

DEFEATING ARBITRATION AGREEMENTS ENCLOSED IN THE DELIVERY OF MAIL ORDER PRODUCTS: WHAT PROTECTION CAN THE UCC AFFORD CONSUMERS

A contract for the sale of goods can be formed simply by paying the purchase price for a product and leaving a store.ⁱ In such a case, a vendor makes an offer to a consumer by placing a product on the shelf, and a consumer accepts by paying the price and leaving the store with the product.ⁱⁱ However, the Uniform Commercial Code (“U.C.C.”) allows a contract to be formed in a variety of other ways.ⁱⁱⁱ For example, contract formation occurs in the mail order context when a consumer opens a mail order package to find an enclosed insert containing terms of the contract and an accept-or-return device. In such a case of contract formation, the vendor may include terms such as an arbitration agreement requiring the purchaser to submit all future disputes over the product to binding arbitration. The buyer can prevent the formation of the contract and the finality of the arbitration term by returning the package within an allotted time indicated by the vendor in the enclosed insert.

However, in the excitement over a new purchase, consumers who hastily discard those inserts without carefully reading the terms run the risk of submitting all disputes over the product to binding arbitration. By failing to return the product within the allotted time, a consumer could unknowingly replace his constitutional right to a jury trial with mandatory binding arbitration.^{iv} Hence, a consumer who later experiences dissatisfaction with such a product could be bound to submit any dispute with the vendor to binding arbitration.

Are parties who purchase mail order products bound to obey the terms, specifically, an arbitration agreement, included in the delivery box of their product? The crucial argument adopted by several federal courts is that the contract is dormant until the consumer keeps the product beyond the allotted return time.^v Under this argument, the consumer has an opportunity to reject the arbitration agreement and return the product within an

allotted time. Therefore, contract formation occurs between the parties when the consumer fails to return the product within the allotted time. In the eyes of the court, the arbitration agreement included in the mail order delivery is binding after the time lapses and the product is not returned.^{vi}

However, several federal courts have recognized the faults in such an argument and have reached a different outcome by applying section 2-207 of the Uniform Commercial Code.^{vii} Under the U.C.C., courts may deem a contract for the sale of a mail order contract actually formed during the telephone order.^{viii} Thus, under section 2-207, additional terms such as an arbitration clause included in a mail order package merely constitute modifications of the original contract and require assent to be binding.^{ix} When federal courts adopt this rationale, an arbitration clause included in a mail order delivery purchase does not bind the consumer absent express assent to the arbitration clause. In other words, whether an arbitration agreement included in a mail order package is binding turns on when a court considers the contract actually formed.^x

Arbitration allows parties to “voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal.”^{xi} The Federal Arbitration Act ensures “the enforceability of arbitration clauses and [codifies] the procedures through which such clauses would be enforced.”^{xii} Congress intended to use the FAA as a means of creating “a national policy favoring arbitration and [to withdraw] the power of the states to require a judicial forum for the resolution of claims which the contracting parties [had] agreed to resolve by arbitration.”^{xiii} As a result, federal policy favors arbitration agreements and requires the court to rigorously enforce them.^{xiv}

Through provisions such as the Federal Arbitration Act, Congress may prescribe how the federal courts conduct themselves with respect to subject matter over which Congress plainly has the power to legislate.^{xv} The FAA governs questions

regarding the validity of arbitration agreements when the underlying transaction involves interstate commerce.^{xvi} In *Allied-Bruce Terminix Co. Inc. v. Dobson*,^{xvii} the United States Supreme Court interpreted what Congress meant by the phrase “involving commerce” used in the body of the FAA as “affecting interstate commerce.”^{xviii} As the court indicated, contracts “evidencing a transaction involving commerce [are] broad and are indeed the functional equivalent of affecting commerce.”^{xix} Thus, the FAA ensures that written arbitration agreements in maritime transactions and transactions involving interstate commerce are “valid, irrevocable, and enforceable.”^{xx}

In many jurisdictions, binding arbitration is contrary to public policy.^{xxi} Consequently, some states have employed statutory barriers to arbitration.^{xxii} However, the FAA applies not only in the federal courts, but in state courts as well.^{xxiii} According to the Supreme Court in *Southland Corp. v. Keating*,^{xxiv} the FAA is applicable to both federal and state court proceedings, and the FAA preempts state law.^{xxv} As a result, the Supreme Court eliminated any statutory barriers to arbitration and withdrew the states’ power to require a judicial forum for the resolution of a controversy that the contracting parties agreed to resolve by arbitration.^{xxvi}

The existence of an arbitration agreement is a matter of contract between the parties.^{xxvii} Arbitration simply provides a way to resolve contract disputes that parties have agreed to submit to arbitration.^{xxviii} However, “the Federal Arbitration Act was not enacted to force parties to arbitrate in absence of agreement; [the] existence of agreement to arbitrate is a threshold matter which must be established before FAA can be invoked.”^{xxix} Thus, the FAA does not require a party to arbitrate a dispute it did not agree to arbitrate.^{xxx} “It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit, and unequivocal and must not depend upon

implication or subtlety.^{xxxii} Accordingly, genuine issues of material fact regarding the making of an arbitration agreement warrant a jury trial on the existence of the agreement.^{xxxiii}

Before granting a stay or dismissing a case pending arbitration, the court must determine whether the parties have made a written agreement to arbitrate.^{xxxiii} Although federal law mandates the enforceability of binding arbitration, state contract law, including article 2 of the Uniform Commercial Code, governs the issue of whether a contract to arbitrate exists.^{xxxiv} In *First Options of Chicago, Inc. v. Kaplan*^{xxxv}, the Supreme Court stated that when deciding “the issue of whether the parties agreed to arbitrate a certain matter....courts generally.... should apply ordinary state-law principles that govern the formation of contracts.”^{xxxvi} Those principles of contract interpretation must be the principles that apply to contracts generally: “A court may not, in asserting the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law.”^{xxxvii}

