MARKET TESTING BOILERPLATE

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ABSTRACT

Boilerplate contract terms are regularly enforced against consumers who do not like them and would not have selected them if given a choice. But there is no choice. Such terms are offered on a take-it-or-leave-it basis to consumers who are either unaware of the terms until a problem arises or hope those terms will never have to be invoked. The lack of meaningful choice is justified by arguments that consumers will avoid contracts that contain harmful terms, so market constraints will prevent businesses from offering socially inefficient terms. If consumers really had a problem with certain boilerplate terms, the theory goes, businesses would find it unprofitable to require them. Indeed, businesses claim that without some boilerplate terms, their goods and services would cost more, perhaps more than consumers would be willing to pay.

This Article encourages regulators to call this bluff by requiring businesses to make some important terms optional and allowing them to price the opt-out. Only then can consumers make a meaningful choice and truly consent to the terms of ubiquitous, term-laden contracts. It also explains why market protections have thus far failed consumers. Consumers can and will make meaningful choices about boilerplate terms that address topics they find important if they are made aware of those terms and given a choice.

This Article makes important contributions to the literature. It offers a realistic regulatory solution to the problem of consent in consumer contracting that honors freedom of contract. Requiring that consumers be able to opt out of some standard terms preserves meaningful choice and consent for consumers without banning conscionable terms that businesses prefer. Understanding consumer preferences about boilerplate terms and how those preferences may be expressed and manipulated is vital to designing a framework for more meaningful consent in consumer contracting.

INTRODUCTION

A consumer buys a big-ticket item like a car and signs and initials all of the necessary documents. When it comes time for the car dealer to explain what "binding arbitration" means, he says, "This just means that if anything goes wrong, we'll try to work it out between ourselves instead of going to court." The consumer asks if she can opt out of the arbitration clause and the dealer informs her that she cannot—it's a mandatory term. The dealership will not sell the car without her consent to the arbitration term. The consumer shrugs and signs as directed. Then, when something does go wrong, say, the car fails on the way home because the fuel gauge is broken and the consumer is hit by another car as a result, the consumer threatens to sue. The dealership reminds her of the arbitration clause and invites her to begin an arbitration proceeding instead. After talking to a lawyer, the consumer realizes that she is likely to receive a lower damage award, if any, as a result of an arbitration process. What's more, if she is unhappy with the outcome, she will not be able to appeal the decision. The arbitrator's ruling is final.

Or a consumer signs up for a new gym membership and must initial by a term that explains that the membership will automatically renew at the end of the current term, three months later, for a longer six-month term. She refuses to initial by the automatic renewal term, but she signs the bottom of the contract and uses the gym's facilities for the three months. At the end of the three months, the consumer, who is under the impression she is no longer a member of the gym, discovers her membership has been automatically renewed and her credit card has been charged. Because she did not tell the gym in writing that she wanted to cancel her membership thirty days before the expiration of the term, she is bound for the entire six-month term.

Consent in consumer contracting relies on a legal fiction. In both of the above scenarios, a consumer did not want to consent to a particular boilerplate term even though she saw and understood the term. Nevertheless, the consumers were led to believe they were bound by the terms in question and were treated as though the terms applied because they signed the contract and performed under their understanding of the agreement.

Indeed, most consumers do believe they are bound by boilerplate terms even if they do not know what the terms are and even when the terms are not actually enforceable in their state.[1] In most boilerplate

1. *See* Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014).

circumstances, consumers, quite rationally, do not read most of the contract terms that apply in their transactions with merchants and so do not meaningfully consent to those terms.[2] The law enforces most of the terms nonetheless. In consumer contracting by boilerplate, many terms of the agreement are not negotiable, indeed, often, none of them are. Even if a consumer expressly objects to a term, she will still be bound by it. The ubiquity of dense boilerplate terms for a variety of consumer transactions, large and small, means that the legal fiction driving the enforcement of various consumer contract terms affects large portions of the population daily. While fictionalizing consumer contract to this extent is expedient, it is hardly necessary. Just as modern technology proliferates complex boilerplate terms, it also provides the means to give consumers meaningful choices, and so enable meaningful consent, regarding important terms.

This Article argues that it would be relatively easy and informative to require that consumers be permitted to opt out of certain frequently used and potentially problematic terms. Companies could charge consumers more for opting out of the terms, to defray the "higher costs" the opt-outs would impose on them. Pricing a term and giving consumers the ability to opt out will allow the market to send meaningful signals about what terms are acceptable and which terms are unpopular because it will make the terms salient to consumers. It will also convey more information than we have now about what the true market value of a particular deal is—the value the consumer places on the product and the terms upon which she may purchase it.

Legal scholars have pointed to a number of boilerplate terms as being particularly pernicious.[3] For example, there is a heated debate

2. Scholars, judges, and regulators have long wrung their hands about consumers' inability to meaningfully consent to terms in consumer transactions. *See, e.g.*, Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 8–11 (2010) (discussing the disregard for the assent requirement by businesses as well as the erosion of its applicability in courts in the context of consumer contracts); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 29–38 (2012) (discussing psychological barriers to consumer assent as well as those created by the market through boilerplate terms); Wilkinson-Ryan, *supra* note 1, at 1751–53, 1758–62 (reviewing studies indicating that consumers do not read terms of transactions and offering psychological theories elaborating on this phenomenon); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 126–29 (2017) (discussing issues with the pervasiveness of clickwrap and browsewrap terms that solicit assent merely by a consumer's failure to leave a web page).

3. James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 280–88 (2018); D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 510–14 (2016); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 271–92 (2015).

about whether arbitration terms necessarily disadvantage consumers in dangerous ways.[4] While some studies have found that consumers do no worse in arbitration and may even do better than in litigation, others challenge the arbitration system as being biased in favor of business.[5] Terms that waive class actions are considered troubling because they allow businesses to escape financial responsibility for widespread injuries to their customers that impose relatively small costs on individuals.[6] Terms that waive or alter legal rights raise concerns if consumers do not understand the consequences of the waiver. Hidden fees or monetary penalties may catch consumers off-guard and force them to bear responsibility for financial consequences they did not plan for and cannot afford.[7] It is easy to see why we may be concerned that consumers are being inappropriately taken advantage of when they are unaware that they will be bound to terms such as these.

The Restatement of the Law of Consumer Contracts (the "Restatement") is an attempt to address the problem of harmful constructive consent. It preserves the practice of enforcing terms that consumers have an opportunity to read and object to[8] and offers protections for consumers in the event the terms they do not see impose unjust hardships.[9] Substantive and procedural unconscionability and a prohibition of deceptive practices do most of the work in the common law to guard against abuses in boilerplate terms. The Restatement focuses

4. Omri Ben-Shahar, *The Paradox of Access to Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1795–98 (2016) (discussing the elimination of judicial access that occurs in populations covered by adhesive arbitration agreements).

5. *See* Michael A. Helfand, *Arbitration, Transparency, and Privatization: Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3000–10 (2015) (discussing the traditional framework for supporting arbitration regimes as beneficial, while raising counters to this by critics). *See generally* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015) (empirical studies of multiple outcomes and discussing issues of fairness related to the pro-business outcomes in these proceedings); RESTATEMENT OF CONSUMER CONTS. § 6 cmt. 4c (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

6. Charles Gibbs, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL L. REV. 1345, 1352–54 (2012). Of course, this may just be a function of market forces and consumer expectations. Consumers may be willing to self-insure for minor losses and will respond by avoiding inadequate products in the future. Litigation need not be the answer to all of life's disappointments.

7. Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1523–25 (2007).

8. RESTATEMENT OF CONSUMER CONTS. § 6 cmt. 4c (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

9. *Id.* §§ 6–7.

on the opportunity of the consumer to read the terms, rather than on the reality of whether consumers can understand and appreciate the consequences of the terms were they to read them. Its remedies and reasoning focus on increasing disclosure and transparency rather than on offering consumers choices or taking steps to make sure that consumers actually read and understand sensitive terms.

A number of theories are used to explain the current practice of enforcing terms by constructive consent. Chief among them is the theory that the market protects consumers by disfavoring firms that offer bad contract terms.[10] The theory posits that consumers will prefer firms that do not insist upon the bad term. They will be willing to pay more to avoid the troublesome contract terms and over time, businesses will adapt and stop offering terms disfavored by consumers. A corollary to the economic argument is the point that businesses make—that they would have to charge higher prices to offer their goods and services to consumers on different terms.[11] The terms in the boilerplate allow them to keep their costs, and prices, low. Both of these claims beg the question: Are consumers willing to trade disadvantageous contract terms for lower prices? Would they pay more to opt out?

There are a number of reasons to be skeptical of the claim that the market naturally protects consumers from undesirable contract terms in contracts of adhesion. In order for market mechanisms to work to protect consumers from risks they do not understand, there must be market actors who know what those risks are, understand them, and exercise enough purchasing power to pressure firms and signal to the rest of the market that there is a problem. Research has shown that in some cases, no one is aware of the terms in boilerplate contracts.[12] Even when word has spread about particular kinds of terms, such as arbitration terms, optimism bias may cause consumers to under-value

10. Gibson, *supra* note 6, at 252–55.

11. Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 342–45 (2010); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 439–40 (2002).

12. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 55 (Princeton University Press, 2014); *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (Princeton University Press, 2012); Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 15–20 (2015); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 11–19 (2014).

the effects of small probability outcomes. Further, terms that only rarely affect consumers are not likely to be salient to them in choosing products. Other attributes of the product or service may dominate their choice.

