

***ProCD v Zeidenberg* and Cognitive Overload in Contractual Bargaining**

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Sellers often find it useful to sell products without revealing the terms of the contract to buyers until after buyers have taken the products home or begun to use them. These transactions take a number of forms. A buyer might purchase a box containing software or a database from a store. The box's skin bears the name of the software and a description of its function, and perhaps a statement that other terms are inside, or perhaps not. The buyer learns the terms only after he takes the box home and opens it; if he does not like the terms, he can return the product as long as he has not yet begun to use it, and sometimes not even then. A buyer might order a computer or appliance or airplane ticket over the phone. The operator tells him none of the terms other than price and a few others; again, he learns those terms when the product or ticket arrives and may (or may not) have an opportunity at that point to repudiate the transaction.

The evident business reason for these “terms later” or “rolling” contracts, as they are sometimes called, is that sellers cannot communicate all the relevant information to the buyer on the outsides of boxes or in telephone conversations. Buyers do not have the time or patience to listen to or read and understand the terms. The optimal terms cannot be disclosed without causing cognitive overload. To avoid driving off buyers, sellers provide minimal information in advance of purchase. Yet when buyers learn of unfavorable arbitration clauses or other adverse terms, they complain that they never consented to those terms, and therefore should not be bound to them.¹

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¹ For the academic literature on these contracts, see, for example, Stewart Macaulay, *Freedom from Contract: Solutions in Search for a Problem?*, 2004 Wis L Rev 777, 802–19 (arguing that access to arbitration is of little use in many consumer transactions while noting that the general public is aware of the existence of unfavorable contract terms lurking in tiny disclaimers or inside boxes); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis L Rev 679, 683–84 (arguing that rolling contracts “should be considered binding as long as the process through which they emerged was one in which the nonreading, nonparticipating buyer was virtually represented in a manner that satisfies the same objectives as personal assent”); Roger C. Bern, “Terms Later” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J L & Pol 641, 643–44 (2004) (disparaging *ProCD* as “devoid of legal, economic, and moral sanction” for reasons including “increase[d] information asymmetry”

This problem is not entirely new. The earlier manifestation involved lengthy standard form contracts that consumers signed when they purchased automobiles, appliances, and other complex products. Consumers were given the opportunity to read the terms before they signed the contracts, but clearly many did not. They could not make their way through the legalese, the complex sentences, the fine print, the sheer length of the document. Under the common law duty to read they were nonetheless bound, but courts gradually relaxed the rule, holding that buyers could be bound to especially unfavorable terms only if they were conspicuous (and not unconscionable).² What is different about the new group of cases is that the terms are not even inconspicuous—they are invisible.

It would seem to follow that these contracts are invalid. And that is what the district court held in the case of *ProCD, Inc v Zeidenberg*.³ ProCD created a database consisting of names, telephone numbers, and other information, from more than three thousand telephone directories.⁴ It sold two versions of this database: a cheaper version to the public, and a more expensive version to businesses. The first contract limited use of the database to noncommercial purposes; the contract with businesses had no such limitation. ProCD stated on the outside of the box that the database was subject to restrictions in a license in the box but did not state what those restrictions were. Zeidenberg bought the consumer version of the product and sought to resell ProCD's database to customers over the Internet. ProCD brought a lawsuit based on breach of contract.

The district court refused to enforce the license restriction, holding that the "offer," which included only the visible terms on the outside of the box, did not include the restriction to noncommercial uses.⁵ Zeidenberg "accepted" this offer by handing money over to the store. Because he could not see and learn of the restriction at the time that he accepted, he could not be bound by it.

and the abandonment of "impartial treatment of parties"); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1265 (2003) (arguing that terms inaccessible until after purchase may be procedurally unconscionable due to the presence of unequal bargaining power between the seller and the buyer, who must incur additional costs to return the product); Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 Wayne L Rev 1805, 1852–62 (2000) (discussing the ways in which disclosing terms after, rather than before, sale may mislead consumers).

