



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 16 | Number 4

Article 9

March 2016

The Gateway Thread

AALS Contracts Listserv

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Contracts Commons](#)

Recommended Citation

Contracts Listserv, AALS (2016) "The Gateway Thread," *Touro Law Review*. Vol. 16: No. 4, Article 9.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol16/iss4/9>

This Common Sense and Contracts Symposium is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Contracts Listserv: The Gateway Thread

THE GATEWAY THREAD – AALS CONTRACTS LISTSERV

From: Deborah Post
[mailto:dpost@WPPOST.DEPAUL.EDU]
Sent: Wednesday, February 09, 2000 3:21 PM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: class problem

I just finished covering the chapter on defenses in my first year contracts class. One of the cases is about an attorney who leases a copier for \$4500 and the machine never worked. (For the film people out there, I love to show Laura Nader's *Little Injustices* at this point in the course.) Of course we also read *Williams v. Walker Thomas* and a case from Delaware about an alcoholic who loses his house (*Ryan v. Weiner*, 610 A.2d 1377 (1992)) and a land claim case involving the Nez Perce tribe. (*Nez Perce Tribe v. United States*, 176 Ct.Cl. 815, 829-30 (1966), *cert. denied*, 386 U.S. 984 (1967)). In the course of the class discussion there were naturally many allusions to the obligation of self-reliance and some expression of hostility towards practices that seemed predatory.

I am giving my students an assignment and would appreciate some feedback from whoever might still be listening out there. I thought I would ask them to consider the following: What would happen if we altered the way we think about defenses, especially unconscionability? The focus is not on the human frailties or inadequacies of the person who seeks to avoid the contract (paternalism, maternalism or parentalism), but rather on the limits we must or should place on the use of power. What would be the advantages of this change?

Would the distinction between substance and process be as important? Would we still talk about the "prevention of unfair surprise and oppression" or the "absence of meaningful choice?" Is it right that we want rules that do not disturb "the allocation of risks because of superior bargaining power?" Would it be asking

too much to give them a hypo and have them apply the unconscionability doctrine as it is now and then discuss how they might like to see the problem discussed?

Deborah

From: Stewart Macaulay
[mailto:smacaula@FACSTAFF.WISC.EDU]
Sent: Wednesday, February 09, 2000 4:48 PM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: class problem

Power is one of those words that means everything, nothing or something odd in between. Isn't the problem one of my right to live in a world based on trust? Of course, I shouldn't trust some merchants, but, empirically, I am going to trust Wal-Mart, Sears, IBM, Land's End and the like. And they want me to trust them and they invest a great deal in building that trust. Indeed, if few of us did trust them, wouldn't modern merchandising grind to a stop? But when things turn sour, the work product of an element of our profession cuts in. The hidden terms and the courts that enforce it, say that I was a fool to trust the Gateways and others who reduce the idea of contract to an empty ritual.

Whatever the virtues of Judge Easterbrook's Gateway opinion, it gets an "F" as a law exam. It is a pitiful reading of the UCC, ignoring the definition of "agreement" that was so important to Llewellyn. Maybe Judge Easterbrook's approach gives everyone more goodies for less, but it means that I will lose and my expectations will be defeated. If we think that choice is an important value, we cannot be content with polite evasions such as: there is a duty to read and understand a document written in a code (legal English) and buried in a box. The doctrine of reasonable expectations exists largely in insurance to limit what can be hidden by lawyers in documents which they know will not be read and understood. In an impossibly just world, measured by my preferences, this doctrine would apply to all form

contracts. Given the cost barriers to litigation, it wouldn't raise the price of goods enough to matter. I suspect that the impact would be largely symbolic, but I like symbolizing that fraud from fancy offices is a bad thing. It would make some corporate lawyers unhappy, but it couldn't happen to a better bunch of people. Instead of the "safe harbors" that they demand, they deserve harbors filled with mines put down in random patterns. There is a simple safe harbor that they work hard to avoid: don't try to deceive people.

You could challenge me: Suppose Gateway advertised in big type as they puff their products, and said "if there is trouble, you must trust us to fix the computer because you have no legal remedy." Would it make any difference? Wouldn't customers just accept this? Would any of them understand what risks they would be taking? Would competitors jump in and advertise that they didn't take away legal rights? Of course, this is but a mind experiment. We'll never know. Gateway and its legal staff work hard to hide that this is what they are doing with their arbitration clause that creates a Kangaroo Court. And Judge Easterbrook and the judges who have followed his opinion tell us that misrepresentation is the oil that lubricates capitalism. It is okay for Gateway to hide what it is doing. I ask in class whether Gateway's lawyers should be disciplined. Of course, they won't be. Judge Easterbrook has testified in their behalf.

Or am I just old and cynical?

Stewart Macaulay

From: Alan Hyde
[mailto:Alan.Hyde@WORLDNET.ATT.NET]
Sent: Wednesday, February 09, 2000 4:57 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: class problem

For years in teaching all the “fairness” materials, I’ve emphasized the “two-step” under which the victim FIRST must be placed into the category “other” or “not us” (he couldn’t read, he was young, she had limited options, she had Alzheimer’s) and only then is the transaction evaluated, typically for adequacy of consideration though often without saying so. I always ask the class what would happen if the law emphasized, not the strangeness of the choices people make, but their reasonableness: there but for the grace of God go I, any of us could have made such a choice. Why should that defeat relief? Would the law look better or worse if it were based on such empathy, rather than paternalism? We could look at how the law treats victims of pressure with whom it really identifies, like shareholders subject to tender offers under the Williams Act (who are given LOTS of time to make up their minds).

That having been said, I’m less turned on by Deborah’s proposal that we reframe the issue as “limits on power.” What is the power that the office equipment rental company has over the lawyer?

Alan Hyde

From: Deborah Post
[mailto:dpost@WPPOST.DEPAUL.EDU]
Sent: Wednesday, February 09, 2000 5:01 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: class problem

According to the case, and maybe it is right, the power is knowledge - technical expertise. We discussed the sources of

2000

COMMON SENSE IN CONTRACTS

1151

power in class: monopoly power, wealth, class, and knowledge.
Does that seem wrong?

Deborah

From: Dave Slawson [mailto:dslawson@LAW.USC.EDU]
Sent: Wednesday, February 09, 2000 6:25 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: class problem

Deborah,

The way I understand unconscionability, it does deal with the abuses of power. "Absence of meaningful choice" means lack of notice, inability to understand, and/or no reasonable alternative, and the first and third of these have nothing to do with the victim's frailties but only with the perpetrator's failure to give fair notice or the circumstances that foreclose alternatives. Even the inability to understand is usually focused on the perpetrator, i.e., would the drafter of the provision reasonably have expected readers of it to understand it? The last time I looked at the cases - admittedly some years ago - they supported this understanding of the doctrine.

David Slawson

From: Kettering, Kenneth C. [mailto:kck@RSSM.COM]
Sent: Wednesday, February 09, 2000 6:38 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: class problem

We discussed the sources of power in class: monopoly power, wealth, class, and knowledge. Does that seem wrong?

Well, yes... at least pending clarification as to what you have in mind regarding "wealth" and "class". Can you illustrate what

you would view as a potentially illegitimate exercise of power in a contract setting that derives solely from “wealth” or “class” (that is, where neither party has monopoly power or materially better knowledge & expertise)?

Ken Kettering

From: Franklin G. Snyder [mailto:fsnyder@UIDAHO.EDU]

Sent: Wednesday, February 09, 2000 8:24 PM

To: AALSCONTRACTS@TC.UMN.EDU

Subject: Re: class problem

Isn't the problem one of my right to live in a world based on trust?

We inhabit a legal system that permits people to be wildly negligent with respect to truth or falsehood without legal penalty. We encourage criminal defendants to announce to the world that they are not guilty when they in fact are. If I have no right to trust what the New York Times says on the front page or what an individual says on the record in open court, I'm not sure where we would derive an idea that we have a “right to live in a world based on trust.” The existence of a coercive mechanism for enforcing promises, and the fact that the penalties are performance-based (rather than, say, penalties for breach of a moral trust), suggests that what's at issue isn't a right to a world based on trust, but merely a right to performance. Perhaps it's better to look at the problem of arbitration clauses more as one that interferes with what a party thought was his promised performance than one that violated his right to trust. I'm new here, and I'm finding this discussion fascinating.

Frank

From: Rasmussen, Robert
[mailto:robert.rasmussen@LAW.VANDERBILT.EDU]
Sent: Thursday, February 10, 2000 11:40 AM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

Two quick points. First, I’m pretty confident that Easterbrook wrote *Pro-CD*, (*ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (1996)) so he is relying on his prior opinion in *Gateway*. Second, my sense is that, at least for software as in *Pro-CD*, the game is now clickware licenses. The software maker is pretty much saying - “Here’s the terms that I am selling on, take it or leave it.” Why isn’t this an enforceable contract? Sure, I’m as good as the next guy at making up hypos (what if one term in the click license is “you agree to pay me \$10,000”), but that doesn’t seem to be what is actually happening in the market.

From: Mark Gergen
mailto:mgergen@MAIL.LAW.UTEXAS.EDU
Sent: Thursday, February 10, 2000 11:48 AM
To: AALSContracts@tc.umn.edu
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

I do not know the case to which Deborah refers. Stewart’s message raises the specter of the *Gateway* case, which I just taught so my comments are directed to it.

The issue, briefly, is whether someone who buys a computer from Gateway over the phone, paying when he places the order, is bound to terms that came with the computer that stated that he could return it if he did not assent to such terms. The 7th Circuit (Easterbrook) said “yes,” reasoning that delivery of the computer was an offer that the buyer accepted by not returning the computer. He relied on *ProCD*, a shrink-wrap license case which held a buyer of software is bound to license restrictions

found in the box upon opening and installation of the software. Neither term at issue is on its surface all that offensive (an arbitration provision in Gateway, a prohibition of commercial use in *ProCD*) but nothing in the two decisions limits the logic to inoffensive terms.

We ill serve our students (and through them the world) if we approach these cases as posing unconscionability problems or as raising deep moral dilemmas about one's duty towards others in the marketplace or the appropriate place for empathetic reasoning in the law. The reasoning, if not the result of these cases, is objectionable because assent to the "terms in the box" is found where, under general principles of contract law, it may well not exist.