On the other hand, consumers may well be showing that they are not concerned about terms that seem problematic. Consumers are more likely to complain about terms or other problems with products or services via social media and review platforms than to vote with their feet by boycotting a particular product (particularly as it can be difficult in some industries to find a replacement product without accepting the troublesome term). That "word of mouth" may convince firms more directly to change the terms on which they offer their wares than the slower process of market competition. There also may be some losses for which consumers are happy to self-insure, and terms that risk those losses may not matter to consumers. That is, consumers are very willing to accept some risks in order to buy a product or service at the offered price and they may feel that there are enough resources available to express displeasure without boycotting a particular product or suing its seller.

This Article is a first step in revealing the consumer preferences that have thus far been assumed. If we want to know what consumers think about suspect boilerplate terms, we should ask them. Contracts of adhesion do not necessarily do that effectively. It would not be difficult to ask consumers whether they are willing to pay more to opt out of terms that scholars and others have deemed troublesome or whether they really are indifferent or prefer the discounted price they receive in exchange for being bound by the term in question.

While consumers must be free to make a choice, good faith choice architecture may make businesses more open to providing optional terms and so ultimately provide consumers with more choices, sooner. Once businesses design procedures for opting out of boilerplate terms, they may find that they want to take consumers' temperatures about a variety of terms. The back and forth between a business's offering terms and consumers' either accepting them or paying to opt out will allow the parties to come to something closer to a real agreement (a real result of a bargain) that includes terms both parties accept at a price they both agree to and understand. Of course, a number of relatively insignificant terms will remain boilerplate and, as to those terms, the old problems remain, particularly if businesses try to slip some terms consumers would not like into the boilerplate sections. A process that gives consumers meaningful choices should awaken market forces by focusing consumers on terms and their accompanying

prices, thereby beginning a conversation of sorts between businesses and consumers about what terms are acceptable and under what conditions.

The Federal Trade Commission (FTC)[13] is in the best position to require that firms allow consumers to opt out of certain terms, to decide which terms should be optional in each industry, and to coordinate the information produced by allowing consumers to make choices to more effectively regulate opt-outs in the future. Firms would be primarily responsible for deciding what prices to charge consumers to opt out of the terms in question. Firms would then be competing on the basis of terms and the prices they assign to opt out. The FTC would have to pay careful attention to what those prices are so that firms do not use pricing to unduly discourage consumers from opting out. An industry-wide program would focus consumers' attention on particular terms and help them to form clear preferences about how terms operate and what opting out of them is worth. Because most companies that use significant boilerplate terms operate nationwide, differences between industries are more important than differences between states. For that reason, typical state-level intervention is less helpful in moderating boilerplate terms.

Part I of this Article engages in the debate about the legitimacy of mandatory contract terms that do not receive consumers' attention or actual consent at the time of contracting. It addresses the problem of the legal fiction that consumers have consented to contract terms they do not know about or understand. It confronts the economic arguments that market choices fully reflect consumer preferences regarding ubiquitous mandatory consumer contract terms. It concludes that consumers may not have the tools within the consumer market to protect themselves from disadvantageous terms and that limited, precise regulation may be necessary to provide consumers meaningful choices about important terms.

Part II examines some of the kinds of boilerplate contract terms that have been deemed particularly troublesome by scholars and consumer advocates. Terms that limit or waive legal rights otherwise available to protect consumers should be enforced with caution. They can generally be described as terms that would result in "surprise" or

13. The FTC is empowered to "prevent . . . unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45 (2023).

"hardship" when discovered.[14] Terms that add fees in opaque or difficult-to-understand ways can have the effect of making contracts unexpectedly unaffordable for consumers and even causing financial hardship in some cases. Significantly increasing the price of a contract without the full knowledge and understanding of one party seems to directly undermine the purpose of consent in contract doctrine.

Part III situates a proposal to mandate optional terms in the literature about boilerplate and consumer contracting and acknowledges the complexities inherent in a problem that spans industries and technologies. It acknowledges that while market testing boilerplate on an industry-by-industry basis is a start, optional terms will be most effective if they encourage contracting parties to think about their interactions differently and to invest in ways to understand each other and their agreements better. Only then will consumer contracting find a basis in consent and true agreement again.

Part IV details an appropriate and carefully-tailored regulatory response that emphasizes real choice and consent for consumers. It also explains the ways in which regulation should be limited to allow for freedom of choice for both parties to a contract and considers potential problems the regulation could encounter. Lessons learned from early optional terms can then inform regulation of consumer contracting more broadly with the goals of allowing consumers to make real choices about what terms will bind them and how much they are willing to pay for a product and the terms that accompany it.

I. THE TROUBLE WITH BOILERPLATE

Scholars and regulators have focused on the function, role, and efficacy of boilerplate contract terms for decades.[15] Boilerplate terms,

14. In explaining the material terms that should not be imposed against consumers without consent, comment 4 to Section 2-207 of the Uniform Commercial Code (U.C.C.) describes terms that would "result in surprise or hardship if incorporated without express awareness by the other party." *See* U.C.C. § 2-207, cmt. 4 (AM. LAW. INST. & UNIF. LAW COMM'N, 2021). Section 5 of the Restatement defines procedurally unconscionable terms as those that would "result in unfair surprise." *See* RESTATEMENT OF CONSUMER CONTS. § 6 (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

15. *See* Gibson, *supra* note 6, at 252–56 (discussing issues related to the replacement of traditional terms with boilerplate counterparts); Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 392–400 (2018) (reviewing pro-defendant terms in arbitration clauses of contracts); Aaron Blumenthal, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 708–15 (2015) (providing general critique of arbitration and adhesion clauses in consumer contracts).

or those that are standardized to operate in a number of settings and are contained in long documents, constitute the bulk of the terms that apply to contracts between businesses and consumers and between businesses themselves.[16] The terms range from innocuous topics—such as common return policies, information about how to contact the drafter in the event a consumer has questions or problems, and limiting use of the product or service to personal, noncommercial uses—to more significant terms about penalty fees, warranty limitations, and limitations or waivers of legal rights and protections.[17] The businesses and consumers who receive boilerplate terms from their contracting partners almost never read the contracts they sign (or "click" to agree to).[18] The notion that the non-drafting parties have specifically consented to terms in boilerplate forms is absurd.[19] The more reasonable claim is that they have consented to the transaction, with some knowledge that they are not aware of all of the terms in the agreement, but that they are willing to assume the risk that a "hidden" term will harm them.[20]

And we are not often harmed by the terms we do not see.[21] Many terms in boilerplate address what happens if something goes wrong. Most consumer transactions are brief and successfully completed. Products generally last long enough for consumers to feel that they got their money's worth. We are all willing to self-insure against the risk that a backpack purchased at Walmart will not last forever. If we are truly dissatisfied with a purchase beyond our expected risk of loss, the more common reaction is to complain as publicly as possible about the upsetting transaction. Social media and the ease of posting reviews on the Internet allow consumers to vent their disappointments in ways

16. Gibson, *supra* note 6, at 251; Jens Dammann, *Flytraps, Scarecrows, and the Transparency Paradox: The Case for Redesigning the Law on Vague Boilerplate Contracts*, 2018 U. ILL. L. REV. 185, 186 (2018); Parker Smith, *Coping with the Death of the Bargain Without Burying the Spirit of the Law: A "Foundational" Approach to Comparative Law and Its Application to Adhesion Contracts in Louisiana*, 76 LA. L. REV. 1277, 1295 n.80 (2016).

17. TERMS OF SERVICE; DIDN'T READ, https://tosdr.org/en/frontpage (last visited Sept. 23, 2023) (compiling, as a consumer protection site, a very broad list of clauses present in terms of service).

18. Bakos et al., *supra* note 12, at 19–22; Wilkinson-Ryan, *supra* note 1, at 1751–53.

19. RADIN, *supra* note 12, at 19; Wilkinson-Ryan, *supra* note 1, at 1751–53; David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1600–06 (2016).

20. Wilkinson-Ryan, *supra* note 1, at 1757–58, 1782–83.

21. Douglas G. Baird, *Boilerplate and Market Power: The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 936 (2006).

that can directly harm the offending business.[22] Perhaps this degree of protection from the usually minor harms and inconveniences occasioned by terms consumers do not see is sufficient. Perhaps we are willing to consent to this sort of system without parsing the details of the terms of our contracts.

But some terms do seem to be more significant and to have the potential to cause more problems, particularly for less sophisticated consumers. While more sophisticated consumers often have the financial resources to allow them to absorb a wide variety of unexpected losses, less sophisticated consumers usually operate on tighter margins. More sophisticated consumers are also better able to prevent losses in the first place. We are left with the troubling reality that the poor and unsophisticated consumer subsidizes the wealthy, sophisticated one.[23]

Some argue that the risks posed by all of the terms contained in form contracts are small or unlikely enough that most or all consumers would shrug and assume them.[24] We should be wary of that claim. The fact that consumers have been lulled into complacency about reading boilerplate gives businesses the cover they need to make the specific terms in boilerplate contracts worse for consumers.[25] Once businesses know that the terms in boilerplate will be enforced, limited only by unconscionability, and that consumers will not scrutinize the terms, they can include almost any terms they want. That means they are free to ensure a favorable position for themselves in the event of any dispute or to unilaterally change the terms to suit their interests should circumstances change. If the lack of real consent were not troubling enough, surely lack of consent coupled with opportunism by the drafters of the contracts should concern us.

Lucian Bebchuk and Richard Posner argue that businesses choose boilerplate terms that seem one-sided to allow themselves the ability to enforce those terms only against consumers who are abusing their

22. Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1706–10 (2008).

23. Alces, *supra* note 7, at 1524–26; Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 914 (2006); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 883 n.102 (2006).