² See, for example, *Williams v Walker-Thomas Furniture Co.*, 350 F2d 445, 449 (DC Cir 1965) ("[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."):

³ 908 F Supp 640 (WD Wis 1996), rev'd, *ProCD, Inc v Zeidenberg*, 86 F3d 1447 (7th Cir 1996).

⁴ *ProCD*, 86 F3d at 1449–50.

⁵ *ProCD*, 908 F Supp at 655.

The court's decision was vulnerable to two objections, one logical and one practical. In his opinion reversing the decision, Judge Frank Easterbrook pressed both of these points.⁶ The logical objection is that the offer *did* include the terms in the box by reference. If Zeidenberg did not like the idea that he could be bound to terms that he has not seen, he was free to refuse to buy the product.

In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the [district] judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way?⁷

If contracts rest on consent, then parties should be able to consent to be bound by hidden terms.

The practical objection is that all the terms of a contract can rarely be put on the outside of a box. Contracts are long and detailed by necessity. To sell goods, manufacturers need to be able to put just the crucial terms on the box (such as the price) along with useful information, and to omit information of little use to consumers, including obvious information. These exigencies prevail in other settings as well. Here is Judge Easterbrook in the later case of *Hill v Gateway 2000, Inc.*,⁸ which involved the sale of a computer by phone:

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

⁶ See *ProCD*, 86 F3d at 1450–51.

⁷ *Id.*

⁸ 105 F3d 1147 (7th Cir 1997).

transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.⁹

When customers buy goods and services over the phone, they should not be required to listen to a twenty-minute recitation of the contract terms. If they were forced to do so, they would not buy goods in this way in the first place.

These two powerful objections imply that the district court erred by refusing to enforce what I call the Incorporation Clause, the clause that points to hidden terms inside the box. But Judge Easterbrook does not, in fact, hold that the district court erred by failing to enforce the Incorporation Clause. Instead, Judge Easterbrook holds that the district court erred by concluding that acceptance took place at the time of purchase. In fact, according to Judge Easterbrook, acceptance did not take place until Zeidenberg used the software.¹⁰ The reason is that the “offer” was not “you may have the product if you pay now,” but “you may have the product if you pay now and use it later.”

This zigzag ought to puzzle the many commentators who attribute Judge Easterbrook’s holding to excessive confidence in the rationality of consumers, a notion that the buyer can rationally determine the odds that those terms favor or hurt him. If that were Judge Easterbrook’s view, then he would have simply held that Incorporation Clauses that point to hidden terms are enforceable, and he would not have needed to construe the offer in what seems at first to be a strange fashion. Why didn’t Judge Easterbrook take this simpler route? Consider the following clue:

Ours is not a case in which a consumer opens a package to find an insert saying “you owe us an extra \$10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price.¹¹

If one believes that buyers are fully rational, one should not object to such a clause (which I call a Surprise Clause). If the buyer consents to the surprise, then he cannot claim that he was wronged if he does not like it. Yet Judge Easterbrook balks at this conclusion, or appears to. Although he does not say that he would not enforce such a term, he

⁹ *Id.* at 1149.

¹⁰ *ProCD*, 86 F3d at 1452.

¹¹ *Id.*

averts to offer-acceptance analysis rather than merely saying that such a term is enforceable.

The issue came up in *Hill v Gateway* as well. In that case, the buyers ordered a computer over a telephone and later learned of an arbitration clause that they regarded as unfair.¹² (They could have, but did not, read the clause at the time that the computer arrived.) Under the clause, a buyer would have to travel to Chicago for the arbitration and pay a fee of \$4,000, only half of which they could recover if they prevailed. In many if not all cases, it would be cheaper for the buyer to purchase a new computer.¹³ The clause is not the same as “you owe us \$10,000” but comes close to denying the buyer any effective remedy in case of breach by Gateway. Although the buyers in *Hill* had the right to return the computer within thirty days, they chose to keep it and then sue. In the course of rejecting their argument under the *ProCD* precedent, Judge Easterbrook noted:

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case—could it exceed shipping charges?—is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover those in advance.¹⁴

Again, Judge Easterbrook seems to insist that the buyer would not be bound by an adverse Surprise Clause. He could simply return the product and, if it is expensive, he might even have a remedy. And what if the seller says explicitly that the buyer has no right to return the product if he dislikes the terms? On this crucial question, Easterbrook is silent.