Since state contract law clearly controls whether a valid agreement to arbitrate exists, a consumer seeking to avoid an arbitration agreement enclosed in a mail order package could employ state contract law principles, such as the Uniform Commercial Code (“U.C.C.”).^{xxxviii} Since the U.C.C. is adopted as state law, a consumer could argue that section 2-207 of the U.C.C. prevents the enforcement of an arbitration clause included in the delivery of a mail order product.^{xxxix} Thus, the U.C.C. provides a potential remedy to the enforcement of binding arbitration agreements included in the delivery of mail order products. Alternatively, a vendor seeking to enforce the arbitration agreement could argue that U.C.C. Section 2-204 gives the vendor the authority to propose a contract that the consumer accepted by failing to return the product.^{xl} Under a section 2-204 analysis, the additional terms, such as an arbitration

agreement, would bind a consumer if he failed to return the product.^{xli}

In *ProCD v. Zeidenberg*^{xlii}, the court addressed whether terms inside a box of software bind a customer who uses the software after the customer had the opportunity to read the terms and return the product.^{xliii} In *ProCD*, a producer of computer software brought an action against a user of its software under various copyright claims.^{xliv} The computer software included a license that limited the use of the information contained in the software to non-commercial purposes and gave the buyer the opportunity to reject the software if the buyer found the terms of the license unsatisfactory.^{xlv} The license appeared on the computer screen each time the consumer loaded the software, on the software itself, and in the user’s manual.^{xlvi} In violation of the license, the software user chose to “ignore the license,” and resold the information on the software for less than what ProCD charged.^{xlvii} According to the court, the license included in the computer software bound the buyer under the Uniform Commercial Code.^{xlviii} According to the court, the “terms of use are not less a part of the product than are the size of the database and the speed with which the software compiles listings.”^{xlix}

The court began its analysis with section 2-204(1) of the Uniform Commercial Code after having deemed section 2-207 inapplicable because the parties only exchanged one contract form.¹ By applying section 2-204, the court concluded that ProCD proposed a contract that the buyer accepted by using the software after having the opportunity to read to license and reject the product upon dissatisfaction with the terms of the license.^{li} In sum, the contract formation occurred after the buyer accepted the terms of the license by failing to reject them and return the product. According to the Seventh Circuit, contract formation can occur when a buyer fails to reject terms included in a delivery shipment by returning the product.^{lii} As a result, the license appearing on the software bound the purchaser to arbitrate any dispute over the product.^{liii} In *Hill v. Gateway*^{liv}, the Seventh Circuit construed an arbitration agreement included in a mail order

purchase as part of the original contract between the parties rather than a proposal to modify the original contract.^{lv} The Seventh Circuit employed its reasoning in *ProCD* and held that the arbitration clause included in the delivery of a home computer bound the purchaser to arbitrate the dispute.^{lvi} In *Hill*, the Hills purchased a computer by a telephone order, and Gateway subsequently shipped the computer.^{lvii} In addition to the new computer system, the purchasers received an arbitration clause.^{lviii} Under the clause included in the shipment, the arbitration agreement governed unless the purchaser returned the computer within 30 days.^{lix} The Hills kept the computer system more than 30 days before finding shortcomings in the product and filing suit against Gateway in federal court, asserting RICO and various other claims.^{lx} Admittedly, the Hills had noticed the terms, but had not read the agreement closely enough to find the arbitration clause.^{lxi} Subsequently, Gateway asked the court to enforce the arbitration agreement.^{lxii} Relying on its decision in *ProCD*, the Seventh Circuit enforced the arbitration clause contained inside the product’s box.

According to the court, by keeping the computer beyond thirty days with an option to return the computer, the Hills accepted Gateway’s offer - including the arbitration clause.^{lxiii} As the court indicated, a “contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove to be unwelcome.”^{lxiv} Further, the court noted that a requirement that an arbitration clause be prominent was inconsistent with the FAA.^{lxv} The court concluded that the terms inside the delivery box must “stand or fall together. If they constitute the parties’ contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.”^{lxvi} According to the Seventh Circuit, the Hills “knew the delivery would contain some important terms before they ordered the computer, and they did not seek to discover these terms once they possessed the computer.”^{lxvii} and the arbitration clause.^{lxviii} As a result, the court enforced all the terms, including the arbitration agreement.^{lxix}

The court in *Hill* noted the similarity between the accept-and-return offer used by ProCD and Gateway.^{lxx} Thus, under the *ProCD* rationale, Gateway proposed limitations on the kind of conduct that constituted acceptance – not returning the product within 30 days – and the Hills agreed to terms by acting accordingly.^{lxxi} Furthermore, under the Seventh Circuit’s rationale, contract formation did not occur when Gateway delivered the computer to the Hills.^{lxxii} Rather, contract formation occurred after the allotted period to return the computer had passed.^{lxxiii}

Clearly, the question in both *ProCD* and *Hill* was not whether the terms were added to the contract after its formation, but rather how and when contract formation occurred.^{lxxiv} More specifically, the court considered the question to be whether a vendor may propose that contract formation occur “after the customer has had a chance to inspect both the items and the terms”^{lxxv} included in a mail order delivery.^{lxxvi} Unfortunately for mail order consumers, both courts answered “yes,” a vendor may propose that contract formation occurs after the customer has had a chance to inspect both the terms and the items included in the mail order delivery.^{lxxvii} Under this rationale, arbitration agreements enclosed in the delivery of mail order packages will compel a consumer to submit his dispute to arbitration if he fails to return the product within the proposed time frame.

The court in *Hill* provided some practical considerations in allowing vendors to enclose full legal terms, such as arbitration agreements, within the packages of their products.^{lxxviii} Moreover, the court in *ProCD* stated: “Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable may be a means of doing business valuable to buyers and sellers alike.”^{lxxix} According to these courts, consumers will benefit when vendors skip costly and time-consuming telephone recitation and include a simple approve-or return-device.^{lxxx} According to the court in *Hill*, salespeople should not be expected to recite legal documents to each consumer before completing the sale.^{lxxxi}

In addition, the court in *Hill* argued that communication by telephone of such terms would not keep a customer from “asserting that he did not understand the arbitration agreement”^{lxxxii} or that the salesperson did not read the arbitration term to him.^{lxxxiii}

However, under *ProCD* and *Hill*, enclosed arbitration agreements will bind consumers, regardless of whether the arbitration terms are read or unread, in return for such benefits. While putting the terms in writing does provide some practical benefit for consumers and vendors, it also forces a consumer who is unaware of an enclosed arbitration agreement to replace his constitutional right to a jury trial with mandatory binding arbitration.^{lxxxiv} In sum, arbitration results in the consumer’s loss of an important judicial forum.^{lxxxv} A great danger lies in the mail order context when an unsuspecting consumer is unaware of the possibility that such an arbitration agreement is enclosed in his purchase.^{lxxxvi} The Seventh Circuit could have weighed the burden of requiring a vendor to explain the arbitration clause before mailing his product and the burden of requiring every consumer to search and explore what he or she may agree to by paying for, receiving, and keeping the product.^{lxxxvii}