24. Dammann, *supra* note 16, at 195–96; Wilkinson-Ryan, *supra* note 1, at 1758–60.

25. Alces, *supra* note 7, at 1527.

relationship with the business.[26] They posit that businesses do not and should not regularly enforce one-sided terms because doing so would cause their reputation in the consumer markets to suffer and consumers would avoid dealing with them.[27] Consumers, on the other hand, do not stake their reputations on their one-off transactions with businesses and so would abuse the relationship if businesses could not build in protections.[28] Bebchuk and Posner seem to contemplate enforcement of terms through expensive litigation or less expensive arbitration. Indeed, businesses should not want to generate reputations for suing their consumers over every term in a boilerplate agreement. But most disputes do not get that far. Most consumers comply when reminded or informed of a contract term that applies to their situation.[29] Many others do not know how to pursue the issue further or cannot afford to. They may just end their relationships with the business and move on. Bebchuk and Posner refer to reputational harms that will be visited on businesses that even informally enforce one-sided terms.[30] Many businesses are not swayed until a given consumer demonstrates a willingness and ability to impose a reputational penalty.[31] Businesses are often poised to stand on their rights until a consumer registers a public complaint over social media or in a public forum for reviews.[32] Research has shown that wealthier consumers have more success convincing businesses to cave on the informal enforcement of contract terms.[33] One-sided terms, then, can remain problematic for many consumers, particularly if those terms are important to businesses.

A. Legal Response

Boilerplate terms are regularly enforced, even if they obviously operate to the disadvantage of consumers and even while courts acknowledge that consumers do not read the terms and would be irrational to do so.[34] Judge Easterbrook, in two noteworthy cases, has

26. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–31 (2006).

27. *Id.* at 828.

28. *Id.* at 827.

29. Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 559–560 (2016).

30. Bebchuk & Posner, *supra* note 26, at 828.

31. Van Loo, *supra* note 29, at 569.

32. *Id*.

33. *Id.* at 579 (citing Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979)).

34. Gibson, *supra* note 6, at 254–59.

crafted the legal justification for enforcing terms that arrive after the completion of a sale, even when they operate against the interests of consumers.[35] In *ProCD, Inc. v. Zeidenberg*,[36] Judge Easterbrook parted ways with prior courts[37] and held that a shrinkwrap license for computer software was enforceable against consumers.[38] The primary justification for the enforcement of the shrinkwrap license is that the term itself does not violate positive law. The facts that the buyer does not receive the term before paying for the item and almost certainly does not read the terms do not disqualify the terms from becoming enforceable parts of the contract as long as the consumer has an opportunity to review the terms and cancel the deal if the terms are unsatisfactory.[39] In *Hill v. Gateway*, Judge Easterbrook wrote the opinion in the Seventh Circuit's enforcement of an arbitration term against consumer buyers of a personal computer.[40]

In both cases, Easterbrook emphasized the practical difficulties of explaining contract terms to a consumer over the phone or to a shopper browsing in a store. Better for everyone, Easterbrook says, if the consumer can review the terms in the comfort of her own home and then return the product if the terms are undesirable.[41] In addition to these convenience considerations, Easterbrook supposes that businesses would have to charge higher prices if they were forced to clear all terms with consumers before completing a transaction.[42]

The Easterbrook approach is controversial, and some argue that it contradicts the mandates of Section 2-207 of the Uniform

35. *Id.* at 263.

36. ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

37. *See, e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991) (finding that "box-top" standardized terms with warranty disclaimers received with a product after purchase were a material alteration of the contract terms at purchase under U.C.C. § 2-207 and should not be considered part of the parties' original agreement); Arizona Retail Sys. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993) (finding software licenses received after the initial purchasing agreements are not conditional acceptances of that agreement but proposals to modify the agreement); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972) (holding that order acknowledgment forms containing binding arbitration clauses received after an oral agreement is reached that materially alter that agreement are not binding on the purchaser); Winter Panel Corp. v. Reichhold Chems., Inc., 823 F. Supp. 963 (D. Mass. 1993) (giving significance to the timing of the receipt of terms, indicating that where received after the receipt of goods, terms will not be considered part of the agreement).

38. *ProCD, Inc.*, 86 F.3d at 1449.

39. *Id.* at 1450–53.

40. Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997).

41. *Id.* at 1149.

42. *Id.*

Commercial Code and the common law doctrine that came before it.[43] When a consumer does not receive the terms governing the contract until after they have received and paid for the product, it is impossible for them to have reviewed those terms, let alone consented to them, before parting with their money. Under Section 2-207, terms that are presented to a consumer after the initial offer and acceptance are to be treated only as "proposals for addition to the contract" and are not to be binding on a consumer.[44] Section 2-207 provides that such additional terms may only become part of a contract between merchants.[45] Easterbrook and those supporting his view, including the drafters of the Restatement of Consumer Contracts, look instead to Section 2-204, which allows for more flexible contracting, even with consumers. For instance, Section 2-204(2) allows that "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."[46] Applying this reasoning to rolling contracts such as the ones in *ProCD* and *Hill*, the contract is formed when the consumer does not return the product within the allotted time period, thereby accepting the terms that arrived in the product's packaging.

The reporters of the Restatement adopted the Easterbrook approach. In the reporters' comments, they explain that they tallied reported opinions around the country and found that a large majority adopted the Easterbrook position.[47] Accepting the enforceability of "pay now, terms later" (PNTL) contracts accepts the most extreme version of binding consumers to terms they have not, and could not have, consented to before parting with their money. The Restatement only requires that the consumer be informed at the time of payment that additional terms are forthcoming, that the consumer be able to review those terms, and that the consumer be able to return the product

43. James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 741 (2004) (asserting that Easterbrook was plainly incorrect in holding that 2-207 only applies to cases with more than one form); Colin P. Marks, *Not What, but When Is an Offer: Rehabilitating the Rolling Contract*, 46 CONN. L. REV. 73, 107 (2013) (arguing that Easterbrook's justification in *ProCD* on the basis of the applicability of 2-207 was wrong); Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 NW. U. L. REV. 403, 422–23 (2001) (compiling critiques throughout commentaries on Section 2-207).

44. U.C.C. § 2-207(2) (AM. LAW INST. & UNIF. LAW COMM'N 2021).

45. *Id.*

46. U.C.C. § 2-204(2) (AM. LAW INST. & UNIF. LAW COMM'N 2021).

47. RESTATEMENT OF CONSUMER CONTS. § 2 cmt. 15 (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

or terminate the contract within a reasonable time after the terms have been made available.[48] The Restatement firmly takes the position that boilerplate terms are enforceable as long as they are clearly and conspicuously disclosed.[49]

The arguments favoring enforcing boilerplate terms have focused on the inefficiency of asking consumers to specifically consent to each term. Boilerplate, both in the terms it contains and in its method of delivery, is supposed to decrease the costs of doing business and so keep prices low.[50] Businesses purport to need the terms in their forms in order to do business on a large scale at affordable prices.[51] It would be prohibitively tedious and cumbersome to obtain specific consent to each term, particularly in light of the fact that most consumers do not care about and will never be affected by the vast majority of boilerplate terms.[52]

Those arguing for the enforcement of boilerplate terms also note that the terms are limited in enforcement by consumer protection laws and the doctrine of unconscionability.[53] Unconscionable terms and those that defraud consumers will not be enforced under any circumstances.[54] The second half of the Restatement is devoted to protecting consumers from abuse of the allowances made in the first half. It provides for the unenforceability of procedurally and substantively unconscionable terms and terms that are presented using deceptive practices, and prohibits oral affirmations made to consumers from being nullified by boilerplate terms.[55] The focus, still, is on technical, though

48. *Id.* § 2(b)(1)-(3).

49. The comments detail all of the ways terms might be hidden or disguised and makes clear that such terms would not be enforceable. In order to be enforceable, terms must be easy for consumers to find and must be made available in obvious, predictable ways. *Id.* § 2 cmt. 9.

50. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting*, 83 VA. L. REV. 713, 720–27 (1997); Stephen J. Choi & G. Mitu Gulati, *Contract as Statute,* 104 MICH. L. REV. 1129, 1153–56 (2006).

51. Gibson, *supra* note 6, at 271–74.

52. Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1425–27, 1435–38 (2009).

53. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996); RESTATEMENT OF CONSUMER CONTS. reporters' introduction (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

54. Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations On the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1133–38 (2010).

55. RESTATEMENT OF CONSUMER CONTS. §§ 6-8 (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

not necessarily meaningful, disclosure of terms. The Restatement openly acknowledges that disclosure is ineffective and that consumers do not read, and so do not meaningfully consent to, boilerplate contract terms. Nevertheless, it maintains that those terms will continue to be enforced without taking any measures to require, or even encourage, consumer consent or choice.

B. Market Protections

Theoretically, the market should operate to protect consumers from strongly disfavored terms. The terms in a boilerplate contract should be reflected in the price of the good or service offered. If consumers think that particular terms are harmful, they will pay more for products offered by firms that do not seek to enforce those harmful terms. Then, market competition should force firms to abandon the disfavored terms or else drive firms that insist upon those terms out of the market.