The question takes on salience in light of another aspect of the *Hill* decision. Recall that in *ProCD*, the seller put the Incorporation Clause on the outside of the box. The observant buyer therefore knows that a surprise might come when he opens the box, and can refrain from taking this risk by refusing to buy. In *Hill*, Judge Easterbrook suggests that an Incorporation Clause is not even necessary.¹⁵ In that case, there was no Incorporation Clause: there was just a telephone conversation and no evidence that the operator warned the buyers of

¹² *Hill*, 105 F3d at 1148.

¹³ *Hill* does not discuss the clause, but a different case involving the same clause provides the details. See *Brower v Gateway 2000, Inc*, 676 NYS2d 569, 570–71 (NY App 1998).

¹⁴ *Hill*, 105 F3d at 1150.

¹⁵ *Id.*

potentially adverse terms. So unlike Zeidenberg, the Hills did not even learn that they were taking a risk. Too bad, says Easterbrook:

Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. § 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.¹⁶

It is as though the box in *ProCD* did not even have an Incorporation Clause, and nonetheless Zeidenberg was bound by the restrictions inside—on the theory that he could have, and should have, telephoned the company prior to the purchase and demanded that it read the contract to him.

There seem to be two Judge Easterbrooks struggling for priority in *ProCD*. One Easterbrook betrays skepticism about market rationality by balking at enforcing Surprise Clauses where the buyer has no right to return the product if he dislikes them. The other Easterbrook displays great confidence in market rationality by suggesting that buyers do not need notice of incorporated terms because they can ask about them prior to entering a contract.

The tension between these positions lessens, however, when one understands what exactly Judge Easterbrook's doctrinal approach does. Because the buyer has the leisure to read the terms after he obtains the product, it does not matter whether he knows of those terms before the product is delivered, or has been given a hint that they might exist. Even if he knows nothing at all about the terms, he is free to return the product for a full refund. So, far from assuming hyperrationality on the part of the buyer, Judge Easterbrook makes a pretty conventional assumption that the buyer needs to see the terms before he gives his con-

¹⁶ Id.

sent. At the same time, he gives due recognition to the cognitive constraints on precontractual communication. The burden of communicating the terms prior to purchase is relieved because the buyer has the leisure to read the terms after purchase. So the two opposing ideas—that the buyer needs to know the terms before he can be contractually bound, and the seller does not have the time or space to communicate the terms before the purchase—are reconciled. The box can have a modernist aesthetic of empty planes and clean lines; the buyer can learn as much as he wants at home before committing himself to the purchase. Freedom of contract is vindicated *and* unwary buyers are protected. Judge Easterbrook's doctrinal solution is ingenious.

But it is not flawless. For one thing, the quotation from *Hill*, above, raises a number of troubling questions that Judge Easterbrook does not answer. How broad must the buyer's search for terms be? Must he read every document in the box? Must he read all the perhaps lengthy and complex terms that appear on the screen (or appear in documents that can be accessed from the screen) when the software is started up? Must he keep an eye out for advertisements that might mention the terms of the contract? One expects that some kind of conspicuousness requirement would need to be imposed, but no hint of such a limitation comes from Judge Easterbrook.