According to the Seventh Circuit, U.C.C. section 2-204 serves as the applicable provision to determine whether additional contract terms included in a mail order delivery are binding on the consumer. However, several other jurisdictions have found that section 2-207 was the appropriate provision to apply in factually analogous situations to *ProCD* and *Hill*.^{lxxxviii}

In *Step-Saver Data Systems, Inc. v. Wyse Technology*,^{lxxxix} the Third Circuit employed U.C.C. section 2-207 and held that additional terms included in a shipped product constituted a proposal for the modification of the original contract.^{xc} In *Step-saver*, two merchants agreed by telephone to purchase software.^{xci} The seller shipped the product and a “box top license” stating “opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened within 15 days from the date of purchase and your money will be

refunded.”^{xcii} The two merchants had not discussed the license during the telephone order.^{xciii}

According to the Third Circuit, the parties had formed the contract during the initial telephone order conversation.^{xciv} Under the court’s 2-207 rationale, “the parties’ performance [demonstrated] the existence of a contract.”^{xcv} As the court indicated, the seller’s simply keeping the product did not amount to assent to the “box top license.”^{xcvi} Furthermore, the court found that the buyer had never expressly assented to the terms of the license, and that section 2-207 “provides the appropriate legal rules for determining whether such an intent can be inferred from continuing with the contract after receiving a writing containing additional or different terms.”^{xcvii} In a later decision involving the same seller, *Arizona Retail Systems v. Software Link*^{xcviii}, the court concluded that “by agreeing to ship the goods...or at the latest, by shipping the goods, [the seller] entered into a contract with [the buyer].”^{xcix}

Recently, in *Klocek v. Gateway*,^c a federal district court held that an arbitration clause included in a computer delivery package did not become part of the parties agreement when the purchasers of the computer failed to return the product.^{ci} In *Klocek*, Klocek purchased a computer by telephone from Gateway.^{cii} Several additional terms were enclosed in the delivery, particularly, an arbitration agreement.^{ciii} Under the additional terms, the consumer accepted all additional terms and conditions by keeping the computer past five days of delivery.^{civ} Klocek brought several claims against Gateway arising from the mail order purchase of a computer.^{cv} Klocek alleged that Gateway induced him to buy a computer in return for false promises of technical support.^{cvi} Klocek also brought breach of contract and breach of warranty claims against Gateway.^{cvii} Subsequently, Gateway urged the court to enforce an arbitration agreement enclosed in the computer package delivered to the Kloceks.^{cviii}

As recognized by the court in *Klocek*, the issue of whether terms received with a product become part of the parties’ agreement turns on when the court finds the contract fully formed.^{cix}

However, the court declined to follow the reasoning in *ProCD* and *Hill* and adopt U.C.C. section 2-204 as controlling in the mail order context.^{cx} More specifically, the court stated that the “Seventh Circuit concluded without support that U.C.C. section 2-207 was irrelevant because the cases involved only one written form.”^{cxii} The court reached this conclusion by acknowledging that the language of section 2-207 does not preclude its application in cases involving only one form.^{cxii} As the court indicated, section 2-207 “governs cases involving a written confirmation following an oral contract, and does not require another form before the provision becomes applicable.”^{cxiii} Speaking directly to the situation, Official Comment 1 to section 2-207 provides that section 2-207 (1) and (2) “apply where an agreement has been reached orally....and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed.”^{cxiv} As a result, section 2-207 governed the issue of whether an arbitration clause in the delivery of a product is part of the contract.^{cxv}

The court in *Klocek* also rejected the Seventh Circuit’s application of section 2-204 in *Hill* and *ProCD*.^{cxvi} The court acknowledged that “in typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.”^{cxvii} Relying on *Step-Saver* and *Arizona Retail*, the court assumed *Klocek* offered to purchase the computer through the telephone order and Gateway accepted *Klocek*’s offer by agreeing to ship and/or shipping the computer to the *Kloceks*.^{cxviii} Since *Klocek* was not a “merchant” for purposes of U.C.C. section 2-207, the additional arbitration term contained in the delivery was not part of the contract, because the *Klocek*’s did not expressly agree to the term.^{cxix} Further, the court expressly dismissed Gateway’s argument that *Klocek* demonstrated acceptance of the terms included in the delivery by keeping the computer for more than five days after the date of delivery.^{cxx} According to the court, Gateway gave no evidence that it informed the plaintiffs of the accept-or-return device as a condition of the transaction or that the plaintiffs knew of possible additional terms to the

original agreement.^{cxxi} As a result, the “act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed” to the additional terms in the box, specifically -- the arbitration clause.^{cxvii}

Official comment (2) speaks directly to the issue in *Klocek*. Under section 2-207, when a court finds that contract formation occurred at the point of sale, any additional terms added are regarded as proposals for change in the original contract.^{cxviii} Even the court in *Hill* and *ProCD* acknowledged that “a contract may be formed in many ways, including at the point of sale.”^{cxviii} Therefore, terms included in the delivery of a product should be regarded as proposals under a section 2-207 analysis. The crucial language in section 2-207 is “the additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless....”^{cxv} Therefore, when a consumer is involved in the transaction, an arbitration clause delivered with a product is considered a “proposal” of a new or modified term of the contract.^{cxvi} As the court in *Klocek* revealed, an application of section 2-207 to the mail order context will render an arbitration agreement enclosed in a mail order purchase unenforceable absent the purchaser’s express assent.^{cxvii}

An important aspect of the *Klocek* court’s analysis is the conclusion that Gateway accepted the *Klocek*’s offer by shipping the computer with the additional terms. Under the Seventh Circuit’s analysis in *Hill v. Gateway*, the *Hills* phoned Gateway and waited for Gateway to make the offer. Under the Seventh Circuit’s analysis, no contract existed until the *Hills* accepted Gateway’s offer thirty days later by failing to return the computer. However, an application of the *Klocek* section 2-207 analysis would yield a different result in *Hill v. Gateway*. Under a section 2-207 analysis, the *Hill*’s phoned Gateway and made an offer to purchase a computer.^{cxviii} Gateway accepted the offer by shipping the computer along with additional terms.^{cxix} Under section 2-207 (1), Gateway accepted the offer by shipment, even with additional terms enclosed. Further, under

section 2-207, additional terms are simply proposals to an already formed contract. Moreover, simply keeping the computer past the allotted time does not amount to assent of the arbitration clause.^{cxx} Applying section 2-207, Gateway could not successfully argue that the *Hills* accepted the proposed arbitration agreement by keeping the computer. Clearly, an application of section 2-207 would yield relief from binding arbitration to the mail order consumer in *Hill*.