There are a number of reasons market mechanisms seem not to work to protect consumers in these contexts.[56] A significant source of the market failure may be informational asymmetry. Because consumers are not aware of the terms, they do not base their purchasing decisions on them. In other markets with informational asymmetries, such as the securities markets, learned intermediaries such as professional analysts and institutional investors digest the relevant disclosures and make investment decisions that affect the prices at which the securities trade. Such protections are not available on consumer markets. While there are consumer watchdog groups that read some boilerplate terms and provide consumers advice about how to navigate particular purchases, they are generally third parties that run websites that many consumers do not even know about let alone visit on a regular basis. They are not making enough buying decisions on their own to influence prices or competition among firms. Even if consumers know about particular boilerplate terms, those terms may not be a salient consideration in the purchasing decision.[57] There are a number of attributes about a product or service that consumers will consider when choosing among firms. Boilerplate terms, particularly those that are

56. For a thorough economic rebuke of the theory, *see* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

57. *Id.* at 1207.

unlikely to affect most consumers, may simply not form the basis of that choice most of the time.[58]

Because consumers' misgivings about boilerplate terms or their preferences with regard to them do not have an effective outlet for expression in the market, businesses are not motivated to respond to them. The terms are beneficial to businesses, so businesses want to enforce them and they know they can. There is insufficient motivation for businesses to abandon terms that are favorable to them when most consumers do not realize the terms exist. So, all businesses in an industry will adopt a particular boilerplate term and even consumers who are actively trying to avoid a term, such as one that provides for binding arbitration, will have nowhere to go.[59]

Regulation is usually considered an appropriate response to exactly these kinds of market failures. Federal and state consumer protection laws could respond to these problems, but do not do so effectively. Those regulations tend to focus on disclosure and preventing

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58. *Id.*

59. Anecdotal evidence abounds that consumers sometimes try to avoid the binding arbitration terms found in car sales agreements and are unable to find someone from whom to buy a car who does not require a binding arbitration term to complete the transaction. *See* Stephanie Mencimer, *The Quest for a Car, Sans Arbitration Clause*, MOTHER JONES (Dec. 14, 2007), https://www.motherjones.com/politics/2007/12/quest-car-sans-arbitration-clause/ (describing the difficulty a reporter had in identifying dealership sales agreements that did not include arbitration clauses). Even Carmax requires that its customers submit to binding arbitration. https://www.citizen.org/news/its-not-just-general-mills-dozens-of-major-companies-use-unfair-fine-print-to-deny-people-their-legal-rights/; *see also Forced Arbitration Rogues Gallery*, PUB. CITIZEN. https://www.citizen.org/our-work/access-justice/forced-arbitration-rogues-gallery-references/ (serving as a protection watchdog site that maintains an active list of companies with arbitration clauses) (last visited Dec. 26, 2023).; Brian Fung, *Is Your Fitbit Wrong? One Woman Argued Hers Was – and Almost Ended Up in a Legal No-Man's Land.*, WASH. POST (Aug. 2, 2018), https://www.washingtonpost.com/technology/2018/08/02/is-your-fitbit-wrong-one-woman-argued-it-was-almost-ended-up-legal-no-mans-land/?noredirect=on&utm_term=.5af65d433731 (discussing Fitbit arbitration clauses precluding customers from pursuing class action lawsuits unless those customers opted out in writing); Elliot Harmon, *Forced Arbitration is a Bad Deal: Justice for Telecommunications Consumers Act Would Thwart Unfair Arbitration Clauses*, ELEC. FRONTIER FOUND. (May 3, 2016), https://www.eff.org/deeplinks/2016/04/forced-arbitration-bad-deal (discussing the prevalence of arbitration clauses in a wide range of consumer transactions); Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts*, CONSUMER REPS. (Sep. 29, 2015) https://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts.

fraud. To the extent disclosure is ineffective because consumers do not read the terms, those regulations do not solve the problem of lack of direct consent for boilerplate terms. In some situations, such as the regulation of credit cards, there is a regulatory race to the bottom as jurisdictions try to attract credit card issuers.[60]

Though consent to contract terms is important, some boilerplate may be sensible for assumed or relatively unimportant terms. Consumers have a general understanding of what terms to expect, and they are generally comfortable with most terms. Consumers who only plan to use software for personal purposes do not care much about the restrictions in a software license. Everyone assumes there is a return policy and that they are bound by it. Consumers know how and when to look for a return policy given their preferences and have experience adjusting their buying behavior based on that term. Consumers do not have the time or desire to weigh in on every term in every contract. The law should focus consumers' attention on particularly important terms and allow consumers to opt out of terms that might harm them or unduly surprise them.

II. TROUBLESOME TERMS

As scholars have expressed concern about boilerplate contracts and their effects on consumers, there are particular terms they have identified as being especially worrisome. Arbitration clauses, whereby the parties "agree" to submit all claims to arbitration, foregoing litigation in the court system, have been the subject of significant debate.[61] Similarly, complete waivers of liability have proven controversial, with states differing on whether to enforce them.[62] Terms that allow

60. Alces & Greenfield, *supra* note 54, at 1108, 1128–29.

61. *See generally* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016) (generally reviewing problematic terms involved in various consumer arbitration clauses); Leslie, *supra* note 3, at 269–91 (reviewing the prevalence and enforcement of arbitration clauses, as well as specific terms that are harmful to consumers); Blumenthal, *supra* note 15, at 708–15 (discussing issues with consumer willingness to pursue arbitration); *see generally* Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L & PUB. POL'Y 549 (2008) (identifying potential benefits offered by the arbitration process over standard litigation).

62. Doyice J. Cotten & Sarah J. Young, *Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools*, 17 J. LEGAL ASPECTS OF SPORT 53, 65–67 (2007) (discussing the refusal to uphold waivers in North Dakota, Ohio, Wisconsin, and Georgia courts, hesitance in enforcing the waivers in Idaho and Mississippi, and the

unilateral modification by the drafting business and those that surprise consumers with "hidden" fees[63] and costs also challenge prevailing notions of equity.[64] The Restatement also identifies potentially problematic terms in its comments, focusing its examples on terms that include privacy agreements, shrinkwrap and browsewrap terms, arbitration clauses, autorenewal clauses, personal injury liability and class action waivers, contractually determined "statutes of limitations" for consumer claims, discretionary and unilateral modification terms that allow businesses to change the terms that apply to a longstanding contractual relationship, warranty disclaimers, and early termination fees.[65]

Most of these potentially problematic terms fit roughly into four categories. The first category contains terms that seek to alter the operation of the legal system and the rights it usually provides consumers by waiving liability or causes of action, choosing alternative dispute resolution mechanisms, or choosing a particular forum for litigation. The second category contains terms that allow the business to change the terms of the contract at any time, without the specific consent of the consumer, simply by disclosing the changed term in writing and providing an opportunity for the consumer to terminate the contract. In the third category are terms that contain unexpected costs such as late fees and early termination fees. This third category could be stretched to include terms that limit the time a consumer has to object to or terminate a contract because a consumer could find herself financially obligated under the contract before she has the expected opportunity to exit. The fourth category includes terms that purport to limit personal liberties in unexpected ways that are not necessary to performance of the contract, such as terms that notify consumers that their personal or private information will be used by the company for profit

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prohibition of the use of these waivers in eleven more states by the courts and state legislatures); Douglas Leslie, *Sports Liability Waivers and Transactional Unconscionability*, 14 SETON HALL J. SPORTS & ENT. L. 341, 345–47 (2004) (further discussing the nuances of enforcement, considering whether the terms are specifically negotiated and what the status of the sued entity is, as well as the "'public function' test").

63. Alces, *supra* note 7.

64. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 649–51 (2010); Bar-Gill & Davis, *supra* note 2, at 19.

65. *See generally* RESTATEMENT OF CONSUMER CONS. § 1, cmt. 10 (AM. LAW INST., Revised Tentative Draft No. 2, 2022); *Id.* § 2, cmt. 7, 10-11; *Id.* § 5, cmt. 2-6; *Id.* § 6, cmt. 4(a)-(d), 7(b); *Id.* § 9, cmt. 2-3, 6.

and anti-disparagement terms that, prior to recent legislation discussed below, tried to penalize consumers for making negative comments about the business in a public forum.

In designing a framework for giving consumers choices about certain kinds of terms, these categories are a sensible place to start. That does not mean that any term that falls into one of these categories must be made optional on every contract to every consumer. Rather, these categories give us a way to identify terms that might be harmful or important and thereby help us consider whether they are appropriate targets of mandatory choice. Consumers may have made their peace with mandatory arbitration and liability waivers in a variety of circumstances, but such terms should be reviewed carefully by regulators and the use of those terms should be monitored.

A. Waive or Alter Rights in Legal System

Arbitration clauses have been controversial for quite some time now, and regulation in some states has responded by making arbitration procedures more favorable to consumers, or at least more protective of their rights.[66] Some object to arbitration as being skewed against consumers as businesses tend to choose the arbitrators and are able to obtain counsel that has more experience navigating the arbitration process.[67] Consumers may not even realize they should retain counsel in an arbitration proceeding.[68] Other scholars have completed studies that show that arbitration can be beneficial to consumers.[69]

66. Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 2000–01 (2014) (discussing state prohibitions against "carve-out" provisions in arbitration clauses in California and Arkansas); Erin O'Hara O'Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 138–39 (2012) (noting how California is a leader among states who seek to regulate unfair arbitration, causing some firms to modify their arbitration agreements when based in California).

67. David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 410–11 (2018) (discussing how repeat players hand-pick arbitrators who have an incentive to find disputes to fall within the scope of an arbitration clause and maintain favor with their repeat-player clients); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256–58 (2001) (noting limited data supports the theory that arbitrators tend to favor repeat-players).

68. One car dealer told your author that binding arbitration was the parties' attempt to work out any dispute "before getting lawyers involved."

69. Rutledge, *supra* note 61, at 556–65 (arguing that empirical evidence shows that consumers fare well in arbitration proceedings and that they perceive the process as handling their disputes in a balanced manner).

Some of the scholars who accept that arbitration can be a benefit to consumers express concern about clauses that waive class arbitration proceedings.[70] Class action waivers may raise additional concerns because consumers with small claims are left without a class dispute resolution venue and businesses are not held accountable for causing significant societal harms because the individual harms are too small to warrant individual litigation.[71]

While the class action waiver may be worrisome to legal scholars who believe that class actions are necessary to manage the externalities of business operations, it might not bother individual consumers. Consumers might be happy to self-insure against small losses, often up to the price of the product. If what the company would be getting away with by avoiding a class proceeding is a significant societal inconvenience, then there may be more effective ways to discourage the company from that particular behavior. Some would argue that class proceedings may not always confer societal benefits that justify their costs.[72] Direct regulation of harmful business activities may be more effective in some instances. Consumer reviews and consumers' ability to vote with their wallets to prefer better products may deliver the necessary message to businesses more efficiently. The appropriateness of class action waivers is beyond the scope of this Article. For now, it is important only to note that consumer choice about class action waiver contract terms may not be the way to eliminate those terms. Individual consumers are unlikely to opt out of a class action waiver for causes

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70. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 469–71 (2011) (arguing that while arbitration is not necessarily anti-consumer, coupling arbitration clauses with class action waivers raises significant concerns for consumer access to justice).

