very clear that section 2-207 can indeed apply in a case where you have an oral contract followed by a single written confirmation.

I then ask my students to assume for the moment that we do have a section 2-207 case here. In other words, I ask them to assume (not unreasonably) that an oral contract was formed during the phone call, based on the combination of the Hills’ oral offer to purchase the computer and Gateway’s “prompt promise to ship.” The “formal memoranda” referred to in Official Comment 1 would then be the written terms that are included in the computer box. If that is our working assumption, I ask my students: *What would happen to*

16. U.C.C. § 2-207 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2014) (emphasis added). Although the Official Comments to the UCC are not “the law” like the statutory provisions themselves, most courts defer to what the drafters have said in the Comments. Or, at least if a judge disagreed with a particular Official Comment, he or she would typically explain why. Furthermore, the text of section 2-207(1) itself refers to additional terms contained in a “definite and seasonable expression of acceptance or a written confirmation [singular],” suggesting in the text that a single confirmation could trigger application of section 2-207.

Gateway's arbitration clause (and to any other new terms that are included in Gateway's confirmation memoranda in the box)?

This exercise gives students a chance to do a fairly straightforward application of section 2-207(2), which tells us how to handle additional terms that appear in a single confirmation of an already-concluded oral contract. Because the Hills are not merchants, the additional terms would remain mere “proposals”¹⁷ and would not become part of the contract unless the Hills specifically and affirmatively agreed to them, which obviously did not happen here. Any argument that a pair of non-merchants like the Hills could agree by default to additional terms via a “no objection” route would not be tenable under the language of section 2-207(2). Indeed, that subsection was drafted to obviate that very argument in these situations involving parties sending boilerplate forms which claim that their additional terms will govern the contract in the absence of specific objection to those terms.

As you might imagine, students can see by this point in my discussion of *Gateway 2000* that whether we use section 2-206(1)(b) or section 2-207, the result is the same: the arbitration clause does not become part of the contract, which is exactly the opposite result reached by Judge Easterbrook.¹⁸ Students can also see by this point that section 2-206(1)(b) ought to apply to this case, even though the reasons for its supposed inapplicability are never even mentioned in the opinion. Similarly, students can see that the brief reason given in the opinion for the non-application of section 2-207 is directly contradicted by Official Comment 1 of that section. And this is where the class gets really interesting, because this is where the case teaches my students some broader policy issues about the law and legal realism that go beyond the mere substance of UCC Article 2.

17. U.C.C. § 2-207(2) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

18. Even if this case were considered a “sale on approval” under section 2-326(1)(a) because of the Hills’ thirty day option to return the computer, that does not change the analysis under section 2-206 or section 2-207. That is because neither section 2-206 nor section 2-207 creates an exception to its usual rules for a case involving a sale on approval. U.C.C. §§ 2-206 to -207, -326(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

II. BROADER ISSUES OF LEGAL REALISM

The first “legal realist” lesson that students get to see with *Gateway 2000* is that sometimes (maybe oftentimes!) judges work backwards to justify a result which they believe to be right in a particular case. It is pretty clear in this case that Judge Easterbrook believes that a world in which Gateway would be precluded from using a “no objection” default mode to creating binding terms on its buyers would be a much less efficient and less desirable world. As Judge Easterbrook explains in his opinion:

Payment preceding the revelation of full terms is common for air transportation, insurance and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway’s had to read the four-page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers’ assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and inefficient steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.¹⁹

I suspect that—in addition to the parade of horrors Judge Easterbrook suggests above—there is another reason why he felt comfortable enforcing the arbitration clause in this case. I believe that Judge Easterbrook would view an arbitration clause as not such an unusual (or in his mind unreasonable) clause to enforce, even against

19. *Gateway 2000*, 105 F.3d at 1149.

a consumer buyer. Others, such as plaintiff class-action lawyers, might disagree with that conclusion. I have created a set of problems in my casebook that push the students on this point. In these problems, I change the facts of the *Gateway 2000* case to include other (arguably more onerous) terms, to see if the students think that Judge Easterbrook would be comfortable enforcing those. For example, what if the terms in the box said that the buyers, absent return of the computer in thirty days, hereby agree not to use any other printer with the computer except for a special Gateway printer that they can buy from Gateway? What if the terms say that the seller is not responsible for any consequential damages? What if the terms say that the buyers' sole remedy for any defects in the computer is that the buyers will receive a special Gateway baseball cap for their troubles?²⁰