While the FAA preempts state law that treats arbitration agreements differently from other contracts, it also “preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate.”^{cxv} Uniform Commercial Code sections 2-207 and 2-204 are such general principals of state contract law governing issues of contract formation. Such “general [rules] of contract law...[are] not impermissible state [statutes] or [decisions] which [limit] arbitration agreements with rules not applicable to other contracts.”^{cxv} Therefore, a court may not construe an arbitration agreement differently from that in which it construes other non-arbitration agreements under state law,^{cxviii} and state law preempts the FAA on the issue of whether a consumer and a vendor have agreed to arbitrate their contract dispute.^{cxv}

Before determining whether two parties have agreed to arbitrate, federal courts must determine what state’s law controls the formation of the disputed contract.^{cxv} In diversity actions,^{cxv} a federal court must apply the substantive law, including choice of law rules that the forum state court would apply.^{cxvii} Therefore, federal courts sitting in diversity must make a choice of law determination in order to determine what state law governs the formation of the arbitration agreement and how the federal court should interpret the agreement according to the law of the forum state.^{cxviii} However, a choice of law analysis is unnecessary if the relevant states have adopted the identical controlling statutes.^{cxv}

Even in the event that a choice of law determination is unnecessary, a federal

court addressing the issue of the formation of an arbitration agreement must apply state principles of contract law.^{cxl} Although the U.C.C. was intended to “make uniform the law among various jurisdictions,”^{cxli} federal courts must adopt the contract principle that its forum state would apply, which could vary from state to state.^{cxlii} In a diversity case in which the relevant states have adopted conflicting approaches, a federal court may adopt either approach depending on the state contract law deemed applicable according to choice of law rules.^{cxliii} The United States Supreme Court is unable to adopt a uniform approach – either section 2-207 or section 2-204 – for all federal courts.

Although the United States Supreme Court cannot adopt a uniform approach for all federal courts, 25 state courts have found section 2-207 applicable when addressing the issue of whether a valid agreement to arbitrate exists between a buyer and a seller.^{cxliv} Out of these 25 state court decisions, 12 of these state courts have afforded relief to the consumer by applying section 2-207.^{cxlv} In several of these cases, the buyer was unaware of an arbitration clause included in one of the contracts when inconsistent contract forms were exchanged, and the buyer had not signed the contract form containing the arbitration clause.^{cxlvi} By applying section 2-207, these state courts held that an arbitration provision was merely a proposed additional term for inclusion in the contract that did not become part of the contract absent express assent by the buyer.^{cxlvii} Since the arbitration terms were deemed proposed additional terms, the state courts afforded a remedy to binding arbitration for the buyer in each of these state court decisions.^{cxlviii} The remainder of these courts have held section 2-207 to be applicable when deciding whether an agreement to arbitrate exists, but have failed to afford a remedy to the buyer under a section 2-207 analysis.^{cxlix} However, in all of the cases in which the state courts failed to afford the buyer a remedy under a section 2-207 analysis, both the buyer and the seller were merchants.^{cl}

In contrast, only 3 state courts have found section 2-204 applicable when faced with the same issue.^{cli} Each state

court decision to apply section 2-204 involved cases in which the seller sent multiple consistent confirmation forms to the buyer, and the buyer failed to object to the arbitration provision in any of his responses to the seller.^{clii} Under a 2-204 rationale, the conduct of the buyer and the seller was sufficient evidence of an agreement to arbitrate, and the arbitration agreements were binding on the buyers.^{cliii} However, the state courts in each of these cases specifically distinguished these cases from cases in which state courts have held section 2-207 to apply.^{cliv} Unlike the cases in which the courts applied 2-207, consistent forms were exchanged between the seller and the buyer when the court applied section 2-204, and each buyer had signed the contracts containing the arbitration clauses.^{clv} Additionally, the buyers in section 2-204 cases were aware of the arbitration clauses in the contracts.^{clvi} Moreover, state courts applying a 2-204 rationale made no mention of contract formation. None of the state court cases in which the state court applied 2-204 involved the delivery of a product in the mail order context.^{clvii} In sum, the state court cases in which the courts applied section 2-204 differed significantly from many of the cases in which state courts have applied section 2-207 and afforded a remedy from binding arbitration.^{clviii}

Conclusion

Arbitration essentially results in the consumer’s loss of his constitutional right to jury trial. Consent to arbitrate should not be given by inadvertence.^{clix} A party who consents to arbitrate “waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.”^{clx} A great danger lies in the unknowing loss of this constitutional right to litigate disputes in court when an arbitration clause is included in the delivery of a mail order product. Although the United States Supreme Court cannot adopt a uniform approach for all federal courts, U.C.C. section 2-207 appears to provide a potential remedy for the unsuspecting consumer if the court determines that the

contract between a mail order vendor and purchaser is formed upon the telephone order. Moreover, consumers sitting in federal courts in certain states appear to have a relief from binding arbitration via section 2-207 based on a majority of previous state court decisions that section 2-207 governs. Even so, contract formation at the time of the order serves as the key to the doorway of section 2-207. As long as federal courts conclude that a contract is dormant until the consumer keeps the product beyond the allotted return time, consumers must fish through their mail order products, after payment and receipt, in order to see what they will agree to by keeping the product.

ⁱ ProCD v. Zeidenburg, 86 F.3d 1447, 1452 (7th Cir. 1996).

ⁱⁱ *Id.* at 1450.

ⁱⁱⁱ *Id.* at 1452.

^{iv} Mark Andrew Cerny, *A Shield Against Arbitration: UCC Section 2-207’s Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products*, 51 Ala. L. Rev. 821, 821 (2000).

^v *Id.* at 822; Hill v. Gateway, 105 F.3d 1147-48 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997); ProCD v. Zeidenburg, 86 F.3d 1447, 1142-43 (7th Cir. 1996).