But there is a more important problem. Citing the chestnut that the offeror is "master of the offer," Judge Easterbrook argues that ProCD stipulated that the offeree accepts the contract "by using the software after having an opportunity to read the license at leisure."¹⁷ In fact, no such statement appeared on the box, and ProCD's offer could have been construed differently.¹⁸ But whether ProCD made the offer Judge Easterbrook attributes to it, it certainly did not have to. If the offeror is master of the offer, he can certainly stipulate that the buyer has no right to return the product after taking it home. Now we are back to where we started. Whatever it did, ProCD could have included a Surprise Clause while denying the buyer a right to return the product if the term displeases him. If buyers are sufficiently rational, they can read the Incorporation Clause and take the gamble. Indeed, if we are to believe Judge Easterbrook's dicta in *Hill*, an Incorporation Clause is not necessary at all.¹⁹ All that is necessary is a price and a no-return clause; the rational buyer will infer the rest. If buyers are not sufficiently rational, then what can protect them from adverse Surprise Clauses?

¹⁷ *ProCD*, 86 F3d at 1452 (emphasis omitted).

¹⁸ Richard A. Epstein, *ProCD v. Zeidenberg: Do Doctrine and Function Mix?*, in Douglas G. Baird, ed., *Contracts Stories* 94, 110–11 (Foundation 2007).

¹⁹ 105 F3d at 1150.

So the opinion does not, after all, resolve the tension between market rationality and unfair surprise. If Judge Easterbrook believes that a no-return offer with a Surprise Clause should be valid, then he should not be uneasy about Surprise Clauses. Nor should he suggest in *Hill* that if the buyers have to pay to return the product, they ought to have a remedy. But if he does not believe that a no-return offer with a Surprise Clause should be valid, then he could not truly think that the offeror is master of the offer. This infringement on freedom of contract would be at odds with Judge Easterbrook's confidence in market forces elsewhere in these opinions and in other settings as well.²⁰

What accounts for this tension? The best explanation is that Judge Easterbrook is foremost a common law judge—not an ideologue or theorist—who in these two cases smells a rat (or several rats): the plaintiffs. Zeidenberg was trying to expropriate ProCD's investment; the Hills were lazy and should have read the terms. Judge Easterbrook believes that for certain types of transactions—involving complex products and terms that consumers are not willing to read before purchasing the products—a “terms later” offer makes the most sense. This gives the consumer the leisure to read the terms, and the consumer who forgoes this opportunity has no right to complain.²¹ In so holding, Judge Easterbrook shows a great deal more imagination than the district judge, who can conceive of only two alternatives—the consumer knows nothing at the time of sale, or he knows everything. Where the seller is not clear about the terms of the offer, the court will infer that it takes this form, which seems to be mutually beneficial. But this rule seems to be more than a presumption that can be overcome by an explicit offer that gives the buyer no right to return. The court is aware that this approach can be abused, that a seller can insert a Surprise Clause and provide for no return. The outcome in such a case is left open—no need to decide it here—but in both *ProCD* and *Hill*, Judge Easterbrook hints unmistakably, if unenthusiastically, that this type of abuse will not be tolerated, that the surprised consumer will have a remedy.

We might usefully think of this approach as updating the old idea with which we began—that adverse terms in complex form contracts can be enforced only if they are sufficiently conspicuous. Judge Easterbrook, in effect, takes this idea and extends it temporally. “Sufficiently conspicuous” can mean not only “on a piece of paper that I read before I sign at the store” but also “on a piece of paper that I

²⁰ See, for example, Frank H. Easterbrook, *Contract and Copyright*, 42 *Houston L Rev* 953, 955–56 (2005).

²¹ *Hill*, 105 F3d at 1149.

read before I use the product at home.” This arrangement seems so reasonable to Judge Easterbrook that he is willing to construe ambiguous offers as having this form. An explicit offer that departs too far from this paradigm—that reveals harsh terms only after the opportunity to return has vanished—will, or might, run into trouble.

Can such an approach be defended? No case, in Wisconsin or elsewhere, supplied precedent for the approach taken by Judge Easterbrook.²² But courts have always construed offers to advance policy goals, and computer software contracts and over-the-phone contracts provide a novel setting not adequately addressed in earlier cases or by the UCC drafters. Law professors usually criticize judges who allow form to triumph over substance. Easterbrook is the latest in a line of celebrated judges who shape the common law to the needs of commercial actors.