71. Rave, *supra* note 3, at 510 (discussing class actions as a valuable commodity possessed by consumers which businesses can preclude via waivers, limiting a claimant's ability to seek appropriate remedy).

72. Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, 8 J. BUS & TECH. L. 117, 130–50 (2012) (discussing procedural and substantive issues involved with class action proceedings under federal class action statutory schemes); Rutledge, *supra* note 61, at 572–73 (arguing that class actions do not necessarily confer significant recovery to claimants and still rely on deliberate actions by consumers); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 38 (2006) (discussing how the increase in class sizes in consumer fraud actions due to the elimination of a reliance requirement at certification could over-deter and chill market participation, or under-deter and reduce the effectiveness of disclosures).

of action that impose small individual costs. A collective action problem would prevent them from selecting against the term individually in order to avoid a larger societal harm.

Complete waivers of liability are contract terms that seek to significantly alter legal rights consumers would otherwise have. They also serve as another example of terms consumers frequently accept. It is quite common to ignore waivers of liability on the back of concert tickets, the tickets that allow us to park in garages or at airports,[73] and it is equally common to sign waivers of liability when engaging in a potentially dangerous sporting activity.[74] While consent does not seem to be a problem with many liability waivers, courts have differed on whether to enforce those agreements.[75] In many areas of the law, citizens are unable to waive rights and remedies.[76] Yet some courts enforce waivers of tort recovery by relatively unsophisticated consumers who sign such waivers under the influence of an optimism that assures them that nothing bad will happen to them. Perhaps consumers believe that even if something bad does happen, the waiver of liability will not be enforceable.[77] Still other courts prefer to see such waivers as

73. Wilkinson-Ryan, *supra* note 1, at 1751–53 (2014) ("Although there is surprisingly little empirical evidence on non-readership outside of the online context, contracts scholars regard non-readership as 'folk knowledge': a claim so obvious that data would be superfluous.").

74. *See* Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. CONTEMP. PROBS. 81, 84 (2012).

75. *Compare* Brigance v. Vail Summit Resorts, Inc., 883 F.3d 1243, 1262 (10th Cir. 2018) (finding in favor of a ski resort, holding that Colorado law permitted parties to contract away negligence claims in a recreational context), *and* Myers v. Lutsen Mts. Corp., 587 F.3d 891, 896 (8th Cir. 2009) (holding that the liability waiver language used by a ski resort was enforceable), *with* Strawbridge v. Sugar Mt. Resort, Inc., 320 F. Supp. 2d 425, 434 (W.D.N.C. 2004) (holding that a liability waiver was unenforceable under state law on the grounds that it ran contrary to substantial public interest), *and* Yauger v. Skiing Enters., 557 N.W.2d 60, 65 (Wis. 1996) (finding waiver invalid due to issues of clarity with the exact terms of the waiver and the significance of the document).

76. For example, when borrowing money, a borrower cannot waive the right to file bankruptcy in the future. Bank of China v. Huang, 275 F.3d 1173, 1177 (9th Cir. 2002) (holding that a prepetition waiver of bankruptcy provisions is against public policy). The right to the disclosures required by securities regulations also cannot be waived. 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.").

77. Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 42–45 (2011) (discussing how empirical research

impermissible because the law was designed precisely to protect people from optimism and to encourage those who are in the best position to avoid injuries to do so.[78] To allow waivers would be to undermine the very purposes of tort law without good justification, particularly where consumers are unable to take the precautions that would prevent their injuries.[79]

Giving consumers a choice about a term whose expected cost they cannot calculate may not lead consumers to make choices consistent with their interests. If a consumer does not know the likelihood of having a cause of action, she cannot price the waiver. Businesses may have a better idea about how likely liability is without a waiver, but they are unlikely to share that information with consumers. Consumers' acquiescence to liability waivers does not mean that those waivers are the terms that consumers would prefer or that consumers have made a judgment that those terms are in their best interests. Rather, the fact that consumers sign such waivers (or acquiesce to them in other ways) may simply indicate that consumers think they are unlikely to be affected by the waiver and further that they expect that personal insurance may cover whatever injuries they cannot remedy with litigation.

Binding arbitration terms, class action waivers, and liability waivers are not all necessarily good or bad for consumers. The context in which each term is presented matters. Courts are well-equipped to judge such terms on a case-by-case basis, applying principles such as unconscionability and fraud or deception. Consumers may indeed be rational to ignore those terms much of the time.

But there are cases in which consumers can and should make informed choices on their own about whether the terms are acceptable. Terms that undermine legal rights or protections should not always be mandatory, presented on a take-it-or-leave-it basis. Consumers may have preferences regarding terms that waive legal rights that they do

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suggests that persons are generally less likely to interpret standard form agreements as strictly enforceable or requiring compliance when compared to negotiated contracts).

78. *See Strawbridge*, 320 F. Supp. 2d at 433 (noting how public policy will not permit significantly regulated activities that hold themselves out to the public to waive liability given the duty of care owed by the drafting entity).

79. One court wondered, in particular, what a skier could do to make a ski lift safer. *See* Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 44–46 (Or. 2014) (acknowledging that while a skier has some control over their activities, an overbroad liability waiver could release a defendant from liability for factors beyond a skier's control, "such as riding on a chairlift").

not have a means to express. They may be willing to pay more to opt out of some terms that alter their legal rights and remedies. All else being equal, there are significant policy benefits to allowing consumers to decline terms that undermine legal protections they would otherwise be afforded without walking away from a commercial transaction entirely; not least of which is the judgment our society has made to provide those rights and protections in the first place.

Consumers may consent to a binding arbitration term if the alternative is losing the deal entirely. But they might be willing to pay half or one percent more to opt out of the binding arbitration term. Consumers, judges, and regulators may be able to determine which terms are potentially significant enough to warrant individual consumer choice. Giving consumers meaningful choices about significant terms may help to price products and services more accurately and may improve the market's ability to communicate consumer preferences to businesses.

B. Unexpected or Unexplained Fees & Costs

The efficacy of some contract terms rests on their being concealed from consumers, or at least obscured from the consumer and made difficult to find or understand.[80] Banks have long been criticized for imposing "hidden fees," and credit cards notoriously change interest rates or other terms without meaningful notice.[81] Such "guerilla terms,"[82] so named by Peter Alces, can spring up, seemingly out of nowhere, and bite unsuspecting consumers. Examples include fees associated with early termination of contracts, long distance telephone rates in hotels, credit card interest rate changes, and the crediting of credit card payments when charges to the card are subject to different interest rates.[83]

Such terms defy notions of consent. Their very function is to prevent consumers from accurately pricing the contract. Obscuring fees and the full costs of the benefit of the bargain makes it impossible for consumers to make rational, well-informed decisions about the primary agreement, let alone ancillary terms and conditions. Guerilla terms also do the most harm to the consumers who can least afford

80. Gabaix and Laibson call this "shrouding" of contract terms. *See* Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 507 (2006).

81. *See* Horton, *supra* note 64, at 623–30.

82. *See* Alces, *supra* note 7, at 1512.

83. *See* Bar-Gill & Davis, *supra* note 2, at 12–16.

them.[84] Not only are those without means more likely to trigger the terms either because of lack of sophistication or an inability to pay bills on time, but the additional costs are more likely to inflict a financial hardship on those consumers.[85]

Regulation in recent years has moved to bring terms detailing additional fees into the open.[86] The Truth in Lending Act was modified under the Dodd-Frank Act to require clear, conspicuous disclosure of the fees associated with mortgage loans.[87] Credit card disclosures are required to be more explicit, drawing attention to terms related to interest rates and fees. The Consumer Finance Protection Bureau has taken steps to require banks to disclose their fees more prominently.[88] The Restatement also focuses on disclosure, noting that automatic renewals of contracts must be clearly disclosed at the outset.[89] Any disclosure is better than no disclosure and conspicuous disclosure is better than fine print, but mandatory disclosure still falls short of meaningfully informing consumers of the choices they must make and the terms they are agreeing to.[90]

There are choices to make regarding how additional fees will be factored into a contract. The fees and contract options that impose additional costs could be discounted by the probability they will occur and factored into an all-inclusive price. Consumers could choose which options they would like to have available to them and which optional terms they wish not to take advantage of under any circumstance, or they could choose a (higher) base price with no additional

84. *See* Alces, *supra* note 7, at 1525 (discussing credit card users, with the most sophisticated consumers benefiting the most from credit card reward programs while the least well-off credit card users subsidize all others as they do not have access to the advantageous terms in rewards programs and are more likely to incur interest on maintained card balances).

85. *Id.*

86. Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1305–06 (2017); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1372–73 (2015).

87. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

88. 12 C.F.R. § 1025.1(a) (granting authority to implement these regulations under the Federal Truth in Lending Act); 12 C.F.R. §§ 1026.5-1026.6, 1026.9 (outlining varying disclosure requirements for Open-End Credit offerings).

89. RESTATEMENT OF CONSUMER CONTS. § 7 cmt. 4, illus. 8 (AM. LAW INST., Revised Tentative Draft No. 2, 2022). The Restatement goes beyond mere disclosure and seeks to render unenforceable excessive termination fees. *See id.* § 3 cmt. 6, illus. 13; *id.* § 10, cmt. 6.