My point in pushing the students on these alternative scenarios is that even if you believe that there is nothing unusual or onerous about this arbitration clause, there is a broader doctrine represented by this case. That doctrine would allow the seller to slip into the terms in the box some other provisions that might shock the average buyer.²¹ I also pose a second hypothetical in my problem set that challenges the students on the implications of Judge Easterbrook's conclusion about the timing of contract formation.²² Judge Easterbrook's opinion holds that the contract was not formed until after the Hills had the computer for thirty days and failed to object to the terms in the box. In my hypothetical, I ask students to imagine that following the Hills' phone conversation with Gateway, Gateway calls the Hills back one week

20. See generally DANIEL L. KEATING, SALES: A SYSTEMS APPROACH 69–70 (6th ed. 2016).

21. In a memorable series of comic strips from January of 1997, Scott Adams, the author of the Dilbert strip, posits a scenario where Dilbert failed to read closely the software license for the Microsoft software that he purchased. As a result, Dilbert inadvertently has agreed to be Bill Gates' towel boy in Gates' huge new house. Even under Judge Easterbrook's view of things, presumably a seller would still be bound by such UCC limits as unconscionability and the reasonableness of a seller's limits on a buyer's remedy. See, e.g., U.C.C. § 2-719 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2014) ("it is of the very essence of a sales contract that at least minimum adequate remedies be available"). This limitation would seem to invalidate my suggested baseball-cap remedy as an unenforceable exclusive remedy.

22. See generally DANIEL L. KEATING, SALES: A SYSTEMS APPROACH 69–70 (6th ed. 2016).

later and tells the Hills that the Hills now must pay ten percent more than the price quoted over the phone if they still want the computer. I then ask whether Gateway would be able to enforce such a condition on the sale of the computer.

At first, the students are outraged at the notion that Gateway could legally enforce such a condition like that after the phone conversation in which the Hills placed their order and Gateway promised to send the computer. But then I remind the students that Judge Easterbrook held that the contract was not formed when Gateway took the Hills' order over the phone and agreed to ship the computer. Therefore, Gateway could theoretically back out of this contract with impunity; alternatively, Gateway could change the terms of the deal that the Hills thought that they had struck with Gateway. Or, even if the basic terms agreed to over the phone could not be changed by Gateway, the "terms to come" could be so onerous as to make the deal completely unattractive to the would-be buyers.

After all, if Gateway's shipment is considered to be a counteroffer to the Hills' phone offer to purchase the computer (rather than an acceptance of the Hills' offer to purchase, as section 2-206(1)(b) would seem to indicate), then Gateway could simply change the terms of that counteroffer prior to acceptance of the counteroffer by the Hills, absent some detrimental reliance on the counteroffer shown by the Hills. And remember, under the Judge Easterbrook view of this contract, the Hills' acceptance of Gateway's counteroffer (which counteroffer took the form of shipment of the computer with terms in the box) will not take place until the Hills fail to return the computer within thirty days of delivery. My basic point with this hypothetical in my casebook problem is that, if nothing else, these possibilities do not comport with most consumers' common-sense understanding of when the sales contract has been formed here.

Judge Easterbrook's parade of horrors certainly does present an unattractive alternative universe that might prevail if a court did not come out the way he does in this case.²³ On the other hand, is an inefficient outcome reason enough to ignore what the legislature has said about a particular matter, in this case through the provisions of

23. See *supra* note 19.

UCC Article 2? That raises for students the second “big picture” legal-realist observation, this one involving the separation of powers between courts and legislatures as it sometimes works in practice.

All of the courses that I teach are Code courses, and yet in all of those classes the students read assigned books that include a lot of cases, rather than simply excerpts and explanations of Code provisions. During the first class of every course that I teach, I try to help students to understand the role that cases play in a Code course. First, I tell my students, cases can give them some excellent real-life examples of how the Code provisions work in practice. Second, I remind the students that as wise as these Code drafters were and as comprehensive as they tried to be, there will invariably be matters that arise in commerce that are simply not covered by the Code’s provisions. Also, there is often Code language that is subject to more than one interpretation. In those cases, we need a court to go beyond just “applying” the Code, and instead to fill gaps in Code coverage or to interpret an ambiguous provision of the Code.