But is Judge Easterbrook’s rule, in fact, the best for this situation? The nub of the problem is that sellers and buyers need a way for sellers to convey sufficient information about a product prior to the contract, without boring buyers or driving them to distraction. As is always the case with contract, the failure to solve this problem hurts sellers and buyers. If the seller conveys too much information, she will drive away buyers. If the seller conveys too little information, she will mislead buyers and possibly drive them away as well.

Given this problem, what is the optimal legal rule? Let us consider three possibilities. First, the district court’s rule, which is apparently that it will not enforce Incorporation Clauses.²³ Let us call this rule the nonenforcement rule. Second, the opposite rule would be to enforce all Incorporation Clauses; we call this rule the enforcement rule. Third, we call the return rule the doctrine that an incorporation rule is enforceable only if the buyer has the right to return the product after reading the terms.

To examine these rules more formally, imagine that the seller sells a product whose use can be either “unrestricted” or “restricted” (to noncommercial uses). The product costs some amount to produce, but the unrestricted version imposes a further cost on the seller by reducing her protection from uses that might reduce demand (the cost $c_H > c_L$,

²² Law professors either agree with the district court or argue that the case should be treated under UCC § 2-207, which produces pretty much the same result. The terms in the form would be treated as an offer to modify the contract that the buyer has no reason to accept. See, for example, Braucher, 46 Wayne L Rev at 1821–23 (cited in note 1).

²³ The district court was also troubled that the clause was inconspicuous, and one reading of the case is that a more conspicuous incorporation clause would be enforceable. See *ProCD*, 908 F Supp at 654.

the cost of the restricted version).²⁴ There are two types of buyers, high types and low types. High types value the unrestricted version (and will pay a lot for it) (v_H); low types will not pay more for the unrestricted version than for the restricted version and are not willing to pay much for either (v_L). If the seller has market power, and can charge different prices for each version, she will charge p_H for the unrestricted version and p_L for the restricted version, such that $p_H = v_H > c_H$, and $p_L = v_L > c_L$. Let us further assume that $v_L < c_H$: low types value the unrestricted version less than its cost.

To segregate the market in this way, the seller must be able to force the low-type buyers to accept the restrictions, which will appear in the contract. Suppose, however, that the cost of communicating the restriction, t , is very high, higher than the benefit from segregating the market. If so, the seller can sell only the unrestricted version. In our example, the seller would choose a price of v_H and deprive the low types of the product. In a more general setting, where the seller faces a distribution of types, she will set a price that is too high for those at the bottom tail so that she gets a larger surplus from those higher up on the distribution.

This outcome is a welfare loss for the seller and (as long as the price is at least a little bit below valuations) low-type buyers—relative to the outcome if communication costs were zero. The question now is whether the legal rule can improve the outcome.

Let us suppose that the seller cannot write the restrictions on the outside of the box at low cost: any such effort would merely confuse buyers or deter them from purchasing the product. However, an incorporation provision, together with the restrictions contained in the contract in the box, would be relatively cheap.

It is clear that the nonenforcement rule does not improve outcomes. It simply deprives the seller of the ability to reduce communication costs to a level that would permit segregation of the market. This was the basis of Judge Easterbrook's ruling.

However, it turns out that the enforcement rule also does not improve outcomes—at least, not in a simple model where all that matters is contract enforcement (and not, as we will see, reputation or branding). To see why, imagine how a buyer might think about a box that says “restrictions inside” and “no return.” The buyer does not know what those restrictions are: they could include a “Surprise! You pay \$10,000” clause, or any other clause (such as an arbitration clause

²⁴ We might imagine that the unrestricted version includes more generous warranties, choice of law and arbitration clauses more favorable to the buyer, and so forth—where the cost to the seller is clearer.

with a high fee) that the buyer does not like. It is possible that a buyer might attach a probability of, say, q , that such a clause would be in the box. Sellers would have to discount the price by q times the loss the buyer imagines. But—and here is the problem—rational sellers would include further restrictions so as to reduce their costs. Buyers, anticipating this, would assume that the contract is maximally bad, and would demand an even lower price. The market “unravels.” This is the familiar lemons problem.²⁵