A vendor could tell a buyer over the phone that his order is being taken without commitment and that the goods are being shipped so the buyer could inspect them and their terms and decide if they are acceptable. This is what Easterbrook cavalierly assumes vendors are doing. As far as I know, they do not do this. My sense is that most consumers think that when they place the order over the phone or buy the software in the store they have made some sort of contract. Though this, finally, is an empirical question of a sociological sort. To test this - and challenge Easterbrook's logic - you might ask whether the vendor could contact the buyer and say it will not deliver unless a higher price is paid.

If there is a contract, then there are several ways to analyze the "terms in the box." We might treat the terms like terms found in a confirmatory memorandum under 2-207, which puts the vendor in a weak position unless the terms are unsurprising (as perhaps they were in *ProCD*). There is one real howler in the opinions - they say that 2-207 applies only when there are two forms (hey, it is the "battle of the forms," right?). This is just dead wrong. It would be correct to say that 2-207 does not apply when the parties understand that one form [or writing or record] defines

the relevant terms. But that is precisely the point at issue in these cases.

Or we might treat the terms like a proposal for modification making the issue whether the buyer's silence is assent to the terms. (Surely the buyer's use of the computer [or the software] is not assent for that should be his right, however we conceive of the initial contract.) The vendor is on weak legal ground here, too, unless consumers actually do understand that by not returning the good they assent to the terms in the box. If the contested term is truly odd and offensive, then the buyer could seek refuge in principles of interpretation even accepting the vendor's form as the governing written agreement. If the buyer is unaware of the term, and the vendor would reasonably expect buyers to be unaware of the term because it is odd and hidden, then it is not a term of the contract. This takes you into the parol evidence rule and rules of interpretation and their relationship.

Resort is needed to the unconscionability doctrine only when you must concede that the consumer knew or should have known of the contested term and acted in a way that a reasonable person would construe as his assent to that term. Even in these circumstances, I would look to other doctrines -- the presumption against forfeiture, fiduciary duty, abuse of confidential relationship, and good faith -- first.

From: Tom Stipanowich [mailto:tstipano@POP.UKY.EDU]
Sent: Thursday, February 10, 2000 12:21 PM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

Mark Gergen's observations are right on the mark. We just covered *ProCD* and *Hill v. Gateway 2000* in my first year sales class and brought out Easterbrook's blithe misstatement of 2-207 and the underlying policy implications.

From: Joseph Perillo
[mailto:jperillo@MAIL.LAWNET.FORDHAM.EDU]
Sent: Thursday, February 10, 2000 12:23 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

To add to Mark Gergen's observations, has anyone seen *Brower v. Gateway 2000*, 676 NYS2d 569 (App.Div.)? It follows the 7th Circuit but then takes up the same arbitration clause under an unconscionability lens.

Joseph

From: Flechtner, Harry
[mailto:FLECHTNER@LAW.PITT.EDU]
Sent: Thursday, February 10, 2000 12:25 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

Ken,

I think you have stated the case for the Gateway analysis quite well. The problem I have is that vendors bank on the fact that buyers will not bother to read or fathom the significance of the terms, and certainly won't bother to pack the computer up and send it back - not when they've spent considerable time and effort deciding what they want, ordering, waiting for the shipment to arrive, etc.... It is the abuse of this "inertia" against returning a product that prompted Congress to outlaw the practice of mailing out unordered merchandise and then billing the recipient unless the item was returned within a specified period. *See* 39 U.S.C. § 3009.

If the Gateway procedure is a valid way of procuring "assent" to terms, it ought to work the other way also. Suppose I order a computer, receive it and get the inevitable terms in the box. I then send the vendor my own form, saying "I received the computer and notice you have included some terms not previously revealed to me. I do not wish to purchase the computer on those terms but would be happy to purchase on the terms printed below. If you do not wish to sell me the computer on the terms I propose, please send someone over in the next 30 days to box up the machine and take it away." The terms printed below would, of course, be favorable to the buyer. Why should this not hold up under the Gateway analysis? If not arranging to return the goods is acceptance of an offer by the buyer, why should the same thing not be an acceptance of a counter offer by the vendor?

Harry Flechtner

From: Kettering, Kenneth C. [mailto:kck@RSSM.COM]
Sent: Thursday, February 10, 2000 12:28 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

A vendor could tell a buyer over the phone that his order is being taken without commitment and that the goods are being shipped so the buyer could inspect them and their terms and decide if they are acceptable. This is what Easterbrook and Posner cavalierly assume vendors are doing. As far as I know, they do not do this.

On the contrary. The hardware in the *Gateway* case was sold on the terms, very standard in the industry, that the buyer could return the product within 30 days for a full refund, no questions asked. The buyer thus had 30 days to ponder the warranty terms, etc. before being bound to the transaction. Ditto for software sold on a shrinkwrap/clickwrap basis. Typically there is some no-questions-asked return period, but at a minimum these

licenses allow the customer a chance to review before becoming bound to keep the software. E.g., the famous initial splash screen that recites the license terms and states that “if you agree to these terms, click ‘I accept’; if you don’t agree, cease installation now and return the disk to your vendor for a full refund.”

Under the Gateway/shrinkwrap/clickwrap model of contracting, the customer in effect initially has an option to purchase, together with the right to possess and use while studying the terms of purchase and deciding whether to exercise the option. That’s not the terminology the parties use, of course, but essentially that’s what is going on. The point is that the customer is not bound by terms that the customer hasn’t had an opportunity to read and study.

Of course, the Uniform Computer Information Transaction Act (UCITA) § 211 now explicitly validates this model of contracting re:software.

Ken Kettering

From: Dave Slawson [mailto:dslawson@LAW.USC.EDU]
Sent: Thursday, February 10, 2000 12:38 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

As Stewart Macauley said, the doctrine of reasonable expectations covers this kind of situation. As he also said, however, the doctrine exists mostly in insurance law. But it exists for all contracts in many more states than people generally realize. See my book in this respect, *Binding Promises: The Late 20th Century Reformation of Contract Law 44-73* (Princeton 1996).

David Slawson

From: Dave Slawson [mailto:dslawson@LAW.USC.EDU]
Sent: Thursday, February 10, 2000 12:45 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

The idea that business buyers “ponder the terms” of the standard contracts they receive is unrealistic. Have any of you ever worked in, or observed, a receiving “dock” for a large business organization? They sometimes receive hundreds of packages a day, and they are almost always unwrapped and examined by very low-level employees or, at best, by engineers, etc., who have neither the time nor the expertise to “ponder” a lot of small print. All this, to say nothing of the absence of reasonable alternatives. Usually, every seller of the same product will have similarly one-sided terms.

Any way you look at it, there is no meaningful consent.

David Slawson

From: Kettering, Kenneth C. [mailto:kck@RSSM.COM]
Sent: Thursday, February 10, 2000 1:00 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

Rather than focus on the empirical point involved (in any organization I’ve ever seen, it isn’t the loading dock employees who make the decision whether to hold on to a product or return it; and I certainly have seen standard terms negotiated), I will simply note that this argument has nothing in particular to do with the distinctive features of the Gateway/shrinkwrap/clickwrap model of contracting. It applies with equal force to all mass-produced goods sold on standard terms, even under the traditional model where the buyer can pick the thing off the shelf, examine the warranty terms, etc. The implication of this

argument is that it is simply impossible to have valid warranty disclaimers, etc. in such situations for want of “meaningful consent” (few people read the legal terms when buying under the traditional model; and even were the vendor to decline to sell unless the buyer initialed each paragraph of the sales terms, the buyer still wouldn’t have “meaningfully consented” because s/he has “no reasonable alternatives”).

The death of contract indeed.

Ken Kettering

From: Thomas Joo [mailto:twjoo@UCDAVIS.EDU]

Sent: Thursday, February 10, 2000 1:05 PM

To: AALSContracts@TC.UMN.EDU

Subject: Re: abuse of power, Gateway, and “pay now, terms later”

As Prof. Gergen points out, Judge Easterbrook certainly makes it seem as if Gateway’s arbitration provision is inoffensive. Arbitration, shmarbitration. But Judge E never tells us what the clause said.

A New York case looked more closely at the same arbitration clause and was offended. (*Brower v Gateway*, 246 A2d 246 (1998)) According to the clause, arbitration was subject to the rules of the International Chamber of Commerce. The ICC is located in France (although the actual forum was, appropriately enough, Chicago), and the plaintiffs alleged it was very difficult to contact ICC or obtain its rules. Moreover, ICC rules required a \$4000 advance deposit, of which \$2000 was nonrefundable. Given the cost of a home computer, this is pretty steep. The NY court found the requirement of arbitration before the ICC thus effectively denied the plaintiffs a forum and held it substantively unconscionable (and pointed out that the Hill court did not mention this issue).

As to Prof. Rasmussen’s comment, not a response but a tangent:

Regardless of how you feel about clickware, note that *ProCD* (yes, Judge E wrote it) was not a click case. The software was on a CD, sold in a store inside a sealed box. Unlike clickware terms, which you can see before clicking, the terms were inside the box and invisible until the CD was paid for, taken home from the store, and opened - arguably, "after" the "contract" had been formed between buyer and vendor (Judge E calls this a "Shrink-wrap license" - but I think he misuses the term. I think a "shrink-wrap license" is one that is shrink-wrapped to the "outside" of the package precisely so it can be read before purchase). *ProCD*, even more than *Gateway*, was a clear case of "pay now, terms later."

So the enforcement of click licenses fits easily within formal assent doctrine, but *ProCD* is a tougher fit.