^{vi} Hill v. Gateway, 105 F.3d 1447, 1148-49 (7th Cir. 1997)

^{vii} Klocek v. Gateway, 104 F.Supp.2d 1332 (D.Kan. 2000).

^{viii} *Id.* at 1340.

^{ix} *Id.*

^x Klocek v. Gateway, 104 F.Supp.2d 1332, 1338 (D.Kan. 2000).

^{xi} Mark Andrew Cerny, *A Shield Against Arbitration: UCC Section 2-207’s Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products*, 51 Ala. L. Rev. 821, 827 (2000), (quoting Traci L. Jones, *State Law of Contract Formation in the Shadow of the*

Federal Arbitration Act, 46 Duke L.J. 651 (1996)).

xii *Id.*

xiii Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

xiv *Id.*

xv Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, 87, S.Ct. 1801, 1806 (1967).

xvi Bery v. Boody, 2000 WL 288398, *2 (S.D.N.Y.). Because the FAA does not create federal question jurisdiction, a district court may hear a petition under the FAA only if there is an independent basis of jurisdiction.

xvii 513 U.S. 265 (1995).

xviii *Allied-Bruce*, 513 U.S. at 273-74.

xix *Id.* at 265.

xx Klocek v. Gateway, 104 F.Supp.2d 1332, 1135 (D.Kan. 2000).

xxi *Id.*

xxii *Id.*

xxiii Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

xxiv Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

xxv *Id.* at 12.

xxvi *See, e.g.*, ALA. CODE § 8-1-41(3) (1993) (refusing to specifically enforce an agreement to submit dispute to arbitration); *See also* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). *See also* Mark Andrew Cerny, *A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products*, 51 Ala. L. Rev. 821, 827 (2000).

xxvii Klocek v. Gateway, 104 F.Supp.2d 1332, 1136 (D.Kan. 2000).

xxviii *Id.*

xxix Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1286 (1997).

xxx *Allied-Bruce*, 684 So.2d 102, 107.

xxxi Marek v. Alexander Laufer and Son, Inc., 257 A.D.2d 363, 363, 683 N.Y.S.2d 50, 51 (N.Y. App. Div. 1999).

xxxii Klocek v. Gateway, 104 F.Supp.2d 1332, 1336 (2000); Avedon Engineering Inc., v. Seatex, 126 F.3d 1279, 1283 (1997).

xxxiii Klocek v. Gateway, 104 F.Supp.2d 1332, 1136 (D.Kan. 2000).

xxxiv Allied Bruce Terminex Co. Inc., v. Dobson, 684 So.2d 102, 105 (1995); Bery, Inc. v. Boody, 2000 WL 218398, *2 (S.D.N.Y.).

xxxv 514 U.S. 938, 115 S.Ct. 1920 (1995).

xxxvi *First Options*, 514 U.S. at 944. *But see* Lory Fabrics, Inc. v. Dress Rehearsal, Inc., 434 N.Y.S.2d 359, (N.Y.A.D. 1980) (In determining whether there is a valid agreement to arbitrate between a seller and a buyer, the Federal Arbitration Act and federal substantive law control); *cf.* American Multimedia, Inc. v. Dalton Packaging Inc., 540 N.Y.S.2d 410, 411, 143 Misc.2d 295, 297 (N.Y.Sup. 1989). *See generally* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

xxxvii Allied Bruce Terminix Co. Inc. v. Dobson, 684 So.2d 102, 107 (1996) (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9).

xxxviii First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 1925 (1995); *See also* Mark Andrew Cerny, *A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products*, 51 Ala. L. Rev. 821, 830 (2000); *But see* Lory Fabrics, Inc. v. Dress Rehearsal, Inc., 434 N.Y.S.2d 359, (N.Y.A.D. 1980) (In determining

whether there is a valid agreement to arbitrate between a seller and a buyer, the Federal Arbitration Act and federal substantive law control); *cf.* American Multimedia, Inc. v. Dalton Packaging Inc., 540 N.Y.S.2d 410, 411, 143 Misc.2d 295, 297 (N.Y.Sup. 1989).

xxxix *See* Mark Andrew Cerny, *A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products*, 51 Ala. L. Rev. 821, 830 (2000)

xl ProCD v. Zeidenburg, 86 F.3d 1447, 1452 (7th Cir. 1996).

xli *Id.*

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

xliii *Id.* at 1450.

xliv *Id.* at 1449.

xlv *Id.*

xlvi *Id.*

xlvii *Id.* at 1450.

xlviii *Id.*

xlix *Id.* at 1453.

^l *Id.* 1452.

li *Id.*

lii *Id.*

liii *Id.*

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

lv M.A. Mortenson Co. Inc. v. Timberline Software Corp., 140 Wash.2d 568, 583, 998 P.2d 305, 313 (2000).

lvi Hill v. Gateway 105 F.3d 1147, 1150 (7th Cir. 1997).

lvii *Id.* at 1148.