So, ironically, an Incorporation Clause without a return right should be as likely to exist in the market as clauses requiring the buyer to devour his own children. Why, then, do they exist? Initially, it is not clear that they do exist in the pure form—that is, an Incorporation Clause along with a no-return clause. Unraveling will not occur if the buyer has the right to reject after inspecting the contract and before use. Perhaps that is exactly what happens, which would explain why Judge Easterbrook so confidently construes ProCD’s offer in the way that he does. A rational offeror would never propose an Incorporation Clause along with a no-return clause because a rational buyer would never accept such an offer.

A further point is that, if such cases exist, buyers probably rely on the reputation of the seller. They assume that terms will be reasonable because any seller who inserted Surprise Clauses in boxes would quickly lose their business. Indeed, buyers depend on the seller’s reputation for much more important features of the product than arbitration terms and warranties. Contracts almost never say that if you do not like the software, you can return it, yet buyers usually have no idea how well the software will perform, and buy in the first place only because of word of mouth and the reputation of the seller. So it would not be surprising if buyers depended on the seller’s reputation for fair contractual terms as well as for high-quality goods.

If Incorporation Clauses interact with branding dynamics in this way, courts should enforce them, return clause or no return clause. But there is reason to think the market does not always work this well. Some consumers buy from some sellers who do not have good reputations; and some sellers with good reputations might insert terms that some buyers do not want. The return rule makes allowances for these limits on human cognition, insisting that people be given the opportunity to read before they are bound to a contract.

²⁵ See George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q J Econ 488, 489–92 (1970) (modeling transactions with information asymmetries about the quality of goods).

To be sure, the return rule has costs of its own. If the buyer can take the product home and inspect it and later return it, he may be able to use it in a way that reduces its value or otherwise harms the seller, who must also incur the cost of restocking and, depending on the product, possible depreciation. For this reason, the seller might justifiably provide in the offer that the buyer must pay some amount in order to return the product. It might also be expensive for the buyer to return the product—an issue noted by Judge Easterbrook in *Hill*.²⁶ Further, buyers may not read the contract even if they have leisure to do so. However, this is an old problem, not one special to this case, and courts have agreed that as long as a contract is reasonably clear and potentially adverse or surprising terms are conspicuous, buyers have no remedy if they fail to read it.²⁷ It would be odd if Judge Easterbrook decided to revisit this issue in a “terms later” case, where buyers are under less pressure to sign the contract because a salesman is not breathing down their necks.²⁸

One might argue that a more straightforward approach to the problem of cognitive overload is for courts to apply the enforcement rule along with a generous doctrine of unconscionability that allowed them to strike out any terms that they deem unreasonable. Such an approach assumes that courts can ascertain whether a term is commercially reasonable or not—which seems doubtful, especially given courts’ traditional reluctance or inability to analyze the contract terms and the market in a sophisticated way. But the decisive objection is that it prevents market segregation—with some consumers reading contracts and returning goods because of adverse terms, and other consumers either reading the contracts and keeping the goods or not reading the contracts and keeping the goods. There are good business reasons for packaging software with different licensing agreements that offer different levels of restriction. Wielding the cudgel of the unconscionability doctrine, courts would need to make all-or-nothing judgments about whether a particular restriction is commercially reasonable or not. Unless courts are prepared to ascertain whether some buyers care about arbitration clauses and other buyers do not—and they have never shown such an inclination—the unconscionability doctrine would introduce unwanted rigidity to the market.²⁹

²⁶ See text accompanying note 14.

²⁷ Putting aside the unconscionability and related doctrines.

²⁸ A similar concern is that it is not realistic to expect buyers to return goods when they disapprove of the contract terms. However, this is just a way of saying that it is not likely that they will be bothered by terms that can realistically be expected to be in a contract.