Thomas Joo

From: Tom Stipanowich [mailto:tstipano@POP.UKY.EDU]
Sent: Thursday, February 10, 2000 1:09 PM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: abuse of power, *Gateway*, and "pay now, terms later"

David,

Since reading your earlier work on reasonable expectations I have been intrigued by uses for the concept. Given my focus on arbitration and ADR, I see a strong analogy to the problems associated with insurance transactions. Among boilerplate provisions, arbitration terms are particularly arcane. It is totally unrealistic to expect members of the public (or even some lawyers) to understand all of the implications of an arbitration agreement and address the option in the contracting process. While arbitration is not inherently good or bad, dispute resolution provisions provide a mechanism for overreaching. Thus far, unconscionability has been the primary tool for courts seeking to address overreaching in this area. I, for one, believe reasonable

expectations fits even better. Recently, a national consumer disputes advisory group (including members of a number of national and state agencies, consumer groups, and corporations) developed a Consumer Due Process Protocol for the use of ADR provisions in consumer contracts. Hopefully, such “community standards” will inform courts attempting to give content to “reasonable expectations” in this arena.

Tom Stipanowich

From: Dave Slawson [mailto:dslawson@LAW.USC.EDU]
Sent: Thursday, February 10, 2000 1:28 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

Tom,

Thanks for telling me about this. It sounds like a hopeful step.

David Slawson

From: Dave Slawson [mailto:dslawson@LAW.USC.EDU]
Sent: Thursday, February 10, 2000 1:52 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

Ken,

The doctrine of reasonable expectations does not eliminate a seller’s right to set any terms it likes. It only requires that the terms be made understandable to buyers before they become bound to them. For example, if computers of a certain kind generally last for 3 years under normal use, buyers will

2000

COMMON SENSE IN CONTRACTS

1163

reasonably expect this, and it will therefore be part of the contract of sale unless the manufacturer acts affirmatively to change these reasonable expectations "before" buyers of its computers become bound, "as a practical matter," to the contract's terms. The manufacturer could change buyers' reasonable expectations of its computers, for example, by saying "in a prominent manner" in its advertisements, catalogues, etc., that they are only warranted to last X days, or whatever.

However, some aspects of contracts are simply too complicated for the buyers concerned to be reasonably expected to understand. The way that the courts handle such aspects of insurance is to make laws of them (generally sounding in tort). For example, it is the law that a liability insurer must accept a reasonable settlement offer from a liability claimant.

I should add that courts should only make these laws as a last resort. If private organizations, administrative agencies, etc. exist or can be created for the purpose, they may be able to do the job for a particular industry more effectively.

I should also add that I realize that reasonable expectations won't solve all our problems. But what legal doctrine does? Thanks for your comments.

David Slawson

From: Kettering, Kenneth C. [mailto:kck@RSSM.COM]
Sent: Thursday, February 10, 2000 2:06 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

Hmmm. Judging by early returns I seem to be in the minority here [dodging another brickbat]. Let me respond to Harry's thoughtful message, then I shall shut up, at least for a while, and see if anyone else wants to carry the ball.

1. *The problem I have is that vendors arrange things this way because they bank on the fact that buyers will not bother to read or fathom the significance of the terms, and certainly won't go to the bother of packing the computer up and sending it back - not when they've spent considerable time and effort deciding what they want, ordering, waiting for the shipment to arrive, etc. It is the abuse of this "inertia" against returning a product that prompted Congress to outlaw the practice of mailing out unordered merchandise and then billing the recipient unless the item was returned within a specified period.*

a. The unordered merchandise situation is quite different in that it is, by definition, a wholly unprovoked bombardment of someone who is minding his/her own business. Under the Gateway model, by contrast, the buyer takes the initiative and orders the goods. The one thing every buyer in that situation knows is that s/he has a 30 day free trial period (indeed, surely buyers consider that to be a positive rather than a negative feature). Surely it should not startle a buyer to expect that sometimes it may be a good idea to take advantage of that feature.

b. The fact that a buyer does bear some incidental costs if s/he decides to walk away from the transaction does give rise to reasonable concerns. That was one of the big battles in UCITA, of course, and as a result the "mass market license" provision was written to require (in effect) the vendor to pay the costs of shipment, if return to the vendor is required. I don't know whether Gateway agreed to pick up the cost of shipping in *Hill v. Gateway*. I don't think Easterbrook's opinion referred to this point, though to my mind it is a significant feature. (I personally bought a computer from Gateway some years ago, it happens, and I'm pretty sure that they agreed to pick up the cost of shipping. I had to return a defective hard drive a year or so after I bought it, and I am certain that they paid the shipping for that.)

However, query how significant shipping costs ought to be before one should make this point dispositive. After all, under the Gateway model, the customer has an option; and nobody should expect an option to be costless.

c. You say: “vendors arrange things this way because they bank on the fact that buyers will not bother to read or fathom the significance of the terms”. I don’t see why you are so confident that the Gateways of this world have sinister motives for adopting this business model. Given that parties want to deal through the mail rather than face to face, and thereby reap the benefits of avoiding investment in bricks and mortar (a very substantial cost saving, last time I priced a computer), what are the Gateways of this world supposed to do? Decline to sell until the customer has sat through a recording reciting all the warranty terms? Decline to sell until the customer has received a written contract in the mail, signed it and returned it? That’s the last thing any customer wants, let alone Gateway. [I have no doubt that if the customer had asked, Gateway would have sent its standard terms to the customer before the customer placed his or her buy order. I also have no doubt that the number of customers who ever asked for such a thing could be counted on the fingers of one hand.]

d. The focus on the process by which the terms are communicated to the buyer before the buyer makes the final decision whether to consummate the purchase seems to me ultimately a red herring. As you state, in most cases “buyers will not bother to read or fathom the significance of the terms.” I agree. But, as I noted in an earlier post, that’s the case no matter how or when the terms are communicated; it’s not a problem with the Gateway model of contracting. People rarely do read the terms when buying goods off the shelf, even if the terms are right under their nose.

2. *Suppose I order a computer, receive it and get the inevitable terms in the box. I then send the vendor my own pre-prepared form, saying, “I received the computer and notice you*

have included some terms not previously revealed to me. I do not wish to purchase the computer on those terms but would be happy to purchase on the terms printed below. If you do not wish to sell me the computer on the terms I propose, please send someone over in the next 30 days to box up the machine and take it away." The terms printed below would, of course, be favorable to the buyer. Why should this not hold up under the Gateway analysis?

The two situations are not symmetrical. At the time the customer places the order with Gateway, both the customer and Gateway know that Gateway's terms will be in the box, and that s/he has 30 days to return. By contrast, Gateway has no knowledge that customer is putting any strings on the deal.

The situation would become symmetrical only if the facts were such that the customer "when placing the order" told the Gateway order-taker: "I reject any terms you may place in the box. Here are the terms on which I will agree to accept the computer [reads terms]. By shipping the computer you agree to my terms. If you ship anyway, I will nevertheless allow you 30 days in which to ponder the matter and, if you like, come and take the computer away." Nothing stops the customer from offering to deal on those terms, but of course the Gateway order-taker will politely tell the customer to get lost. (I'd like to try this and see how the order-taker would respond. "Thank you, sir, but I don't think we can do that. Perhaps you should try Dell, whose number is")

Ken Kettering

From: Jean Braucher

[mailto:braucher@NT.LAW.ARIZONA.EDU]

Sent: Thursday, February 10, 2000 3:03 PM

To: AALSContracts@TC.UMN.EDU

Subject: Re: abuse of power, Gateway, and "pay now, terms later"

Brower v. Gateway, while a wonderful symbolic victory, has to count as a consumer loss as far as the result for the plaintiffs in the case. Like *Hill v. Gateway*, this was a class action for consumer fraud (the claim in both cases was that Gateway advertised one product and shipped a lower grade one to hundreds of consumers). Rather than satisfying its customers, which one would expect of a reputable business, Gateway responded to the fraud actions by asserting the arbitration clause. The court didn't like the particular arbitration system, but rather than throw out the term, the court cut it down to cheaper and nearer arbitration. But a class action still wasn't permitted under the substituted system's rules. Without a class action, dispute resolution wasn't affordable because each consumer's claim was for about \$300 (real money when hundreds of plaintiffs join together). Arbitration systems all have rules against class actions. This satisfies the demand of a segment of their customers -- the repeat players who draft form contracts. Consumer "choice" of arbitration can only be meaningful if it is a post-dispute choice, when the consumer is represented by counsel who can evaluate the system's rules. The best way to reform arbitration systems is to make pre-dispute arbitration clauses unenforceable in consumer contracts, so that the arbitration systems view consumers as customers as much as the businesses they deal with.

From: Flechtner, Harry
[mailto:FLECHTNER@LAW.PITT.EDU]
Sent: Thursday, February 10, 2000 3:20 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

Ken,

I like this conversation, which has deepened my understanding of Gateway. I don't want to prolong it too much, but I can't resist one final comment. You say that my suggestion for a consumer form to turn the “terms-tables” on the vendor shouldn't work because: “The two situations are not symmetrical. At the time the customer places the order with Gateway, [the] customer knows that Gateway's terms will be in the box, and that s/he has 30 days to return.” I doubt that the buyer is aware that there are terms that can impact truly vital legal rights (can I sue in court?), that won't be revealed until the goods arrive, and that then will become legally binding. I doubt most buyers think about these legal aspects at all. I suspect they think about the transaction in line with traditional face-to-face dealings, and thus assume that there is a deal when the order is placed on the phone. They may well expect to be able to make a return, but not because there is no deal yet (as under the Gateway analysis) but because the vendor, as a matter of cultivating customer satisfaction (probably forced on the vendor by competition), has a policy of taking returns.

Certainly in the traditional purchase from a retail store, sellers usually accept returns and the reason is a matter of store policy, not the lack of a completed sale. That's why sellers can insist on particular forms of documentation (a sales receipt) and might limit the buyer's remedy to store credit or the like. In fact, I think the UCC explicitly contemplates that the right to return goods is fully consistent with having a previously-formed contract. That would be a “sale on approval” under UCC 2-326. I assume that formation of the contract in a sale on approval does

not wait until the buyer has failed to exercise its right to return. It seems clear to me that 2-326 contemplates that a sale on approval contract is formed (and the terms of the original contract determined) at least by the time the buyer receives the goods.

Why the sale-on-approval model of the right-to-return goods situation, a model that is explicitly adopted in Article 2, could not be used to analyze the sale in Gateway is unclear to me. If it had been used, Gateway's terms would be seen as an attempt to modify an already-formed contract. They would not be binding without more assent from the buyer than mere failure to exercise the return option, which after all was part of the original sale-on-approval contract. Indeed, on this model the buyer's failure to return would not be an assent to anything not in the original contract.