Most 1L students could tell you that when a statute is clear as to a particular matter, the court’s job is simply to apply the statute as written, even if the court does not agree with the statute or with the outcome that it would yield with a given set of facts. This is where the separation of powers issue gets thorny, and where legal realism rears its head. Who gets to decide when a particular court is merely “interpreting” a statute rather than re-writing or ignoring it because the court doesn’t care for the result that would obtain with a straightforward interpretation of the statute? Practically speaking, it is going to be the court that makes this call, especially if the court is a federal court of appeals like we have in the *Gateway 2000* case.²⁴ In

24. Even a federal court of appeals, if it is sitting in diversity as the Seventh Circuit was in the *Gateway* case, is supposed to apply the state’s substantive law on a state-law issue like the interpretation of the UCC. See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 58, at 396 (7th ed. 2011) (federal court’s job in diversity cases involving substantive state law is “not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule that it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt”). Yet Judge Easterbrook’s sole reference in his opinion to the substantive state law of either Illinois (the Hills’ state) or South Dakota (Gateway’s state) is limited to observing that “neither side has pointed us to any atypical doctrine that might be pertinent . . .” and offers no comment on whether a single form qualifies for the application of section 2-207. 105 F.3d 1147, 1149. Instead, he simply refers to his own

theory, even a federal court of appeals can be reversed by the U.S. Supreme Court, but what are the odds that a given case will ever be heard by the Supreme Court? Similarly, in theory, a legislature that believed that courts were misapplying, misinterpreting, or just plain ignoring one of its statutory directives could re-draft the statute in a way that left no doubt how the statute should be applied to the facts of those kind of cases. But again, what are the odds that a legislature would take the time or have the necessary consensus to reverse legislatively what it believed was a misapplication of one its statutes?

REALITY CHECK: HOW CAN A SELLER ENSURE THAT ITS TERMS PREVAIL?

The third broader policy point that the *Gateway 2000* case raises is a contract-theory question, rather than a separation-of-powers question. This is an age-old question of how the legal system ought to determine the non-immediate terms of a contract where, for whatever reason, the two parties have not sat down to negotiate and sign a written contract that outlines all of the non-immediate terms.²⁵ The classic manifestation of this problem is captured in section 2-207's battle of the forms scenario, where a buyer and a seller agree to the purchase and sale of goods but don't bother to negotiate and sign a unified written contract. This issue comes up in other ways as well, including most consumer retail purchases, whether in-person or online.

This brings us back to Judge Easterbrook's parade of horrors again. Do we want to live in a world where sellers, if they wish to protect themselves as to particular non-immediate terms that are important to them, will be forced to give lengthy recitations of contract terms either over the phone or in the checkout lane at the brick-and-mortar stores? This issue gives me a great follow-up question for students that tries to put them in the shoes of Gateway, a seller that clearly cares about its non-immediate term that would

decision in *ProCD*, which similarly lacks any reference to the relevant state substantive law on that question. 86 F.3d 1447.

25. By non-immediate terms, I mean things like remedies and mode of dispute resolution, as opposed to immediate terms like price, quantity, quality, and delivery terms.

require arbitration as the mode of dispute-resolution. In my hypothetical, however, I tell my students to assume a world in which the judge in this case is me rather than Judge Easterbrook. If I am the judge, I remind them, then I will apply UCC Article 2 as I read it, especially section 2-206(1)(b) and section 2-207. If the students are now to imagine that the judge (me) will actually apply the provisions of Article 2 here, what exactly should Gateway say on the phone to a prospective buyer if Gateway does not want its computer shipment to count as an “acceptance” under Article 2 unless Gateway can be sure that all of its terms in the box will govern?