90. BEN-SHAHAR & SCHNEIDER, *supra* note 12, at 7.

fees possible. Consumers can make meaningful choices when fees and hidden costs are made salient. Of course, businesses have incentives to obscure additional fees and costs when the contract will be more profitable to them if the consumer does not appreciate its likely full cost from the outset. Businesses' desire for opacity should make us suspicious of those strategies. Simple disclosure may not be enough. Forcing consumers to make specific choices about additional fees and costs will allow them to truly learn the cost of the contract they are entering into and is a more reliable way to make once-hidden terms salient parts of the decision to contract.

C. Unilateral Modification

In addition to imposing poorly understood fees, many businesses reserve the right to unilaterally modify the terms of their services.[91] While they provide notice of these unilateral modifications, that notice is seldom more effective than other disclosures of terms.[92] A consumer's options upon notification of the change are usually limited to abiding by the terms (their consent to do so signaled by their continuation of the contract) or terminating the contract.[93] Again, the consumer may take it or leave it, except now they have to "leave" a service they have relied upon for some time. Shopping for another provider is often more expensive than it would have been at the outset.[94]

Unilateral modification is anathema to notions of mutual contractual consent. It allows the party with the modification right to essentially enter an illusory promise that it can enforce against the other party.[95] It must offer the contract on these terms, unless it does not feel like it, or unless other terms would be better for it.[96] The idea that the consumer has "consented" to the unilateral modification right is not

91. *Id.* at 8–16; Horton, *supra* note 64, at 649–51; Alces & Greenfield, *supra* note 54, at 1099–1108.

92. Horton, *supra* note 64, at 649–51.

93. *Id.*

94. *Id.* at 650–51 (noting amendments impose transactional search costs as well as new service fees, leaving consumers with little alternative but to accept a change).

95. RESTATEMENT OF CONSUMER CONTS., § 5 cmt. 4 (AM. LAW INST., Revised Tentative Draft No. 2, 2022); Horton, *supra* note 64, at 649–53.

96. *See* Horton, *supra* note 64, at 651–53 (discussing the meaninglessness of "shopping" for unilateral amendments which offer an infinite range of terms given the drafting party's ability to change its position at will).

very meaningful if that party has no idea what the modification might be or when or whether it will occur.[97]

The Restatement approach takes these concerns seriously and offers both procedural and substantive protections to consumers facing business modifications to their contracts.[98] It requires that a business seeking to modify standard terms disclose the change to the consumer and give the consumer a reasonable time period during which she can review and either accept or reject the new terms.[99] The consumer must also have the opportunity to continue the relationship according to the original terms.[100] Modified terms will not be enforceable if they undermine the basis of the original bargain or if the consumer does not have the ability to terminate the contract "without unreasonable cost, loss of value, or personal burden."[101] This last protection directly addresses a real problem with unilateral modifications presented on a take-it-or-leave-it basis. Consumers may assent to terms because termination of the contract requires them to lose significant value or because switching costs are prohibitive.

The procedural protections provided by the Restatement could be sufficient if consumers enforce them. Practically speaking, it is possible that nothing will change. Consumers can still "assent" to modifications through silence. A consumer who receives a notice of a change of terms in the mail could still ignore it, open it, and fail to read all of it, or simply miss the deadline to reject the terms and still be bound by the modified terms without appreciating the consequences. If the consumer discovers that the change is burdensome or that they feel forced to accept the change because of the difficulty of finding an alternative contract, the law may help them. But that, by itself, does not guarantee a meaningful choice.[102] If all industry competitors adopt the new term, a consumer would have no alternative if she wanted to continue to enjoy a particular product or service.[103] Even effective remedies are expensive to seek and most consumers restrict their agency to the product market rather than pursuing litigation.

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97. Bar-Gill & Davis, *supra* note 2, at 8–12 (discussing the erosion of the mutual assent requirement for modifications and the freedom drafters have to modify these terms with a free hand for the duration of the contract).

98. RESTATEMENT OF CONSUMER CONTS. § 3 (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

99. *Id*.

100. *Id*.

101. *Id*.

102. Alces & Greenfield, *supra* note 54, at 1137.

103. *Id.*

The law may not be able to do more for consumers than the Restatement suggests. The Restatement provides mechanisms to invalidate modifications that impose unreasonable burdens; it requires clear notice and a reasonable opportunity for consumers to respond. It even acknowledges that termination of a contract may impose unreasonable costs on a consumer and protects consumers from that consequence. The substantive protections, in particular, take significant steps to guard consumers against unwelcome surprises. Businesses must be able to change some terms that apply to consumers in long-term agreements. Prices, in particular, are expected to increase over time. Under the Restatement provisions and the application of the common law, businesses must inform consumers of those changes and give them some choices. For most terms and under most circumstances, those protections may be sufficient.

But, for essential terms, ensuring meaningful choice, to the extent possible within an industry, is important. Modifications of essential terms should be presented as a menu of at least two viable options. If the price is to increase, the increase should track inflation or include new services. If it is possible to provide some level of service at the original price, consumers should be able to choose to take a downgrade rather than pay the increased price. To the extent it is commercially feasible, modification of significant terms should not be imposed on a take-it-or-leave-it basis.

D. Limit Personal Liberties in Unexpected Ways

It is, perhaps, uncontroversial to regard with suspicion terms that limit or impose upon personal liberties in unexpected ways. Such terms allow businesses to penalize consumers for the exercise of personal liberties that do not obviously interfere with the contract. For example, anti-disparagement clauses fined consumers for posting negative reviews about the business online.[104] It is not obvious that a consumer's right to share an opinion about their experience is part of what they give up when they pay to stay at a hotel or dine at a restaurant. Congress agreed and the Consumer Review Fairness Act now prohibits anti-disparagement terms.[105]

104. RESTATEMENT OF CONSUMER CONTS. § 5 cmt. 4d, illus. 12 (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

105. Consumer Review Fairness Act, 15 U.S.C. § 45b(b) (2016).

Terms that unexpectedly invade a consumer's privacy are also subjects of concern.[106] While the scrutiny of privacy policies has helped ensure that consumers are better informed about those terms, we do not yet have a coherent doctrine that addresses all terms that might go beyond the basic contractual relationship to try to dictate consumers' behavior more broadly. Substantive unconscionability is available to address many such terms,[107] but as businesses provide services that operate by learning more about the personal details and habits of consumers, personal liberties may become the subject of real bargains and consumer choice about such terms may become important.

In sum, certain kinds of terms have the potential to be particularly problematic. Sometimes, significant terms will fall within one of the categories of troublesome terms and regulation may be necessary to ensure meaningful consumer choice about those terms. Some terms may be appropriately banned entirely. Some significant terms that lend themselves to exploiting consumers' relative weaknesses and lack of information should be set aside for separate, affirmative consent.

Businesses are already giving consumers "menus" of differently priced options when choosing exactly what product or service to purchase. The next Part examines some of those choices and shows how technology has made the compartmentalization of the buying

106. Invasions of privacy such as location tracking (particularly unannounced location tracking that is not essential to the use of the service) and use of private information for business profit have been the subject of intense scrutiny in recent years. *See* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1647–49 (2017) (discussing how apps like Uber continue to track users and collect personal data through their mobile app, even after users discontinue their use of the service); Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 624–28, 669–70 (2014) (discussing the significant level of personal data collected in exchange for the "free" services offered by Facebook, Google, and countless applications, as well as paid services); David Meyer, *Google and Ad Industry Accused of "Massive" Abuse of Intimate Personal Data*, FORTUNE (Jan. 28, 2019, 6:35 AM), http://fortune.com/2019/01/28/google-iab-sensitive-profiles/; Ben Popken, *Google Sells the Future, Powered by Your Personal Data*, NBC NEWS (May 10, 2018, 4:30 AM), https://www.nbcnews.com/tech/tech-news/google-sells-future-powered-your-personal-data-n870501; Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N. Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html.

107. RESTATEMENT OF CONSUMER CONTS. § 6 cmt. 4 (AM. LAW INST., Revised Tentative Draft No. 2, 2022).

experience not only possible, but easy for consumers to navigate and understand. Consumers are making real choices about the terms and prices of their agreements with a number of companies. Any claim that it is impractical to do so is being convincingly disproven every day.

III. CONSUMER CHOICES

The Internet is a vibrant hub of commercial activity. Eighty-five percent of Americans and ninety-six percent of Americans ages eighteen to twenty-nine own a smartphone.[108] Access to the Internet is ubiquitous. Even those without smartphones have computers at home or are able to access the Internet at local public libraries. In 2021, ninety-nine percent of young adults used the Internet, with the trend moving upward for all age groups.[109] Online shopping is often easier and more convenient than shopping in brick-and-mortar stores. When shopping online, consumers interact directly with businesses without relying on a salesperson intermediary. With a few clicks, consumers can customize their experience, choosing different elements of a product or service, seeing the individual price of each element, and arriving at a total package and price that fits the consumer's desires and budget.

Airlines have led the way in disaggregating the costs of air travel and allowing consumers to choose exactly what they want their in-flight experience to be. Where a consumer used to purchase an airline ticket that included an assigned seat on the plane, free beverage and snack service, space in the overhead carry-on bin, and at least one checked bag, airlines now offer a base price that does not include many of these amenities and then allow consumers to add services à la carte. Airlines generally began this trend toward à la carte service by charging extra for checked bags.[110] Refundable tickets have always cost more than non-refundable fares. Now, depending on the airline, the base fare may only guarantee a non-refundable seat somewhere on the

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108. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), http://www.pewinternet.org/fact-sheet/mobile/.