Harry Flechtner

From: Deborah Post

[mailto:dpst@WPPOST.DEPAUL.EDU]

Sent: Thursday, February 10, 2000 7:58 PM

To: AALSCONTRACTS@TC.UMN.EDU

Subject: Re: abuse of power, Gateway, and "pay now, terms later"

I wish I could share your comments with my students. But first, I would like to reserve the right to respond to some of the points that have been made in the conversation we have been having. We have gone from power to trust to assent. Personally, I think we would be better off if we excised consent from this entire discussion.

1. I believe that trust is important. I wrote about it in my short piece "The Square Deal Furniture Company" in our casebook. But this is a problem for students and at some level I am talking about changing the response (consciousness) of the public (represented by our students) on this issue. My students do not

believe that we have a “right” to trust anyone, let alone other participants in the market place. Nor do these students have much “empathy.” Absence of meaningful choice is about powerlessness not about powerfulness. The two are linked but one is more visible than the other. And fault is often assigned to those who do not have power while it is seldom linked with the existence of great power.

2. What is wealth and class? Can I give some examples that do not involve monopoly power? Well, how about the wealthy person who hires undocumented workers at below minimum wage? There is plenty of competition for workers. Is this an example of class and power? Or wealth and power? What if a multinational corporation enters into a contract with a start-up company that is developing technology and promises to fund research and build planes using this technology? What if the company is also building its own planes and one suspects that the “joint venture agreement” might have been a way of tying up the competition? And what if the contract included the standard “I really am not promising you anything and if I don’t build a thing too bad for you” clause? Is that monopoly power or wealth? (Boeing and Skyfox corp. 38 F.3d 1152 (1994))

3. I don’t think we do our students a disservice by pointing to the moral dimensions of any problem. I always like to call attention to Corbin’s somewhat naive view in contemporary times that there are “mores” in the marketplace. Marketing by making promises while you market while writing clauses that make it impossible for anyone to ever hold you responsible for a crummy product you turn out is immoral. Hey, if personal responsibility is the hallmark of this era re: poor people, why is the merchant class absolved of responsibility?

4. Power is a word that means many things but so is reasonableness and Easterbrook’s argument after all is that no consumer reasonably could expect anything other than a contract whose terms were imposed unilaterally by the seller with the

consumer's only choice being return of the goods even before the defects become known.

Thanks guys.

Deborah

From: Franklin G. Snyder [mailto:fsnyder@UIDAHO.EDU]
Sent: Friday, February 11, 2000 9:35 AM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

1. I confess I agree with the students regarding the right to trust. Trust is an emotion, and it seems troublesome to say that I have a right to have you conduct yourself in such a way that I can subjectively enjoy a particular emotion. Again, if I have no right to trust the politician I vote for, the newspaper I buy, the law professor who tells me that the rule is X or Y, or the person I'm taking out to dinner who says she enjoys my company, there seems no obvious reason why I have a right to trust someone who sells me a computer. Each of these people may have a moral obligation not to engage in particular conduct that I might, myself, consider to make them "untrustworthy," and I agree that lying with regard to what you sell is immoral. But I don't see how using my emotions rather than their conduct as the yardstick for moral worth adds to the analysis.

2. There seems to be a contradiction running through some of this discussion. If Gateway offers terms much more favorable than the defaults found in the UCC (which it does), there seem to be three possible explanations. Either (a) they are doing so because they're wonderful people acting out of the goodness of their hearts; or (b) they are forced by their competition to offer these goodies as a way of attracting enough business to survive; or (c) they simply feel that by offering this particular bundle of rights (rather than the off-the-rack UCC scheme) they will attract

people away from competitors who offer less attractive bundles. If (a), then we hardly need worry that Gateway will act in an underhanded fashion. If (b), then it's plain that Gateway doesn't have the power to dictate terms, but rather that buyers have the power to dictate terms by shopping for the most favorable among competitors. If (c), then it seems that we ought to analyze Gateway's entire offer (low price, reliable product, great warranty, easy ordering, easy customization, liberal returns, free delivery, free pickup and return of defective products, liberal telephone technical support, arbitration clause) against the standard UCC regime, which is obviously available to any buyer who wants to walk down to Bill & Ted's Excellent Computer Store. If we look at the entire transaction, it seems hard for me to say that Gateway is less "moral" in this sense than Bill & Ted, who build the product in the back room and whose sale is ended when you walk out the door, unless the buyer wants to hire a lawyer and sue on an implied warranty. I suppose no one would argue that Bill & Ted have a legal obligation to provide all the benefits Gateway does. So why should Gateway have to provide the one benefit (ability for lawyers to make a lot of money on class action lawsuits) that Bill & Ted have over Gateway?

3. It's hard to argue that an arbitration clause itself is unconscionable, given that Congress has declared that the national policy favors it. Where a particular arbitration clause actually turns out to be truly unconscionable (as was Gateway's ICC clause with the nonrefundable fee), courts have plenty of tools to cut them down to reasonable size. The Brower court quite sensibly did this.

– Frank

From: Charles Knapp
[mailto:knappch@UCHASTINGS.EDU]
Sent: Friday, February 11, 2000 1:12 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

Okay, I guess I have to chime in at this point. It may well be that Gateway is the greatest product since sliced bread and that the market has rewarded this excellence by snapping up both its product and its contract. (Recall Arthur Leff's "Contract as Thing.") But to assert that Gateway has no obligation to include in its contract-package "the one benefit (the ability for lawyers to make a lot of money on class action lawsuits) that [its competitors] have over Gateway" is to make the classic cart-horse-positioning mistake. The legal system (including the dread trial by jury) isn't something that Gateway, or State Farm Insurance, or Bank of America, or any other business giant allows us ordinary mortals to use (whether generously or otherwise) as a matter of divine dispensation; it's our right as citizens to have and use that system. Trial by jury in a public courtroom existed before Gateway, and God willing will exist after it. The question is rather under what circumstances the Gateways of the world - excellent product or not - are entitled to immunity from the public justice system, with the public access and public accountability that this system entails. I think Jean Braucher has hit the nail in precisely the right place - if arbitration is so economically sound for everybody, then let the consumer be persuaded "once the dispute has arisen" that arbitration is in her best interests too. The argument that "but then the consumer might have a lawyer" obviously proves too much. That's the same as the argument against a Miranda warning: We don't want people to have meaningful access to knowledge of their rights, because then they might insist on exercising them. And no, I'm not saying all consumers are crooks. But then, neither are all criminal defendants. That's why we have a legal system.

Thanks for an intellectually challenging week, everybody.

Chuck Knapp

From: Spencer Neth [mailto:sn6@PO.CWRU.EDU]

Sent: Friday, February 11, 2000 1:58 PM

To: AALSContracts@TC.UMN.EDU

Subject: Re: abuse of power, Gateway, and "pay now, terms later"

This has been a wonderful discussion and is the sort of thing I had hoped to see on the AALS list. I "taught" Gateway to my students a few weeks ago, and I was not shy about giving my opinions about the case, most of which are similar to those expressed by Gergen.

1. Is it not strange that a conservative judge who normally argues for reading statutes formalistically has ignored the language of the UCC and at least 100 years of common law contract formation law? There is absolutely no basis for saying that when you call Gateway or Dell and order a computer you have not entered into a contract. Your right to get out of the deal does not mean it is not a contract. Getting out is not costless – as anyone would know who opened the many boxes, assembled the parts, attempted to install software and transfer files, only to find that the computer does not have the features promised. In my class I ask the students the question which Gergen puts - would Gateway have the right to call you up a week after your call and tell you that you will have to pay a higher price?
2. The intent of Gateway is not controlling. Remember the objective theory of contract? It does not matter that Gateway may not think it has a contract, the buyers reasonably think they do.
3. Maybe a case can be made for forming contracts like UCITA - although I don't think so unless there is a better way of policing

the terms than there is now or is provided for by UCITA. In any event, that is not what the UCC did, and it is just plain wrong for a judge to distort the law of contract in order to reach what he thinks is a good result. Deborah Post was right when she said:

"Power is a word that means many things but so is reasonableness and Easterbrook's argument after all is that no consumer reasonably could expect anything other than a contract whose terms were imposed unilaterally by the seller with the consumer's only choice being return of the goods even before the defects become known."

4. I have two sons who bought Gateway computers - both are university trained computer science professionals. Both had more than just annoying problems in getting Gateway to live up to its promises. Indeed my one son still has an unused Gateway computer that is a by product of a dispute with Gateway that never was resolved. Incidentally, Gateway makes great computers which they sell at a good price - but they don't necessarily make good contracts.

5. Dell may not be any better. The Dell computer that I bought in December came with a 4 page "terms and conditions" booklet which I photocopied with the intent of handing out to my students for class discussion. Paragraph 13 contains a clause that says all disputes must be arbitrated by the National Arbitration Forum. There is a reference to a web site, which I looked at briefly and was impressed. However, I remember that the NAF - at least in the past - had expensive and not very friendly procedures. Furthermore, I believe it is for profit, or if not, it seems to be a far different type of organization than the AAA. It mostly arbitrates on a contract basis with companies like Dell - and if its arbitrators decide too many cases in favor of the consumers they will not be on the NAF list for long, for if the NAF arbitrations are excessively unfavorable to Dell then Dell will not use its services. How many customers of Dell would know anything about the NAF and the dangers of such a clause? By the way, I think Dell is otherwise a terrific company which makes a terrific

product and provides wonderful customer service. But there has to be some way of policing contracts of adhesion better than we have now.

From: Franklin G. Snyder [mailto:fsnyder@UIDAHO.EDU]
Sent: Friday, February 11, 2000 5:35 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and “pay now, terms later”

I’m enjoying the thoughtful comments and I’m glad I signed up for the list. Some thoughts:

1. With respect to the right to a jury trial, I agree with a lot of what Professor Knapp says. I don’t much like arbitration, and think it’s one of the shames of our current legal system that it’s become a viable option. (I confess I don’t much care for the current state of class action consumer suits either, chiefly because the lawyers always seem to get the money while the consumer ends up with a coupon good for 10% off the next pizza, not valid with any other offer.) But it seems to me that this battle was lost some time ago. The country’s official policy is to encourage arbitration. Therefore, it seems untenable to argue that an arbitration clause ought to be treated differently than, for example, a limitation of warranty clause. Of course, we might choose to make a waiver of either a warranty or the right to a jury trial illegal or unenforceable, or we might require specific manifest assent for a waiver to be effective, but that’s a different issue.