lviii *Id.*

lix <i>Id.</i>	lxxxiii <i>Id.</i>	cvi <i>Id.</i>
lx <i>Id.</i>	lxxxiv Mark Andrew Cerny, <i>A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products</i> , 51 Ala.L.Rev. 821, 821 (2000).	cvii <i>Id.</i>
lxi <i>Id.</i>		cviii <i>Id.</i>
lxii <i>Id.</i>		cix <i>Id.</i> at 1338.
lxiii <i>Id.</i> at 1450.	lxxxv <i>Id.</i> at 844.	cx <i>Id.</i> at 1339.
lxiv <i>Id.</i>	lxxxvi <i>Id.</i>	cxii <i>Id.</i>
lxv <i>Id.</i>	lxxxvii <i>Id.</i>	cxiii <i>Id.</i>
lxvi <i>Id.</i>	lxxxviii <i>Id.</i> at 831.	cxiv U.C.C. § 2-207 Official Comment 1 (emphasis added) (1999).
lxvii <i>Id.</i>	lxxxix 939 f.2d 91 (3 rd Cir. 1991).	cxv <i>Klocek v. Gateway</i> , 104 F.Supp. 2d 1332, 1339 (D. Kan. 2000).
lxviii <i>Id.</i> at 1150.	xc <i>Step-Saver</i> , 939 F.2d at 108.	cxvi <i>Id.</i> at 1340.
lxix <i>Id.</i>	xcii <i>Id.</i> at 95-96.	cxvii <i>Id.</i>
lxx <i>Id.</i> at 1148.	xciii <i>Id.</i>	cxviii <i>Id.</i>
lxxi <i>Id.</i> at 1150.	xciv <i>Id.</i> at 98.	cxix <i>Id.</i>
lxxii <i>Id.</i>	xcv <i>Id.</i>	cxx <i>Id.</i>
lxxiii <i>Id.</i>	xcvi <i>Step-Saver</i> , 939 F.2d at 98.	cxxi <i>Id.</i>
lxxiv <i>Id.</i>	xcvii <i>Id.</i>	cxxii <i>Id.</i>
lxxv <i>Id.</i>	xcviii 831 F.Supp. 759 (D.Ariz. 1993).	cxxiii Mark Andrew Cerny, <i>A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products</i> , 51 Ala. L. Rev. 821, 836 (2000).
lxxvi <i>Id.</i>	xcix <i>Arizona Retail Sys.</i> , 831 F.Supp. at 765; See Mark Andrew Cerny, <i>A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products</i> , 51 Ala. L. Rev. 821, 835 (2000).	cxxiv <i>Id.</i>
lxxvii <i>Id.</i>	c 104 F.Supp.2d 1332 (D. Kan. 2000).	cxxv U.C.C. § 2-207 (1999) Even though section 2-207 contains specific language addressing “merchants,” the provision applies to both merchants and non-merchants.
lxxviii <i>Id.</i>	ci <i>Klocek</i> , 104 F.Supp. 2d 1332, 1340.	cxxvi Mark Andrew Cerny, <i>A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products</i> , 51 Ala. L. Rev. 821, 832 (2000).
lxxix M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash2d 568, 582-83, 998 P.2d. 305, 312-13 (2000) (quoting ProCD v. Zeidenberg, 86 F.3d 1147, 1451 (1996)).	cii <i>Id.</i> at 1334.	
lxxx ProCD v. Zeidenberg, 86 F.3d 1147, 1451 (1996)	ciii <i>Id.</i>	
lxxxi Hill v. Gateway 105 F.3d 1147, 1149 (7 th Cir. 1997).	civ <i>Id.</i> at 1335.	
lxxxii <i>Id.</i>	cv <i>Id.</i> at 1334.	

^{cxxxvii} Klocek v. Gateway, 104 F.Supp. 2d 1332, 1340 (D. Kan. 2000).

^{cxxxviii} Hill v. Gateway, 105 F.3d 1147, 1149 (7th Cir. 1997).

^{cxxxix} *Id.*

^{cxxx} Klocek v. Gateway, 104 F.Supp. 2d 1332, 1340 (D. Kan. 2000).

^{cxxxxi} Chelsea Square Textiles Inc. v. Bombay Dyeing and Manufacturing Co., Ltd., 189 F.3d 289, 296 (1999). *See also* Perry v. Thomas, 482 U.S. 483, 492 (1987). *See also* Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687(1996).

^{cxxxii} Saturn Distribution Corp. v. Williams, 905 F.2d 719, 723 (4th Cir. 1990)(.

^{cxxxiii} Allied Bruce Terminix Co. Inc. v. Dobson, 684 So.2d 102, 107 (1996) (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9).

^{cxxxiv} Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1287 (10th Cir. 1997).

^{cxxxv} Klocek v. Gateway, 104 F.Supp.2d 1332, 1336; Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1284 (10th Cir. 1997).

^{cxxxvi} Bery v. Boody, 2000 WL 288398, *2 (S.D.N.Y.). Because the FAA does not create federal question jurisdiction, a district court may hear a petition under the FAA only if there is an independent basis of jurisdiction.

^{cxxxvii} Klocek v. Gateway, 104 F.Supp.2d 1332, 1336 (D. Kan. 2000). *But see* Lory Fabrics, Inc. v. Dress Rehearsal, Inc., 434 N.Y.S.2d 359, (N.Y.A.D. 1980). In determining whether there is a valid agreement to arbitrate between a seller and a buyer, the Federal Arbitration Act and federal substantive law control; *cf.* American Multimedia, Inc. v. Dalton Packaging Inc., 540 N.Y.S.2d 410, 411, 143 Misc.2d 295, 297 (N.Y.Sup. 1989). *See generally* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

^{cxxxviii} Klocek v. Gateway, 104 F.Supp.2d 1332, 1336 (D.Kan. 2000). The United States District Court of Kansas applied the choice of law rules that Kansas state courts would apply.

^{cxxxix} Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1284 (10th Cir. 1997).

^{cxl} Klocek v. Gateway, 104 F.Supp.2d 1332, 1336 (D. Kan. 2000). *But see* Lory Fabrics, Inc. v. Dress Rehearsal, Inc., 434 N.Y.S.2d 359, (N.Y.A.D. 1980) (holding that in determining whether there is a valid agreement to arbitrate between a seller and a buyer the Federal Arbitration Act and federal substantive law control).

^{cxli} C. Itoh & Co. (America) Inc. v. Jordan International Co., 552 F.2d 1228, 1233 (7th Cir. 1977).

^{cxlii} *See* Klocek v. Gateway, 104 F.Supp.2d 1332, 1336 (D.Kan. 2000). The district court chose to apply section 2-207 of the U.C.C. because neither Kansas nor Missouri law supported the Seventh Circuit's holding that section 2-207 did not apply.

^{cxliii} *Id.*

^{cxliv} Marek v. Alexander Laufer and Son, Inc., 257 A.D.2d 363, 683 N.Y.S.2d 50, (N.Y. App. Div. 1999); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998); Tupman Thurlow Co., Inc. v. Woolf Intern. Corp., 43 Mass.App.Ct. 344, 682 N.E.2d 1378 (Mass. App. Ct. 1997); Stanley-Bostitch, Inc. v. Regenerative Envtl. Equipment Co., 697 A.2d 323 (R.I. 1997); Wilson Fertilizer & Grain, Inc. v. ADM Mill. Co., 654 N.E.2d 848 (Ind. Ct. App. 1995); Alex Colman Inc. V. Silverman Products & Textiles., 212 A.D.2d 452, 622 N.Y.S.2d 729 (N.Y. App. Div. 1995); Tupman Thurlow Co., Inc. v. Woolf Intern. Corp., 3 Mass.L.Rptr. 252, 1994 WL 878959 (Mass.Super. 1994); Int'l Tin Council v. Amalgamet Inc., 138 Misc.2d 383, 524 N.Y.S.2d 971 (N.Y.Sup. 1988); Davidson Extruded Products, Inc. v. Babcock Wire Equipment Ltd., 138

Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); Diamond Run Ltd. v. Rebel Fabrics, Inc., 134 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); Continental Grain v. Followell, 475 N.E.2d 318, (Ind. Ct. App. 1985); Just In-Material Designs, Ltd. v. I.T.A.D. Associates, Inc. 94 A.D.2d 103, 463 N.Y.S.2d 202 (N.Y. App. Div. 1983); Woodcrest Fabrics, Inc. v. B&R Textile Corp., 95 A.D.2d 656, 464 N.Y.S.2d 359 (N.Y. App. Div. 1983); Lounge-A-Round v. GCM Mills, Inc., 109 Cal.App.3d 190, 166 Cal.Rptr. 920 (Cal. Ct. App. 1980); Jones Apparel Group, Inc. v. Petit, 75 A.D.2d 504, 426 N.Y.S.2d 739 (N.Y. App. Div. 1980); Schubtex, Inc. v. Allen Snyder, Inc. 49 N.Y.2d 1, 399 N.E. 2d 1154, 424 N.Y.S.2d 133, (N.Y. 1979); Marlene Industries Corp. v. Carnac Textiles, Inc. 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (N.Y. 1978); Bunge Corp. v. Williams, 45 Ill.App.3d 359, 359N.E.2d 844 (Ill. App. Ct. 1977); I.S. Joseph Co., Inc. v. Toufic Aris & Fils, 54 A.D.2d 665, 388 N.Y.S.2d 1 (N.Y.Sup. 1976); Tunis Mfg. Corp. v. Allen Knitting Mills, Inc. 87 Misc.2d 1091, 386 N.Y.S.2d 788 (N.Y. App. Div. 1976); Lehigh Val. Industries, Inc. v. Artex, Inc. 53 A.D.2d 582, 384 N.Y.S.2d 837 (N.Y. App. Div. 1976); Ganor-Stafford Industries, Inc. v. Mafco Textured Fibers, 52 A.D.2d 481, 384 N.Y.S.2d 788 (N.Y. App. Div. 1976); Alan Wood Steel Co. V. Capital Equipment Enterprises, Inc., 39 Ill.App.3d 48, 349 N.E.2d 627 (Ill. App. Ct. 1976); C.M.I. Clothesmakers, Inc. v. A.S.K. Knits, Inc., 85 Misc.2d 462, 380 N.Y.S.2d 447 (N.Y.Sup. 1975); Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis.2d 193 206 N.W.2d 414 (Wis. 1973); Tunis Mfg. Corp. v. Mystic Mills, Inc., 40 A.D.2d 664, 337 N.Y.S.2d 150 (N.Y. App. Div. 1972).

^{cxliv} Marek v. Alexander Laufer and Son, Inc., 257 A.D.2d 363, 683 N.Y.S.2d 50, (N.Y. App. Div. 1999); Stanley-Bostitch, Inc. v. Regenerative Envtl. Equipment Co., 697 A.2d 323 (R.I. 1997); Alex Colman Inc. V. Silverman Products & Textiles., 212 A.D.2d 452, 622 N.Y.S.2d 729 (N.Y. App. Div. 1995); Davidson Extruded Products, Inc. v. Babcock Wire Equipment

Ltd., 138 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); *Diamond Run Ltd. v. Rebel Fabrics, Inc.*, 134 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); *Continental Grain v. Followell*, 475 N.E.2d 318, (Ind. Ct. App. 1985); *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal.App.3d 190, 166 Cal.Rptr. 920 (Cal. Ct. App. 1980); *Schubtex, Inc. v. Allen Snyder, Inc.* 49 N.Y.2d 1, 399 N.E. 2d 1154, 424 N.Y.S.2d 133, (N.Y. 1979); *Marlene Industries Corp. v. Carnac Textiles, Inc.* 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (N.Y. 1978); *Tunis Mfg. Corp. v. Allen Knitting Mills, Inc.* 87 Misc.2d 1091, 386 N.Y.S.2d 788 (N.Y. App. Div. 1976); *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193 206 N.W.2d 414 (Wis. 1973); *Tunis Mfg. Corp. v. Mystic Mills, Inc.*, 40 A.D.2d 664, 337 N.Y.S.2d 150 (N.Y. App. Div. 1972).

^{cxlvi} *C.f. Marlene Industries Corp. v. Carnac Textiles, Inc.* 45 N.Y.2d 327, 330, 380 N.E.2d 239, 240, 408 N.Y.S.2d 410, 411 (N.Y. 1978) (“Where a buyer orally placed order for fabrics and then sent the seller purchase order which did not provide for arbitration and which specified that its terms could not be superseded by unsigned contract, arbitration clause contained in seller's acknowledgement of order which buyer retained without objection but did not sign did not bind buyer.”)

^{cxlvii} *Marek v. Alexander Laufer and Son, Inc.*, 257 A.D.2d 363, 683 N.Y.S.2d 50, (N.Y. App. Div. 1999); *Stanley-Bostitch, Inc. v. Regenerative Envtl. Equipment Co.*, 697 A.2d 323 (R.I. 1997); *Alex Colman Inc. V. Silverman Products & Textiles.*, 212 A.D.2d 452, 622 N.Y.S.2d 729 (N.Y. App. Div. 1995); *Davidson Extruded Products, Inc. v. Babcock Wire Equipment Ltd.*, 138 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); *Diamond Run Ltd. v. Rebel Fabrics, Inc.*, 134 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); *Continental Grain v. Followell*, 475 N.E.2d 318, (Ind. Ct. App. 1985); *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal.App.3d 190, 166 Cal.Rptr. 920 (Cal. Ct. App. 1980); *Schubtex, Inc. v. Allen*

Snyder, Inc. 49 N.Y.2d 1, 399 N.E. 2d 1154, 424 N.Y.S.2d 133, (N.Y. 1979); *Marlene Industries Corp. v. Carnac Textiles, Inc.* 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (N.Y. 1978); *Tunis Mfg. Corp. v. Allen Knitting Mills, Inc.* 87 Misc.2d 1091, 386 N.Y.S.2d 788 (N.Y. App. Div. 1976); *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193 206 N.W.2d 414 (Wis. 1973); *Tunis Mfg. Corp. v. Mystic Mills, Inc.*, 40 A.D.2d 664, 337 N.Y.S.2d 150 (N.Y. App. Div. 1972).