109. *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

110. *See* Lori Aratani, *It's Buyer Beware as Big Airlines Embrace 'Basic Economy' Fares*, WASH. POST (Mar. 12, 2018, 5:21 PM), https://www.washingtonpost.com/local/trafficandcommuting/its-buyer-beware-as-big-airlines-embrace-basic-economy-fares/2018/03/12/84c71282-2164-11e8-94da-ebf9d112159c_story.html?utm_term=.c24a95f6c7fc; Roberto A. Ferdman, *Airlines Are Making Billions of Dollars Off Your Checked Bags and a la Carte Meals*, QUARTZ (Oct. 30, 2013), https://qz.com/141092/airlines-are-making-billions-of-dollars-off-your-checked-bags-and-a-la-carte-meals/.

plane with only the space under the seat in front of the passenger for a carry-on bag. Passengers must pay extra for a reserved seat with prices differing based on the location of the seat in the plane. Checked bags, additional carry-ons, snacks, beverages, changes in flight schedule, Wi-Fi access, and how soon the passenger may board the plane or whether they can move through security more quickly are amenities that can be purchased for an additional charge.[111] Customers booking fares online can select among the different classes of tickets as they book and prices for additional amenities are listed when the amenities are offered. This process makes the prices of the amenities salient to consumers and it gives them more control over the ultimate price they pay because they do not have to buy elements of the service that they do not want, or do not value as highly as the airline does. If airline passengers are able to make specific choices about the amenities they buy and some of the terms that will govern their agreement with the airline, then they should be able to make choices just as easily about a variety of other terms in the contract, such as those addressing choice of law and arbitration.

The airlines provide the most obvious, but not the only, example of à la carte contracting where consumers can easily make choices about the terms of their agreement while completing a purchase online. Online retailers such as Amazon and a rival firm owned by Walmart that was called Jet (and is now back to just being Walmart) have adopted similar practices on a much smaller scale. For instance, if an Amazon customer is ordering a product that she needs regularly, such as toilet paper or dog food, she can opt to "subscribe" to regular, automatic delivery of the product and receive a five percent discount on each purchase of the item.[112] The commitment to buying the product regularly from Amazon is worth a small discount to Amazon and the customer will receive the product without having to remember to order (and so without taking the risk of forgetting). Seen another way, the subscription is an automatic renewal, a term that is beneficial to the business, that the consumer enjoys a discount for choosing. Jet

111. EasyJet, a British discount airline, sets out its fee schedule here: http://www.easyjet.com/en/terms-and-conditions/fees. Legacy airlines, such as Delta, have also adopted more à la carte fee structure with basic economy seats including fewer amenities than they have in the past. *See Fares & Discounts*, DELTA, https://www.delta.com/content/www/en_US/traveling-with-us/planning-a-trip/booking-information/fare-classes-and-tickets/fares-and-discounts.html (last visited Sept. 25, 2023).

112. *Subscribe & Save*, AMAZON, https://www.amazon.com/b?ie=UTF8&node=15283820011 (last visited Oct. 1, 2023).

took this idea a step further during its run and allowed customers to opt out of free returns in exchange for a small discount.[113] For products such as clothing, the discount for opting out of returns might not make sense, but consumers may be eager to take the discount and forego returns on consumables such as paper products and bathroom supplies.

The mechanisms of these choices show how easily consumers can make choices about the terms of their contracts and how easily businesses can price those terms. Businesses have arranged à la carte contracting to maximize their returns, encouraging consumers to pay the prices the businesses want them to pay for the services the businesses want them to buy. As online contracting becomes more common, consumers are better equipped to consider and manage a variety of decisions as part of a purchase decision. Separately considering parts of the transaction makes those different pieces salient to the consumer, and pricing them individually focuses the consumer's attention on her valuation of the element at issue. The choice infrastructure that is already in place can help consumers make particular choices about essential contract terms in a variety of settings.

Nevertheless, consumers may tire of feeling like they have to "pay extra" for advantages that used to be "included." The problem is that consumers do not realize the elements of the prices they are currently paying because most of them have never been itemized. Revealing the valuations of particular terms might help consumer decision making and it might also lead to fewer terms overall. If a term cannot be reasonably priced, or the price of opt out is very low, businesses might not think the cost of the opt-out process is worthwhile and eliminate the term entirely. Fewer terms overall would be another beneficial change. Most consumer transactions are fairly simple and the more they can stay that way, without pages of fine print for fairly simple circumstances, the more consumer contracting can be based on meaningful consent. Gathering information about what terms are necessary and which are important enough to make optional may result in businesses withdrawing some terms if consumers are frequently opting out (or businesses fear they will).

IV. MARKET TESTING BOILERPLATE

The FTC should require that certain terms be made optional in consumer contracts. Not all boilerplate terms are worth the time and

113. *Jet.com Return Policy, Buyers Remorse, and Jet Remorse Fee SAVES You!*, ENZA'S BARGAINS (Dec. 16, 2016), https://www.enzasbargains.com/jet-com-return-policy/.

attention that would be required to make them optional, so if a regulatory scheme is going to require that some terms be optional, it would be important to discover what kinds of choices would be valuable to consumers and businesses. The FTC should investigate to understand the market and consumer preferences before requiring that certain terms be made optional (for a price) through regulation. Significant terms vary by industry, but are common within industries. The FTC can consult with the regulated entities to determine which terms should be made optional and perhaps even engage in some experimentation to figure out how making terms that are now boilerplate fully optional would work.

This Part of the Article examines details and potential problems in implementing regulation of optional terms, such as how consumers are likely to respond to choice and how to account for cognitive biases, which terms to make optional, and pricing. The purpose of making some terms optional is to help consumers arrive at contracts with businesses that are based in their consent and that represent what they are willing to pay for a given good or service given the applicable terms. Optional terms will be more salient than boilerplate and consumers will be able to register real preferences about what terms apply and what they are willing to pay for a given contract, thus allowing businesses to compete on the basis of the full package they are offering consumers. This transparency should allow greater market efficiency and better outcomes for consumers without resort to litigation or additional regulatory intervention.

A. Cognitive Biases & The Benefits of Choice

Consumers often choose the business-preferred term when given an option[114] and are usually willing to agree to a contract containing the business-preferred term. If they were not so willing, the terms could not be as ubiquitous as they are. Path dependence, optimism, rational apathy, and collective action problems all explain why consumers continue to acquiesce or even affirmatively agree to terms that make contracts more expensive for them or curtail their rights in meaningful ways.[115] That is, consumers have become numb to boilerplate terms, accepting them without much thought, (over) confident that

114. *See* Wilkinson-Ryan, *supra* note 1, at 1748–53.

115. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375–76, 1400 (2004); Wilkinson-Ryan, *supra* note 1, at 1749, 1759–60; Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 709–30 (2011).

they will not cause problems. Overcoming those cognitive biases will require more than simply posing a choice. When considering how firms will be allowed to provide options, the FTC must carefully consider the best ways to frame the choices so as to explain the terms fully without tipping the consumers in one direction or the other.

The purpose of making potentially troublesome terms optional is to allow consumers to honestly appraise their circumstances, needs, and preferences and make the choice that suits them personally. Oren Bar-Gil has suggested giving consumers the information they need to understand the likelihood that they will incur a fee (such as a late fee), perhaps even by disclosing an expected cost of the contract in addition to the base price.[116] Consumers should also learn how terms operate over time. How often are terms such as interest rates modified? What kind of notice do consumers receive of the modification? How much do the rates usually increase when they change? Exactly how is an automatically renewing contract cancelled? More and more autorenewal terms can be cancelled at any time with little effort,[117] but some still require consumers to call a person who will try to talk them out of canceling or, worse yet, require that cancellations be made in writing.

While allowing consumers to make a choice serves their preferences, it does not necessarily protect their best financial interests. If the goal of regulation is to protect consumers from business-preferred terms, then prohibiting those terms is more likely to achieve that end than allowing consumers to opt out of them. Indeed, given the willingness to pay/willingness to accept gap,[118] consumers may be more likely to choose the business-preferred term if they are given a discount to do so. Businesses could lure consumers into a number of improvident terms by offering discounts (from inflated prices). With businesses in a better position to understand and take advantage of consumers' cognitive biases than consumers are, providing consumers

116. Bar-Gill, *supra* note 115, at 1419–20; *see also* Bar-Gill & Davis, *supra* note 2, at 27–29.

117. Apple makes this easy by keeping many subscriptions listed in one place so that users can cancel them with a click at any time. *If You Want to Cancel a Subscription from Apple*, APPLE (Jan. 18, 2023), https://support.apple.com/en-us/HT202039.

118. Janneke P.C. Grutters et al., *Willing to Accept vs. Willingness to Pay in Discrete Choice Experiment*, 11 VALUE IN HEALTH 1110 (2008) (explaining that participants in experiments are more willing to accept compensation to forego obtaining a benefit than they are willing to pay an economically equivalent amount to receive the benefit).

with a choice may do more harm than good if no rational consumer should choose the term. Ultimately, regulators have to make a decision about how paternalistic to be. They should not pretend that mandating a choice, presented in any way a business chooses, is the same as freely allowing a consumer to choose the course of action that maximizes the consumer's return. Cognitive biases afflict us all. Any regulation should take an understanding of those biases into account.

When consumers are given the opportunity to make a meaningful choice, market mechanisms are likely to function better to protect them.[119] Russell Korobkin has argued that if a number of consumers understand a provision and make thoughtful decisions, accompanied by an appropriate price adjustment, then concerns that a term is socially inefficient or undesirable are likely to diminish or disappear.[120] Providing options about certain significant terms will make more terms salient to consumers. As consumers practice making these choices over time, they will become more sophisticated contracting partners. Market forces will be better equipped to respond to particular terms and their pricing as consumers gain an appreciation for the universe of terms available, what those terms mean, and how best to respond. Making important terms salient and giving consumers priced options will allow businesses to compete on the complete package they offer consumers and will make market choices among products and services more meaningful.