2. With regard to Professor Neff’s criticism of Judge Easterbrook’s judicial legislation, it seems to me that at this point it’s hard to make a convincing argument that judges ought to be bound by immutable formal rules of contract which they cannot limit or evade by creative construction, or that the UCC has some kind of “plain meaning” that eliminates any room for judicial interpretation. If the point is that Easterbrook seems

2000

COMMON SENSE IN CONTRACTS

1177

inconsistent on this point, I might agree. If the point is that judges should never engage in the kind of verbal legerdemain he does, I might agree also. But I'd have to point out that most of the creative, pro-buyer judicial activity of the last 40 years that Professor Slawson praises in his book involves much the same kind of judicial machete-work.

3. A question occurs to me. If the terms in Gateway's pamphlet don't become part of the contract, which is oral and was formed at the time of sale, are the pro-buyer promises made in it (the 30-day return, the warranty, the help line, etc.) part of the contract? If a customer has no actual knowledge of Gateway's 30-day return policy, for example, at the time of the phone order, it would seem that the return policy doesn't become part of the contract. I'm not sure that the average consumer would think herself better off under that interpretation.

Franklin G. Snyder

From: Scarberry, Mark
[mailto:mark.scarberry@PEPPERDINE.EDU]
Sent: Friday, February 11, 2000 6:53 PM
To: AALSContracts@TC.UMN.EDU
Subject: Gateway

I get the list in digest form and thus it's hard for me to reply to a particular post. Jean Braucher's post is intriguing. Under 2-206(1)(b) we consider shipment of nonconforming goods to be an acceptance which forms a K (if one had not already been formed) precisely to prevent the seller from using the common law argument that the buyer's non-return of the goods is an acceptance of the counteroffer which the seller supposedly made by shipment of nonconforming goods (the unilateral K trick). Here the inclusion of the arbitration terms allows Gateway to stick consumers with the nonconforming goods with no real remedy.

I also agree with Harry Flechtner that the consumer doesn't assume when ordering by phone that the seller can include any terms the seller wants in the box with the computer. Perhaps an empirical study would be helpful, but I feel confident of the result. Further, the UCC allows oral contracts to be formed without all details being settled; the obvious analysis then is that gap fillers apply if needed, and if any party wants other more detailed terms it can send proposals under 2-207. The whole point of 2-207 is that keeping the goods is not an assent to the additional terms, although for immaterial terms a failure to object may constitute assent.

Also, Gateway does not pay return shipping when the buyer decides not to keep the computer. At least that was true several years ago. I ordered a "cutting edge" Gateway 486dx2-66; it never worked right, and the 30 day period was about to expire. Rather than trust that Gateway would eventually get it fixed, I decided to return it. I had to pay the return shipping, which as I recall was over \$100. It also took some time to take it to the UPS office and get it sent off. It certainly was not a cost-free out, and I certainly did not think I was giving Gateway the right to impose any terms it wished on me, with my only out being to pay over \$100 to get out of the contract by shipping the computer back.

Surely the correct analysis is that a K is formed orally on the phone, or at least no later than when Gateway ships a computer. The terms are those agreed to on the phone (or made available at least somewhat prominently in whatever advertisement the buyer is ordering from). 2-207 governs whether Gateway's additional terms included in the box become part of the K. Per 2-207(2) an onerous arbit clause is a material alteration and should not become part of the K unless expressly agreed to by the buyer. A fair arbit clause might or might not be considered a material alteration. (I haven't looked at that question for a couple of years, but don't some jurisdictions consider arbit to be per se a material alteration and others take it on a case by case basis?) The return privilege will be part of the K either because it is stated by the salesperson on the phone, or because it is disclosed

in ads seen by the buyer, or because it is now a custom in the industry with respect to desktop computers. That makes it a sale on approval under 2-326(1), which then obligates Gateway to pay the return shipping (unless otherwise agreed) under 2-327(1)(c). An additional term shifting the shipping expense to the buyer should be a material term that does not become part of the contract. From 2-327(1)(c) and the comment to 2-327 it seems that a consumer buyer need do nothing other than notify the seller of the election to return the goods. I suppose though that we all understand sellers expect us to put such goods in the hands of a carrier (the book of the month club approach is probably now genetically ingrained). I suppose that is now a custom. But there is no custom that buyers pay return shipping. (Think again of the book of the month club.) Thus Gateway should still be obligated to pay shipping, which it apparently refuses to do when a buyer wants to return the whole system for a refund. Note also that risks in shipping should be on Gateway under 2-327(1).

And I don't suppose any of us need to be reminded that the acceptance spoken of in 2-327(1)(b) is not acceptance of an offer, but just acceptance of the goods, which should not affect the terms of the K, beyond eliminating the return option. I suppose internet orders will be treated differently, because the seller will have a button on the web page saying "Click here to see detailed terms." Buyers who don't want to be bound by those terms will I suppose either need to try to negotiate them out (fat chance) or claim unconscionability.

Mark S. Scarberry

From: Stephen J. Ware [mailto:sjware@SAMFORD.EDU]
Sent: Saturday, February 12, 2000 1:53 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: abuse of power, Gateway, and "pay now, terms later"

On Fri, 11 Feb 2000 11:12:18 -0800 Charles Knapp
<knappch@UCHASTINGS.EDU> wrote:

Trial by jury in a public courtroom existed before Gateway, and God willing will exist after it. The question is rather under what circumstances the Gateways of the world - excellent product or not - are entitled to immunity from the public justice system, with the public access and public accountability that this system entails. I think Jean Braucher has hit the nail in precisely the right place - if arbitration is so economically sound for everybody, then let the consumer be persuaded "once the dispute has arisen" that arbitration is in her best interests too. The argument that "but then the consumer might have a lawyer" obviously proves too much. That's the same as the argument against a Miranda warning: We don't want people to have meaningful access to knowledge of their rights, because then they might insist on exercising them.

I suspect that enforcement of pre-dispute "take-it-or-leave-it" arbitration clauses is in the interests of consumers as a class, while it would typically be against a particular consumer's interests to agree to arbitration once a dispute has arisen.

That is because I believe arbitration lowers prices. Arbitration reduces a business's costs, just like a technological advance or a better way of organizing an assembly line reduces a business's costs. Anything that reduces costs to business ultimately reduces the prices charged to consumers. That's Economics 101, as well as plain common sense about how competition works. And it does not rely on the assumption that consumers understand, or even read, form contracts. (See STEPHAN J. WARE, *Consumer*

Arbitration as Exceptional Consumer Law, 29 MCGEORGE L. REV. 195, 212 n. 25 (1998)).

For consumers as a class, it may well be that the lower prices resulting from arbitration clauses are worth giving up the post-dispute leverage that comes from having a right to litigate, rather than arbitrate. Post-dispute, on the other hand, the price for giving up that leverage increases dramatically because the probability of a dispute has risen from very low to 1. In other words, it is entirely rational for a consumer to prefer, at the time of contracting, that an arbitration clause be in the contract even if, at the time of the dispute, the consumer prefers that an arbitration clause not be in the contract.

To put a finer point on it, the question of arbitration clauses in form contracts may cut differently for different consumers. If you're the sort of consumer who is especially likely to have a claim against Gateway then you may be better off if form arbitration clauses are unenforceable. But if you're the run-of-the-mill consumer who is extremely unlikely to have a claim against Gateway then you're probably better off with the current law enforcing these clauses.

Finally I note at least two possible reasons why arbitration lowers a business' cost: (1) arbitration reduces the cost of decision (damage awards and settlement payments), and (2) arbitration reduces the cost of getting the decision. Only the first reason is a cost to consumers that may, for some, outweigh the benefits of lower prices. The second reason is a cost to lawyers, not to consumers. To the extent the second reason is significant, consumers and businesses both win from arbitration.

Steve

From: Alan Hyde
[mailto:Alan.Hyde@WORLDNET.ATT.NET]
Sent: Sunday, February 13, 2000 2:32 PM
To: AALSContracts@TC.UMN.EDU
Subject: trust

Like Deborah Post, I'd like to hear how people raise the issue of trust in class. Trust, as defined by Hobbes, is an observable behavior, or more accurately the absence of behavior: the absence of the kind of self-protective behavior that you would normally expect of someone in like circumstances. (*See* Thomas Hobbes, *LEVIATHAN* (Richard Tuck ed., Cambridge University Press 1996) (1651)). As such, it cuts across the contracts curriculum; it is potentially implicated in all invocations of the trite argument "If it was so important to them, why didn't they provide for it?" When this argument is not a show-stopper, it is because the answer implicates some version of trust behavior (Hobbes: they didn't provide for it because they trusted their contracting party not to make it necessary). Trust, so defined, is obviously not an "emotion" and is the sort of thing that is routinely contracted for, in special contracts under that name, that have their own place in the curriculum. The present issue is sensitizing students and others to the role trust plays in ordinary commercial activity, not denominated "trust agreements." There is a fair economic literature on this and, as the book by Francis Fukuyama (*TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY*, (June 1996), or Hobbes' book, for that matter) shows, it is not a particular concern of the political left.

I don't, however, think that it has anything at all to do with issues of power. Trust occurs between those both equal or disparate in power. In fact, Deborah, I wonder whether your students reject the importance of trust because you link it to the power issue. If they somehow infer that trust is something widows and orphans do, while the big boys protect themselves, then they can be forgiven for wanting to play with the big boys and not the widows and orphans. So one key to introducing the idea is to show how big boys, too, leave contractual duties

vague, agree to language apparently against their interests, etc. because they trusted the other (and had good reason to do so).