^{cxlviii} *Marek v. Alexander Laufer and Son, Inc.*, 257 A.D.2d 363, 683 N.Y.S.2d 50, (N.Y. App. Div. 1999); *Stanley-Bostitch, Inc. v. Regenerative Envtl. Equipment Co.*, 697 A.2d 323 (R.I. 1997); *Alex Colman Inc. V. Silverman Products & Textiles.*, 212 A.D.2d 452, 622 N.Y.S.2d 729 (N.Y. App. Div. 1995); *Davidson Extruded Products, Inc. v. Babcock Wire Equipment Ltd.*, 138 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); *Diamond Run Ltd. v. Rebel Fabrics, Inc.*, 134 Misc.2d 118, 523 N.Y.S.2d 338 (N.Y.Sup. 1987); *Continental Grain v. Followell*, 475 N.E.2d 318, (Ind. Ct. App. 1985); *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal.App.3d 190, 166 Cal.Rptr. 920 (Cal. Ct. App. 1980); *Schubtex, Inc. v. Allen Snyder, Inc.* 49 N.Y.2d 1, 399 N.E. 2d 1154, 424 N.Y.S.2d 133, (N.Y. 1979); *Marlene Industries Corp. v. Carnac Textiles, Inc.* 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (N.Y. 1978); *Tunis Mfg. Corp. v. Allen Knitting Mills, Inc.* 87 Misc.2d 1091, 386 N.Y.S.2d 788 (N.Y. App. Div. 1976); *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193 206 N.W.2d 414 (Wis. 1973); *Tunis Mfg. Corp. v. Mystic Mills, Inc.*, 40 A.D.2d 664, 337 N.Y.S.2d 150 (N.Y. App. Div. 1972).

^{cxlix} *See Ganor-Stafford Industries, Inc. v. Mafco Textured Fibers*, 52 A.D.2d 481, 384 N.Y.S.2d 788, 788 (N.Y. App. Div. 1976). Where the buyer and seller were both merchants in the textile industry and arbitration was the common practice in the textile industry, seller's order acknowledgment form made clear reference to its terms on its reverse when

he included a binding arbitration clause. Such an arbitration clause did not materially alter the terms of the contract. Thus, the buyer's failure to notify seller within a reasonable time after receipt of the form of objection to the arbitration clause gave such an arbitration clause a binding effect.

^{cl} *See also Preston Farm & Ranch Supply v. Bio-Zyme Enters.*, 625 S.W.2d 295, 299 (Tex. 1981) Although it applies to both merchants and non-merchants, section 2-207 assumes that commercial transactions between professionals require special rules that may not apply to an inexperienced seller and buyer. The duty owed by a merchant is higher than that the duty of a non-merchant to his buyer. Thus, the same course of conduct establishing a contract between merchants may be insufficient to form a non-merchant/consumer contract. While the U.C.C. proscribes different rules for merchants and non-merchants, those particular rules are applied more strictly to merchants than they would be against non-merchant consumers. As these cases show, section 2-207's reference to “merchants” makes a difference in whether 2-207 affords a remedy. *See also Mark Andrew Cerny, A Shield Against Arbitration: UCC Section 2-207's Role in the Enforceability of Arbitration Agreements Included With the Delivery of Products*, 51 Ala. L. Rev. 821, 832 (2000)

^{cli} *See Application of Boutique Industries, Inc.*, 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y.A.D. 1 Dept. 1982); *See Earnest Michel & Co., Inc. v. Anabasis Trade, Inc.* 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980); *See Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc.*, 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y.A.D. 1 Dept. 1979).

^{clii} *See Application of Boutique Industries, Inc.*, 90 A.D.2d 737,737, 455 N.Y.S.3d 796 796 (N.Y. App.1 Div. 1982); *See Earnest Michel & Co., Inc. v. Anabasis Trade, Inc.* 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980); *See Ernest J. Michel & Co.,*

Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{cliii} See Application of Boutique Industries, Inc., 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y. App. Div. 1982); See Earnest Michel & Co., Inc. v. Anabasis Trade, Inc. 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980); See Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{cliv} See Application of Boutique Industries, Inc., 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y. App. Div. 1982); See Earnest Michel & Co., Inc. v. Anabasis Trade, Inc. 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980); See Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{clv} See Application of Boutique Industries, Inc., 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y. App. Div. 1982); See Earnest Michel & Co., Inc. v. Anabasis Trade, Inc. 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980); See Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{clvi} See Application of Boutique Industries, Inc., 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y. App. Div. 1982); See Earnest Michel & Co., Inc. v. Anabasis Trade, Inc. 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980); See Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{clvii} Compare Klocek v. Gateway, 104 F.Supp.2d 1332, 1337 (D.Kan. 2000), with Application of Boutique Industries, Inc., 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y. App. Div. 1982), and Earnest Michel & Co., Inc. v. Anabasis Trade, Inc. 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933,

431 N.Y.S.2d 459, 459 (N.Y. 1980), and Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{clviii} Compare Klocek v. Gateway, 104 F.Supp.2d 1332, 1337 (D.Kan. 2000), and Marek v. Alexander Laufer & Son, Inc. 257 A.D.2d 363, 363, 683 N.Y.S.2d 50, 50 (N.Y. App. Div. 1999), with Application of Boutique Industries, Inc., 90 A.D.2d 737, 737, 455 N.Y.S.3d 796, 796 (N.Y. App. Div. 1982), and Earnest Michel & Co., Inc. v. Anabasis Trade, Inc. 50 N.Y.2d 951, 951, 409 N.E.2d 933, 933, 431 N.Y.S.2d 459, 459 (N.Y. 1980), and Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 72 A.D.2d 715, 715, 422 N.Y.S.2d 79, 80 (N.Y. App. Div. 1979).

^{clix} See Marek v. Alexander Laufer and Son, Inc., 257 A.D.2d 363, 364, 683 N.Y.S.2d 50, 51 (N.Y. App. Div. 1999).

^{clx} Marlene Industries Corp. v. Carnac Textiles, Inc. 45 N.Y.2d 327, 333-34, 380 N.E.2d 239, 243, 408 N.Y.S.2d 413, 415 (N.Y. 1978); Marek v. Alexander Laufer and Son, Inc., 257 A.D.2d 363, 364, 683 N.Y.S.2d 50, 51 (N.Y. App. Div. 1999).