²⁹ This problem is minimal if either no one reads contracts or a few people read them but fail to instill discipline in the market by doing so. See Omri Ben-Shahar, *The Myth of the “Opportunity*

There are other risks. Richard Epstein argues that the problem with the return rule is that it entails that no contractual provisions govern the relationship between the buyer and seller during the important period after the buyer leaves the store and before he either uses or returns the product.³⁰ What happens if the product is destroyed during that interval? How could the contract stipulate that the buyer has an obligation to return the unwanted product to the original retail store if, by assumption, no contract exists?³¹ However, these problems are less serious than Epstein suggests. If the offeror is master of the offer, he can stipulate that rejection occurs only if the product is returned (undamaged) to the original store. Indeed, he can stipulate, as a part of the offer, all the terms that will govern the treatment of the goods before they are either kept or returned. And if he does not, the law can always supply default terms.

ProCD precipitated a typhoon of academic hostility. It is probably the most criticized case in the modern history of American contract law. Law professors scrambled to condemn Judge Easterbrook, with some accusing him of intellectual dishonesty and ideological zealotry.³² These accusations are overwrought. The portion of Judge Easterbrook's opinion concerning contract doctrine is a creative and intelligent effort to address the problem of cognitive overload in bargaining.³³ Like other famous and controversial judicial opinions, the *ProCD* opinion drags the law forward so that it can address a new type of behavior. Consider a case like *Wood v Lucy, Lady Duff-Gordon*,³⁴ where Judge Benjamin Cardozo, in essence, discarded the consideration doctrine because it blocked commercially reasonable contracts that happened to impose precise obligations on only one of the two parties.³⁵ This was an intelligent and overdue move taken under cover of doctrinal manipulation. Easterbrook is Cardozo's heir. In a similar way, Judge Easterbrook reformulates offer-acceptance doctrine so as to permit enforcement of "terms later" contracts, an important new business tool.

to Read" in *Contract Law*, 4 *Eur Rev Cont L* 1, 2-7 (2009) (arguing that the focus on the readability of contracts obscures the real issue—oppressive terms).

³⁰ Epstein, *Doctrine and Function* at 110 (cited in note 18).

³¹ See *id.* at 111-12.

³² There are too many such articles to cite here. For a sense of the debate, see Macaulay, 2004 *Wis L Rev* at 802-04 (cited in note 1).

³³ For an approving discussion of the copyright portion of Judge Easterbrook's opinion, see Randal C. Picker, *Easterbrook on Copyright*, 77 *U Chi L Rev* 1165, 1177-79 (2010).

³⁴ 118 *NE* 214 (NY 1917).

³⁵ *Id.* at 214 (holding that a promise to exert best efforts was implied by the terms of an exclusive marketing agreement).

Judge Easterbrook resisted the radical move that might have been suggested by free market thinking—that even an Incorporation Clause with no right of return can be enforced—because (one speculates) such a move would have outstripped the law too far to be acceptable to the legal community, which has apparently accepted *ProCD* despite the objections of law professors.³⁶ It would also have been unnecessary. More than a decade later, as far as I know there has not been a case involving a Surprise Clause and a no-return clause, suggesting that sellers either do not use such terms or buyers, relying on branding to protect them, do not object to them. Indeed, evidence suggests that the terms in “terms later” contracts and in other types of contracts are the same, indicating that adverse surprise terms are not inserted in “terms later” contracts.³⁷ Time, then, has vindicated *ProCD*, which will be remembered as a masterpiece of realist judging, one of the great opinions in the canon of contract law cases.

³⁶ See, for example, *DeFontes v Dell, Inc*, 984 A2d 1061, 1071 (RI 2009) (concluding that “the *ProCD* line of cases is better reasoned and more consistent with contemporary consumer transactions” than the cases that have rejected it); *M.A. Mortenson Co, Inc v Timberline Software Corp*, 998 P2d 305, 313 (Wash 2000).

³⁷ See Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 *J Legal Stud* 309, 333–41 (2009).