I don't much raise these issues in connection with assent, which is complicated enough, as this week's postings show. This is just a pedagogical choice however. Obviously if you think there's a doctrine of "reasonable expectations," you have to confront the choice of what those are, and that implicates the question of the socially observable and/or desirable level of trust. (I think that doctrine barely exists and have always agreed with the late Art Leff that it's normally reasonable to expect that the one who drafted the form attempted to take as much as it could).

I always raise them to give meaning to *Hadley v. Baxendale's* limitation of damages to the foreseeable. That court asserts quite confidently that the carrier couldn't [be expected to] foresee a mill shut down; it could only foresee a mill with a spare shaft held in reserve. What kind of statement is that? A finding of fact about the expectations of carriers? A rule of law? A reification of what someone thinks is desirable commercial behavior into a universalized aspiration? A reflection of the judge's commercial practice?

The first year I used the Dawson book, *Hadley* was followed by five or six note cases that illustrated every flavor of "foreseeability": tacit agreement, on the cards, 2-716 reason to know. I quickly realized that my Rutgers students, who fear conflict and do not read well, had absolutely no idea that these were competing interpretations; they thought all the notes were somehow saying the same thing. To bring order to the chaos, I began drawing a chart on the board, arranging the different formulas for foreseeability along a line from minimum liability (theoretically, I'm liable only for what I agreed to. The closest we've come in US law is tacit agreement: I'm liable only for what I tacitly agreed to), on through liable for what I was told, for what I knew, for what I probably knew, for what I should have known, and on to another version that isn't law, for what I should have thought of had I been a Kantian moralist who always

acts on generalizable duties and is certainly aware that people are depending on me to do what I said I would! I take to labeling the first pole “Chicago” and the second pole “Woodstock.” Few students really want to live consistently at either pole. All can see that one could live at many different places on the spectrum; we discuss the kinds of rhetorical appeals that drive people in particular circumstances to feeling more Chicagoish today (“People really ought to look out for themselves in these circumstances and not expect others to”) or more Woodstockish (“People who promise things really ought to think about how others are depending on them’’). Time spent on this repays itself; we reuse the framework throughout the semester.

What do other people do?

I should say that (as my earlier message implied) I don’t think that having contractual duties turn on disparity of power ever makes much sense, for reasons well-pointed out by Duncan Kennedy, or Alan Schwartz’s old models of monopolists and consumers. So when I say that the issue of trust should be kept separate from the issue of “bargaining power” and the like, I’m giving away something I don’t believe in anyway.

Alan Hyde

From: Alan Hyde
[mailto:Alan.Hyde@WORLDNET.ATT.NET]
Sent: Sunday, February 13, 2000 2:41 PM
To: AALSContracts@TC.UMN.EDU
Subject: assent in consumer transactions

I’m blown away by Mark Gergen’s UCC analysis and wonder only if there’s any case law support for the application to consumer transactions. It seems to me that the reality is that consumers and small businesses - buyers who don’t have their own forms, but who just phone or write or email orders from catalogs - normally make offers; the offers are accepted when the

seller acknowledges or ships; and that the terms of the resulting contract are the seller's form terms (warranties, arbitration, etc.) Such buyers occasionally (rarely) get a specific form term knocked out as unconscionable or violative of fair credit or the like. But I never heard of a buyer getting them all knocked out on the grounds that under 2-207, seller's additional terms were never any more than proposals.

Precisely what's bothered me about 2-207 is the distinction that I always thought it made - that I think it does make in practice - between buyers-with-forms (businesses big enough to have form purchase orders) and buyers-without-forms (consumers and smaller businesses that just order things on the phone). I thought - and I thought the cases support - that only buyers-with-forms raise 2-207 issues, while buyers-without-forms do not. I now see that 2-206 and 2-207 may be read not to create this distinction. But I think that all the courts follow the clear suggestion of 2-207's official comment, and do limit it to battle of the forms (that is, buyers-with-forms). Are there cases the other way?

Alan Hyde

From: Linzer, Peter [Plinzer@UH.edu]
Sent: Sunday, February 13, 2000 3:42 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: Click wrap, power, trust and the American Way of Life

I've been out of the loop this last week, so I hadn't read the exchange until this morning, when I read all 30 (!) messages (not counting those on tenure - by the way, the term is "untenured," not "pretenured." Leave that to the right-to-lifers ("preborn fetuses").

We owe great thanks to Deborah Post for being the spiritual creator of this list serve and an incalculable debt to Carol Chomsky for doing the hard work in managing it. I'm sure there

are others who deserve thanks as well. The list serve is the biggest (the only?) contribution the section has made to the teaching of contracts in the 24 years I've been taking part in it. Much as I agree with a lot of Deborah's social views, I see the poor consumer issue as one that should be handled as a poor consumer matter rather than a contract matter, precisely because the autonomy that you and I and Richard Epstein really do have is largely absent in Mrs. Williams's case. (As Stewart pointed out about ten years ago, no one knows what happened to Mrs. Williams. She exists as a figure in a myth. A sort of unicorn that we all love but can't find in the real world. And given the political change, I wonder if today's Mrs. Ws do as well [sic] as she did.)

But the issue that we were talking about – the gateway issue, has nothing to do with the poor consumers. Most computer users have a fair amount of education and have a couple of thousand bucks or more to spend. My wife, Rhea Stevens, is a lawyer and the daughter of a computer pioneer, and has dealt with computers since she was a child. Nonetheless, she and I, with five degrees between us, have been involved with about half a dozen computer disputes – with IBM, Micron and Gateway, among others. We have done pretty well, but bringing in a contracts professor and a contracts lawyer who understands computers intimately, is hardly what most users can do.

The issue is over assent. Is it needed and can it exist in a mass consumer transaction? I don't want to rehearse the fight that Jean Braucher led, successfully, against former Article 2B at the American Law Institute, but the ALI expressly disapproved of the clickwrap assent mechanism, and many of the computer trade papers and trade associations oppose UCITA (the current manifestation of 2B) largely because of the assent question, however it is worded. The person who hits the "do you agree?" button while installing software isn't assenting to anything. First of all, he is usually a computer geek from the mailroom who would not be given the authority to sign a certified mail receipt, much less assent to hidden terms in a closely written license.

Second, even if it is the user who installs, hardly anyone is going to stop and spend half an hour reading and trying to understand the license. Third, even if the user does learn of the provision within thirty days, the cost and inconveniences described by Harry Fletcher and Spencer Neth make return much too expensive for what at the point is an unlikely scenario.

While it is possible to fit the disputes into 2-207 as Mark Scarberry did so well, I agree with Stewart Macaulay and Dave Slawson, among others, in finding that some sort of overview, such as the reasonable expectations doctrine, or a notion of fairness is needed. That this smells of tort bothers me not at all. The whole battle of the forms is a fiction since as it would be completely inefficient to have a lawyer read every shipping document in ordinary trade; it's worse when someone not in the trade (whether consumer or small businessman) is clicking on the installation button. To Ken Kettering's concerns about the death of contract, my response is "so what?" Karl Lewellyn made a suggestion somewhat like Mark Gergen's quasi-seal idea in 1939. When he made the distinction between dickered terms and those the buyer agrees to on the understanding that they would screw him. The clickwrap arbitration, choice of forum, after sale modification and similar terms all screw the buyer, that's why they shouldn't be enforced.

Peter

From: Franklin G. Snyder [mailto:fsnyder@UIDAHO.EDU]
Sent: Monday, February 14, 2000 9:53 AM
To: AALSContracts@TC.UMN.EDU
Subject: Re: trust & 2-207

Three points:

1. Perhaps the disagreement over "trust" comes from differing terminology. With apologies to Hobbes, the ability to predict what a reasonable contracting partner will do in the future isn't "trust" in the traditional sense of putting one's faith in the

character and integrity of another - it's merely a recognition that people usually act predictably. Holmes's Bad Man, for example, relied on the court system, not because he "trusted" it, but because he recognized that courts were likely to act in predictable ways. If that's all we mean by "trust," my only disagreement is that I don't see that casting this as A's personal right to put faith and belief in what she thinks B will do adds much to the analysis. And I'm still puzzled why there would be a legal right to "trust" the person who sells you something (when you know clearly that person is dealing with you for an express pecuniary motive) but not a right to "trust" newspapers, politicians, and law professors, who usually claim to be acting disinterestedly in our own good.

2. One difficulty with 2-207 is that an acceptance that adds additional terms doesn't operate as an acceptance if it is "expressly made conditional on assent to the additional or different terms." It seems hard to believe that Gateway would be unsophisticated enough not to make its acceptance expressly conditional.

3. With respect to when the contract springs into existence, suppose Gateway tells its phone reps to have the following conversation with a new purchaser:

Q. Thank you for your order, Mr. Wilberforce. Now, you understand that you have 30 days to return the computer, no questions asked?

A. Yes.

Q. And you understand that there is no legal contract between us until you've had a full 30 days to decide whether you like the computer and accept our offer?

A. Sure.

Q. So that neither of us has a legal obligation to each other until you've had time to get comfortable with the computer and decide whether you want to keep it?

A. Uh-huh.

Q. Now, in the package with the computer you'll find the booklet that contains all of the terms of our contract. Please make sure you read them carefully. If you object to any of them, merely return the computer, no questions asked. If you decide to

2000

COMMON SENSE IN CONTRACTS

1189

keep the computer, those will be terms of the contract. Is that all right?

A. Fine.

Would this obviate all these formal issues we're talking about? If so, what would be the practical point of requiring Gateway to go through this hoop?

Frank

From: Carol Chomsky

[mailto:choms001@MAROON.TC.UMN.EDU]

Sent: Monday, February 14, 2000 10:24 AM

To: AALSContracts@TC.UMN.EDU

Subject: assent in consumer transactions (from Jay Mootz)

This message is being forwarded for Jay Mootz, who couldn't get it on the listserv directly:

The "problem" with a 2-207 analysis of Gateway is that the additional terms will never become part of the contract under 2-207(2) because the contract is not "between merchants." Easterbrook's opinion in Gateway suggests that this result is unrealistic (surely a sin under Article 2), and that both the consumer and the seller anticipate that there will be a number of terms to the deal beyond those established during the phone conversation and those provided by statutory gap fillers. This seems right, as I expect the Hills were counting on receiving warranties and service terms in the shipment that they could enforce against Gateway. Easterbrook's solution is to treat the written terms in the box as an offer that is accepted by retaining the goods, but this is rather artificial. Another possible solution is that the parties show their agreement by conduct under 2-207(3), but this also doesn't seem to match reality since both parties undoubtedly believe that they have expressly contracted. The layered contract approach is closer to reality, but allows us

to avoid the real problem of the “surprise” that buyers face with regard to some of terms included in the box.