My “solution” for Gateway, such as it is, does not necessarily require the full recitation of the four pages worth of terms contained in the box as Judge Easterbrook suggests. But my solution ends up sounding at least cumbersome if not somewhat wacky on its own terms, especially if Gateway wants to be completely certain that it can enforce its terms in the box: first, Gateway should record the telephone conversation; second, Gateway should tell the buyer that “we don’t accept your offer to purchase, but we will make a counteroffer to sell the computer you asked for but with additional terms inside the box that we will ship you”; and third, Gateway should say, “please read all of the terms in the box that we send to you and return the product within thirty days of receipt if you do not agree to accept all of terms of our counteroffer. Otherwise, you will have accepted our counteroffer, including all of our terms in the box.”

Now, I cannot imagine that my “UCC-friendly” method of helping Gateway control the terms of its sale of a computer will end up improving the yield on its phone-order sales. Yet anything short of that method would likely risk having Gateway’s terms in the box not control, at least if I were the judge. In outlining this idiosyncratic process for Gateway, I do not mean to suggest that this is an efficient way for sellers to get the terms they want.²⁶ All I am suggesting above is that some process like this is what the relevant statute, UCC Article 2, seems to require of the seller if the seller truly wants to

26. I am being agnostic for the moment about what is or is not efficient for Gateway to get what it wants.

ensure that it gets all of the terms it wants. If I were the judge, that is what I would be focusing on, rather than on my vision of how commerce could run most smoothly, especially if efficiency means ignoring or glossing over the words of the relevant statute.

To conclude my coverage of *Gateway 2000*, I push students to consider other possible ways that Gateway could get the terms that it wants, once more assuming that I were the judge rather than Judge Easterbrook. One possibility is for Gateway to insist on getting the buyer's signature as proof of the buyer's agreement to Gateway's various terms, instead of just relying on the no-objection presumption that leads to the buyer's acceptance of all the seller's terms. By insisting on the buyer's signature in advance of the sale, the seller could ensure that the various non-immediate terms like arbitration would be specifically assented to by the buyer, making them so-called "dickered terms" and taking them out of the realm of either section 2-206 or 2-207.

Another approach for a seller like Gateway to get the terms it wants would focus on when Gateway accepts payment from the buyer. If Gateway processes the buyer's payment over the phone when the buyer calls to order the computer, that would seem to reinforce the notion that the contract is formed at that point, which is not what Gateway wants with regard to enforcing its terms in the box. If Gateway were to wait until thirty days following the buyer's receipt of the goods to process the buyer's payment, that would seem more consistent with a scenario in which the buyer's acceptance does not take place until the buyer fails to object to any of the terms within thirty days of receipt. One problem with this approach is that Gateway would probably fear (rightly) that this delay in processing the buyer's payment might cause some buyers to keep the computer but never pay for it.

Perhaps the simplest approach for Gateway to get the terms it wants in the Internet age is to stop accepting phone orders, and instead insist that all remote orders be processed online. If that is the route that Gateway takes, then Gateway can do a "clickwrap agreement" online for any potential buyers of its computers. Clickwrap agreements are generally upheld by courts if the agreed-to

terms are conspicuously displayed online before the buyer clicks the relevant “I agree” icon.²⁷ Enforcing a clickwrap agreement would certainly be consistent with Judge Easterbrook’s insistence in *Gateway 2000* that parties can be bound by contractual language that they did not bother to read. The difference, though, between this online scenario and what actually happened in *Gateway 2000* is that formation arguably took place before the buyer had access to the relevant terms. In the standard clickwrap scenario, formation does not take place until after the buyer claims to have read the contract terms, and then clicks his or her assent.

CONCLUSION

Due to the rise of Internet commerce and the decline of phone orders, the practical significance of the *Gateway 2000* holding is becoming less and less significant as time goes on. Nevertheless, I cannot imagine dropping this case from my Sales casebook or my Sales course in the foreseeable future. That is because I believe that the case still presents students with a fascinating range of substantive sales issues, along with a host of larger policy issues about how the legal system operates in practice. And on top of all that, Judge Easterbrook’s opinions are extremely well-written and fun to read—even in the rare case when I think he got it wrong.

27. See, e.g., *Fetija v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (citing numerous decisions upholding clickwrap agreements). See also *Berkson v. Gogo*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015); *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014) (where both courts focus on how conspicuously the online terms were presented to the potential purchaser).