I agree, then, with those who have suggested that the only plausible answer to the Gateway “problem” is that the terms in the box must be substantively regulated by legislatures or courts. Unconscionability and good faith can be stretched for this purpose, but not very effectively. The bottom line is that Article 2 just doesn’t address this problem, which demands a new approach that is not framed in terms of the traditional test of showing agreement. The “doctrine of reasonable expectations” in insurance law is too often construed by courts as nothing more than “super contra proferentem,” but some of the more ambitious articulations of the doctrine strike me as providing a plausible approach. The answer to industry critics of this approach would be simple: they are free to disrupt the reasonable expectations of the consumer by obtaining their genuine, express assent to terms they seek. Unfortunately, courts are backing away from reasonable expectations in insurance law cases, and are very unlikely to pursue this approach to contracts for the sale of goods.

I can’t decide if I have said anything new, but I have benefited from the discussion. Thanks to all.

Jay Mootz

From: Linzer, Peter [mailto:PLinzer@UH.EDU]

Sent: Monday, February 14, 2000 5:41 PM

To: AALSContracts@TC.UMN.EDU

Subject: Re: trust & 2-207

If Gateway tells its phone solicitors to say:

“And you understand that there is no legal contract between us until you’ve had a full 30 days to decide whether you like the computer and accept our offer?” it better get a new lawyer. Of course there is a contract. What are the shipment of the

computer and the payment of thousands of dollars, a bailment and a gift? In fact, there is a contract with a condition that it can be canceled within 30 days. The question remains what are the terms, who agreed to what (and how), and do we care about assent after all?

From: Scarberry, Mark
[mailto:mark.scarberry@PEPPERDINE.EDU]
Sent: Tuesday, February 15, 2000 1:04 PM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: Gateway

Frank Snyder and Jay Mootz (among others) make some interesting and insightful points. I don't agree with Frank, though, that Gateway can prevent a K from being formed by including language in the box to the effect that Gateway's acceptance is expressly conditioned on the buyer's assent to Gateway's terms. If a K is formed orally (on the phone), then acceptance has already occurred, and Gateway can't unmake the K by including such language in its papers in the box. If a K isn't formed orally, then Gateway's shipping of the goods is presumably the acceptance under 2-206(1)(b) (an acceptance of the "order or other offer" made orally by the buyer on the phone). Even if you don't want to get that formalistic with offer and acceptance, a K will still be recognized as having been formed. Assuming Gateway charges the buyer's credit card with the buyer's consent when it ships the computer, then, as Peter Linzer pointed out, there has been both payment and shipment, which ought to suffice under 2-204(1) and/or 2-207(3). I think language tracking the 2-207(1) "no acceptance unless you expressly assent to my terms" language is ineffective unless communicated to the buyer before the time of shipment (or at least in time for the buyer to refuse delivery of the shipment).

I also think that many of these contracts may be between merchants, thus allowing additional terms to become part of the

K under 2-207(2) despite Jay's important reminder of the "between merchants" language in 2-207(2).

Many computer purchases are for small business or home office use. If the buyer is in business, then arguably he or she is a merchant with respect to issues such as negotiation and formation of contracts. See Comment 2 to § 2-104, which states that for purposes of 2-207 and similar sections any person in business is a merchant. (Note that 2-104(1) includes as merchants persons who by their occupation hold themselves out as having knowledge peculiar to the practices involved, which for purposes of 2-204, 2-206, and 2-207 is arguably the formation of contracts.)

If the Gateway rep has the conversation with the customer which Jay posits, then I have no problem holding the buyer to the conscionable provisions in the box. But if the buyer decides not to keep the computer, it will be Gateway's obligation to pay for its return, absent agreement otherwise in the phone conversation. And I don't think Gateway wants to ship computers on such an iffy basis, with an obligation to pay return shipping. (And perhaps also with no right to charge the customer's credit card even for the shipping to the customer unless the customer decides to keep the computer.)

If Gateway says (in addition to the things in Jay's dialogue), "We'll charge your credit card on shipment, and you will have to pay shipping both ways if you don't want to keep the computer after you read our terms," and if the customer says "OK" (trusting Gateway not to include overly abusive terms), then I would hold the customer to that agreement (subject to unconscionability analysis).

Thank you to everyone who has participated in this thread. It's been two years since I've taught contracts, but I'll be teaching it again next year. This has been helpful to me to get back into the subject.

Mark S. Scarberry

From: Franklin G. Snyder [mailto:fsnyder@UIDAHO.EDU]
Sent: Tuesday, February 15, 2000 1:13 PM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: Re: Gateway

I appreciate the thoughtfulness of this discussion; I'm learning a lot. I'm in agreement with most of Mark Scarberry's points. We certainly can view the contract as completely final as to its terms when the telephone call ends, or when the goods are shipped. (Although both Hill and Brower expressly hold that there's no contract at either point.) But it's not intuitively obvious that this must necessarily be the case, even if we view the buyer as the offeror. If Gateway sent the additional terms as a "written confirmation" of the oral contract before shipping, and expressly made its acceptance conditional on those terms, it would seem to be a clear case. Shipping the papers and the hardware at the same time might make a difference, but I'm not sure why it would.

Take, for example, airline tickets. Granted, they don't fall under Article 2, but we still have a buyer negotiating some terms on the telephone (route, price, seat) and then getting the fine print later. As the Supreme Court held in *Carnival Cruise*, the contract isn't merely the terms dickered on the telephone; the fine print on the ticket when it arrives is part of the deal, which is consummated when the purchaser uses the ticket. There seems no obvious reason to me to treat a big company that sells \$1500 airline tickets over the phone differently than a big company that sells \$1500 computers over the phone, at least absent some language compelling that result. So it's hard for me to see why 2-207 should get a narrower reading.

Frank

From: Thomas Joo [mailto:twjoo@UCDAVIS.EDU]
Sent: Tuesday, February 15, 2000 1:27 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: trust & 2-207

Professor Linzer writes:

"In fact, there is a contract with a condition that it can be canceled within 30 days."

Another way to look at it is as an option contract. The Buyer has purchased an option to accept Gateway's offer to sell the computer - the terms of G's offer are those disclosed during the phone conversation. After the option K is created, G cannot alter the terms of its offer to sell. That's the whole point of an option, after all (a similar point was made in an earlier post that argued G could not change the sale price of the computer after the phone call).

Gateway might say there is no consideration to make the option enforceable, so G can change any terms it wants (including the price).

Well, I would respond, the consideration is incorporated into the shipping & handling cost Buyer promises to pay - this cost is presumably nonrefundable. (Buyer also promises to pay to ship the computer back if she declines to exercise the option). (I put a similar problem on my midterm exam, and a few students actually got this point.)

Tom Joo

2000

COMMON SENSE IN CONTRACTS

1195

From: Jean Braucher
[mailto:braucher@NT.LAW.ARIZONA.EDU]
Sent: Tuesday, February 15, 2000 2:31 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: Gateway

Airlines and insurance companies are often used as examples of businesses that send terms after you order and pay, but these are both heavily regulated industries. Try looking at what comes with the airline ticket - it is mostly stuff required by federal regulation (no smoking and exit-row seating restrictions) or international treaty (Warsaw Convention, Hague Protocol Amendment, and the like). Insurance contracts have to be submitted to state insurance commissioners for review, and usually there are requirements for a simplified disclosure of key terms before a policy sale can be closed. If we had a state computer commissioner or a federal software administration, airlines and insurance might be good analogies for computer and software transactions.

The Gateway problem was discussed at the recent Revised Article 2 meeting. At one point drafting committee chair Bill Henning went around the room and asked all the seller representatives to comment on the importance of protecting terms sent after order and payment (with a shipment). The only one who thought it was important was the Gateway lawyer. The others all said it wasn't a business model they would use. My guess is that Revised 2 will be silent on the issue - and let all of us have fun with it for years to come (although Internet sales probably will eliminate the issue - easy enough to get agreement before shipment, or download, in that setting - which is another reason not to address the Gateway issue in a statute now, UCITA notwithstanding).

Jean

From: Dave Slawson [mailto:dslawson@LAW.USC.EDU]
Sent: Tuesday, February 15, 2000 5:09 PM
To: AALSContracts@TC.UMN.EDU
Subject: Re: Gateway

This is in response to Jean Braucher's most recent comments. Although insurance is regulated in every state, the regulation is nowhere nearly enough to provide any reasonable assurance that policy provisions are fair. The courts have always had to play the major role in this respect. One reason is that the state commissions were set up deliberately to be weak in most cases, and in all cases they are hobbled by statutes drafted by insurance-industry lobbyists intended to limit their powers. Another reason, I think, is that case by case adjudication is simply superior to administrative review for identifying instances of injustice and doing something effective about them. Anyway, it was the courts and not the commissions that created all the major protections of the consumer in insurance: reasonable expectations and all the rules sounding in tort (such as "bad faith breach" and the "duty to settle") that override anything said to the contrary in insurance policies.

David Slawson

From: Scarberry, Mark
[mailto:Mark.Scarberry@PEPPERDINE.EDU]
Sent: Wednesday, February 16, 2000 11:57 AM
To: AALSContracts@TC.UMN.EDU
Subject: Re: Gateway

I'm not sure how Frank thinks the case comes out if Gateway sends a written confirmation before shipping (and includes language stating that "This does not constitute an acceptance unless you assent to our terms").

Suppose the Gateway rep says to the buyer on the phone, "Now you understand that when we end this call we will have a binding

agreement, subject to your right to return the computer within 30 days?" and the buyer responds, "Yes." Then the call ends. Then Gateway sends such a confirmation. That confirmation can't unmake the contract that has already been formed, can it? Gateway is obligated to ship a computer whether or not the buyer assents to Gateway's confirmation's terms. In other words, as I see it, the inclusion of the phrase "written confirmation which is sent within a reasonable time" in 2-207(1) is the result of poor drafting; it was not meant to allow a party to unilaterally annul a contract that has already been formed.

If I'm wrong on that point, is it because the (presumably) oral contract is unenforceable under the statute of frauds and thus the confirmation is a necessary part of making the contract enforceable? But that doesn't seem right. The Code otherwise treats K formation and the defense of the statute of frauds as separate issues. Cf. 2-201(3)(b). And the confirmation might be a confirmation of an informal written agreement (as Comment 1 to 2-207 states), in which case there might already be a sufficient writing to satisfy the statute of frauds under 2-201(1).

So I'm left thinking that confirmations have no role in K formation under 2-207(1) but only a role in determining the terms of the contract.

Mark S. Scarberry

From: Burnham, Scott [mailto:sburnham@selway.umt.edu]
Sent: Wednesday, February 16 2000
To: AALSContracts@TC.UMN.EDU
Subject: Magnuson-Moss

In the discussion of Gateway, there has been no mention as yet of Magnuson-Moss. Because the computer is a consumer product, and because Gateway offers a written warranty, it surely applies. Curiously, Judge Easterbrook alluded to the Act in Gateway, but said that it was the responsibility of the Hills to request the warranty information. I don't read it that way.

The Act seems particularly relevant because it was supposed to improve the warranty marketplace not through regulation but through disclosure. The theory was that if manufacturers clearly disclosed warranty terms, consumers would shop for the best terms, and marketplace competition would lead manufacturers to offer better terms.

In order for such a system to work, the warranty terms have to be clearly disclosed prior to the sale. The drafters realized this, and the regulations enacted by the FTC state that "the seller of a consumer product with a written warranty shall make a text of the warranty readily available for examination by the prospective buyer..." There are specific instructions for catalog and mail order sales.

The Act also encourages informal dispute settlement procedures, but the mechanism also has to be stated on the warranty and it has to meet standards established by the FTC.

Because the regulations were written before oral or web-based orders became commonplace, it would make sense for the FTC to add another section establishing the procedures for making the warranty terms known in such a transaction. But it would certainly be a reasonable interpretation of the Act that failure to disclose the terms prior to the sale was a violation of the Act.

2000

COMMON SENSE IN CONTRACTS

1199

Because attorneys fees may be recovered for violations of the Act, plaintiffs seeking a private remedy would be crazy not to allege violations as part of their complaint. If they are hoping for a remedy without private action, they should complain to the FTC.

Scott

From: Clark Remington
[mailto:CREMINGT@PCM.BROOKLAW.EDU]
Sent: Thursday, February 17, 2000 11:37 AM
To: AALSCONTRACTS@TC.UMN.EDU
Subject: True life clickwrap adventures

The discussion about shrink-wrap/click-wrap acceptances has been fascinating. A premise of the vendor's argument is that the offeree consents by not returning the item or by clicking yes. We are to imagine that one of the offeree's options is to NOT accept. My thinking about this subject was forever changed when I read Geoffrey Bennett's carefully documented story of his attempt to decline acceptance of the "End User License Agreement for Microsoft Software" and return it for a refund. (See Toshiba/Microsoft Saga, (visited Feb. 1, 2001) <<http://www.netcraft.com.au/geoffrey/toshiba.html>>). I am as big a supporter of the idea of consent as you are likely to find teaching contracts these days, but Bennett's story has caused me to examine claims about consent very carefully.

I have attached Bennett's story, which I pulled from his web site last year. It is in Word Perfect format. I highly recommend giving it a read.

Clark Remington

From: Jonathan Hyman
[mailto:jhyman@ANDROMEDA.RUTGERS.EDU]
Sent: Thursday, February 17, 2000 12:32 PM
To: AALSContracts@TC.UMN.EDU
Subject: Trust in contracts

The thread on trust in contracts brings to mind some of the material on cultural differences in negotiating. Some of the literature says that Asian negotiators (particularly Japanese) tend to look at negotiations as the start of an ongoing relationship in which the details will be worked out and problems will be addressed as they come up. As a result, much of the negotiation process involves events that are as much social as business, to get to know the other parties. Assessing the degree one can trust the others is the key task in negotiating in this manner. The resulting written agreement tends to be rather short and general.

American negotiators, by contrast, look for a much more detailed, fully spelled out agreement, and tend to see the negotiation process as the verbal give and take needed to construct such detail, not a very social way to relate to others. And in this kind of negotiation, one may not consciously attend to the extent trust is of concern. Trust might remain unstated and unarticulated in the background.

Is trust always present in negotiations (and in the contracts that result from them) to a greater or lesser degree? The legal action would then turn on its degree. If that is so, then a court trying to resolve later disputes has some choice as to the extent it will emphasize the trust aspect of the transaction.

Jonathan Hyman

From: Spencer Neth [mailto:sn6@PO.CWRU.EDU]

Sent: Thursday, February 17, 2000 3:19 PM

To: AALSContracts@TC.UMN.EDU

Subject: Re: assent in consumer transactions

In the hope that interest in the Gateway problem has not died, or at least is capable of being revived (it is an extremely important topic which should be of interest to all lawyers) I add the following:

1. Every year in my commercial law course I spend 1-2 hours discussing the Gateway problem and 1-2 hours discussing Magnuson-Moss. I am embarrassed that I did think to put them together. As Scott Bernham points out, it would seem clear that the act bars conclusive arbitration, at least with respect to consumer purchasers (although the act as a whole also applies to non consumer purchasers of a "consumer good"), and at least with respect to claims under the written warranties. I think that a good case can be made that the bar would also apply to claims under implied warranties, for which Magnuson-Moss does give a cause of action. *Boyd v. Homes of Legend*, 981 F. Supp. 1423 (M.D. Ala., 1997), says it applied only with respect to claims on the written warranties, but I disagree, and so long as you can get to court on the written warranties there may not be much practical problem here.

2. There really should not be any argument about when the contract in Gateway was formed, and as many have pointed out the real question is what are the terms. Magnuson-Moss was supposed to enable consumers to know the warranty terms before they contracted, and in that way maybe there would be some chance to shop around for the best warranty, thus subjecting warranties to market forces of competition. This would seem realistic when it comes to micro computers which have become something close to a commodity item. I might have purchased a Gateway rather than a Dell if Gateway did not have the Dell American Arbitration Forum clause, and if I did not know from my son's experience that Gateway is difficult to deal with if you

have a complaint and going to court was not a practical alternative.

3. The reason that Gateway or any one else can use the courts to enforce language in a document which it has drafted against others is assent. Finding meaningful assent is often a problem, as others on the list have pointed out, even in the situations where the buyer has signed the form or clicked his assent. This, however, is no reason to ignore total lack of meaningful assent, but rather a reason for the law to develop some other means of policing contract terms, e.g. Professor Slawson's idea of reasonable expectations.

From: Franklin G. Snyder [mailto:fsnyder@UIDAHO.EDU]
Sent: Thursday, February 17, 2000 3:30 PM
To: aalscontracts@tc.umn.edu
Subject: Re: Gateway

Perhaps I'm too literal, but it seems to me that a "written confirmation" must necessarily refer to a confirmation of an agreement reached orally or by informal correspondence. (That's what Comment 1 seems to say.) As I read 2-207, in that situation the different terms in the written confirmation, if made expressly conditional, do seem to "unmake" the agreement.

The way around this might be the language in comment 2, which says that this analysis doesn't apply to a "proposed deal which in commercial understanding has in fact been closed." If we say that "in commercial understanding" everyone knows the contract for the computer is closed at the time someone says "yes" on the phone, the terms would fall under 2-207(2) as proposals for addition, and presumably they don't come in. But it's hard for me to view the sale as "closed" at this point, because Gateway doesn't seem to think it is, several judges don't seem to think it is, and (for the reasons set out in the next paragraph) I suspect the customer doesn't either. I think that this is where I part

company with Mark and others, although I recognize the force of their analysis.

In support of my reading, though, I note that if we assume Gateway's additional terms fall under 2-207(2) as "proposals for addition," they presumably only come in if the buyer assents. But that would mean that none of the additional terms (30-day right of return, extended warranty, phone support, etc.) would come into the contract unless there's some manifestation of assent by the buyer. (Unless they're discussed on the phone or we strain to get them in as implicit terms due to prior advertising.) The customer's silent acceptance of the computer won't do as assent, because if silence were acceptance the arbitration clause would come in, too. It seems to me that the buyer expects to get the whole Gateway package promised in the literature, and would not be happy with a price term, a quantity term, a shipping term, and a host of UCC defaults. So I'm not sure the customer would view the deal as "closed" based solely on the telephone terms.

Frank

From: Scarberry, Mark

[mailto:Mark.Scarberry@PEPPERDINE.EDU]

Sent: Friday, February 18, 2000 1:55 PM

To: AALSContracts@TC.UMN.EDU

Subject: Re: Gateway

White & Summers cite (and agree with) *American Parts Co. v. Am. Arbit. Ass'n*, 154 NW2d 5 (Mich App 1967), and *Album Graphics v. Beatrice Foods*, 408 NE2d 1041 (Ill. App. 1980) for the proposition that confirmations cannot be expressly conditional on assent to their terms so as to unmake a contract that was already formed. "A party should not be able to escape an oral contract through a confirmation." White & Summers, UCC (5th ed 2000), § 1-3 at 44, n.45. I think they're right, and I know of no contrary authority (although I'll admit I haven't looked for any) other than the language of 2-207(1) itself. And it is possible

to give a literal reading to 2-207(1) that is consistent with *White & Summers*. Suppose a confirmation of an oral agreement or informal written agreement includes different or additional terms and states: "This is not effective as an acceptance unless you assent to our terms." Then under 2-207(1) the confirmation is not effective as an acceptance. But who cares? A contract has already been formed, and thus no acceptance is needed.

That interpretation of 2-207(1) makes superfluous the reference in 2-207(1) to confirmations. We all know that courts tend to disfavor such interpretations. But I think legislative drafters often include phrases for emphasis or out of confusion, with no intent that courts give additional meaning to the statute because of the inclusion of the phrase.

Mark S. Scarberry