Practically speaking, asking consumers to make a few more choices would not be difficult. When contracting online, choices about a few more terms would just mean a few more clicks. At the register, consumers are asked if they want a bag or if they want to make a donation, buy a warranty, sign up for a rewards card, etc. A few more questions, accompanied by the necessary (accurate) explanation, would not impose a hardship on the completion of the deal. The more complex and significant the transaction, as we move from television purchase to car purchase, for example, the more choices a consumer must already make. New choices would not necessarily impose a great burden on the process as long as businesses (in complying with regulation) emphasize the correct terms.

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119. Korobkin, *supra* note 56, at 1207 (arguing that market mechanisms operate well to protect consumers from inefficient terms that are salient to consumers' decision making).

120. *Id.* at 1233–35.

B. Which Terms to Make Optional

The key to unlocking many of the benefits to consumer choice is in choosing the right terms to make optional. Boilerplate is still efficient, in large part. Consumers assume that many of the terms contained within boilerplate terms are there and apply and either do not care about others or are happy to agree to them. The vast majority of boilerplate terms will never even come up in the vast majority of consumer transactions. It is important not to throw out all of the benefits of boilerplate with the bathwater.[121] But some terms are significant and are points of the deal that consumers would care about or that would significantly affect them. Such significant terms should be optional whenever possible. Consent to them is feasible and would go a long way toward both legitimizing their enforceability and helping the contracts themselves reflect consumer preferences over time.

In the long run, if there are terms the law or consumers deem significant, regulation could require firms to make those terms truly optional. Businesses would have to price the option for individual consumers (charge a consumer more to opt out) or could make the opt out appear free but build the risk of opt out into their overall price structure to spread the cost among all consumers. Deciding which terms should be optional would be difficult at first and the regulated terms may change over time. The terms identified by legal scholars and discussed in Part II, above, would provide a starting point as would the European Union (EU) regulations addressing boilerplate.

The EU regulations have identified the kinds of terms that should be specifically consented to, defining those terms as those that "cause[] a significant imbalance in the parties' rights and obligations arising under the contract," including, but not limited to, terms "excluding or limiting legal liability of a seller . . . in the event of the death of a consumer or personal injury to the latter," "automatically extending a contract of fixed duration where the consumer does not indicate otherwise," and "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract," among others.[122]

Consumers should be able to make specific choices about terms that can contribute to the overall cost of the contract. Cost is always

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121. Sarah Rudolph Cole applies this metaphor to arbitration terms in particular in *On Babies and Bathwater: The Arbitration Fairness Act and The Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 469–70 (2011).

122. RADIN , *supra* note 12, at 234–36 (quoting EUROPEAN COMMUNITY COMMISSION DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS (1993)).

an important consideration in choosing among products, and transparency about all elements of price, even those that may not apply in every case, is the only way consumers can make market choices that honor their preferences. Terms that can add to a base price or impose additional fees should be designed so that consumers can understand them and use them in predictable ways.

Consumers should also be able to make choices about terms that affect their rights to legal recourse. Businesses can price these choices so that they are indifferent between the available consumer choices. But consumers should not unwittingly be forced into a contractually-defined legal regime.

Unconscionability will remain an important safeguard even when consumers can more directly make more choices about contract terms. Consumers can and do voluntarily agree to contract terms that are substantively and procedurally unconscionable.[123] Businesses may be in a better position to appreciate the full consequences of the choices, and consumers may agree to terms that do not serve them well because they are desperate. Because of a variety of behavioral biases and personal circumstances, choice is not a perfect protection for all consumers. But it can be a significant protection for many consumers.

C. Pricing

Businesses should have little reason to object to the proposed regulation because choice would be mandated, not particular terms themselves, and businesses would be able to price the optional terms. Businesses should be able to set the price such that they are indifferent to the choices of individual consumers. Not all consumers will opt out of the business-preferred term, even when the term is explained to them and even if they realize that the term will favor the business's interest if it is invoked. Many consumers might prefer to take their chances and save the money on the opt out. They might have other hedges or protections against the risk involved or may understand the industry and contract well enough that they think they can avoid application of the term. In the case of terms that are avoidable, more sophisticated consumers may be able to avoid them reliably. Making some boilerplate terms optional would not necessarily, or even likely, constitute a

123. Korobkin, *supra* note 56, at 1225–34 (discussing the functional limitations consumers have in decision-making when reviewing standard form contracts and ultimately manifesting their assent, usually requiring them to make choices with limited information given the breadth of contract language experienced in day-to-day life).

loss for business. In fact, for better or worse, it may help businesses identify potentially difficult customers.[124] Consumers who would pay more for a product to opt out of arbitration may be identifying themselves as litigious, for example. Businesses can use such information to improve their pricing more generally.

Because of consumers' behavioral biases and informational asymmetries between businesses and consumers, pricing would pose a serious difficulty that regulation would have to address. There is a risk that businesses would overprice the opt out, thereby preventing consumers from opting out just by making it unreasonably expensive to do so. Sellers would have to bear the burden of appropriately pricing the option for regulated terms and there would have to be a mechanism to punish sellers for deliberately overpricing the options.

Sellers may find it difficult to accurately price a term themselves as they are unaccustomed to precisely calculating a particular term's economic consequences. Regulators would have an even harder time finding the right values to plug in to do the math necessary to determine whether a price is appropriate. One way to solve this problem may be to require businesses to make the terms optional without specifically pricing them, at least at first. Businesses can wrap the expected cost of consumer opt out into their total price and continue to compete on price for the package of the product and the terms that go with it. That would give businesses incentives not to overprice the opt out. But it may lead businesses to try to use choice architecture to disguise the optional term or to make it more likely that consumers will not opt out. Regulators should be able to respond to attempts to hide the ball more easily than they could be sure of the accuracy of any given price. Allowing opt out from specific terms without attaching prices to those terms will also help businesses gather information over time about what terms consumers prefer and what the costs of opt out are to the business.

Another challenge pricing presents is that businesses themselves may not know how to price particular contract terms. They might not know the probability that a particular term will be invoked or the average costs of those consequences. Businesses are certainly in a better position to price those terms than consumers. Insurance companies manage to price a variety of risks based on data provided to them by businesses. It seems likely the necessary information is available. Market forces could help fine-tune pricing within an industry. If businesses think certain terms are necessary, they must have some idea of

124. Bebchuk & Posner, *supra* note 26, at 834–35.

their value. Smaller businesses, with their much smaller sample sizes, will have the hardest time pricing such risks, but smaller businesses are less likely to rely on voluminous boilerplate terms. Just as many consumers happily ignore boilerplate terms, I suspect many businesses find those terms are also largely unnecessary. If one result of offering consumers choices is a decline in the number of boilerplate terms insisted upon, then that would be a benefit itself.

Eventually giving sellers more latitude in how they present optional terms and how they structure the choice may make them more willing to comply and less resistant to the change. Recall that an important part of allowing businesses to price an option is that appropriate pricing should make the business indifferent between the available choices consumers can make. If, even with appropriate pricing, businesses still hope that consumers will choose the business-preferred option, they can adjust their framing of the option. According to the literature examining willingness to pay versus willingness to accept, the business-preferred term may be selected more often if accompanied by a discount to opt in.[125] Framing the option that way and with appropriate pricing may ease some of the burden businesses feel in making a term optional. That presents the same concerns we face now, though, that businesses will manipulate consumer behavior in the businesses' favor.

D. Objections

While this Article's proposal may seem too simple in some ways—perhaps it is obvious we should just ask consumers which boilerplate terms they object to and give them a way out—there are many reasons boilerplate endures, despite its problems. From a political economy perspective, the most significant might be that businesses would strenuously object to the change. Businesses that use boilerplate like it. They are able to enforce the terms they prefer without having to bargain for them, and they are able to cheaply and efficiently apply those terms to all of their transactions. Having to arrange to allow consumers to opt out of some terms, perhaps some terms that are particularly beneficial to the business, could be costly, even if priced appropriately. Some businesses might not think they can operate without some of the terms that are now mandatory parts of their contracts, still others may not want to share the information that pricing of particular terms might reveal. Business interests are represented by powerful lobbies. They have significant political power, so regulating over their

125. Grutters et al., *supra* note 118.

strenuous objections can be politically difficult. Even if some terms are made optional, consumers might not succeed at choosing the terms that optimize their value from the contracts because of the cognitive biases mentioned above. Finally, the FTC might not have the information it needs to regulate effectively. It may need to find ways to learn more about which terms should be optional in which industries, what appropriate pricing would be, and how consumers respond to the choices. This Section will consider these objections and will offer ideas for overcoming them.

1. Business Secrecy

Businesses are sharing information when they price a particular term or aspect of their service. They are sharing what portion of the total price a certain element makes up, they are revealing how important a particular term is to them, and they are revealing how they value competition on the basis of that term. Quite simply, businesses may object to having to share that information with consumers and their competitors (and perhaps even regulators). For example, in determining the price at which a consumer could opt out of a liability waiver, a business will have to reveal something about its expected litigation costs, so too the risk of injury, how serious those injuries would be, and how frequent it expects litigation to arise from injuries. That might not be information it wants to share with customers or regulators. In another example, when sharing an indifference point for an opt out from the use of consumers' private information, the business would reveal how much it values the consumers' private information, which will provide insight into how the business uses the information and to what extent it expects to profit from it. Such information might drive consumers to demand different prices overall or may increase the importance of some terms above the current level. Competitors might learn something from the information that allows them to improve their position regarding the aspect of operations implicated by the priced term. Of course, some of those outcomes are exactly what mandatory opt-out regulation would be designed to cause. But businesses will not like it and might feel it threatens how they have designed their optimal operations. Anything regulators do in the hopes of improving consumers' positions vis-à-vis business will be perceived as a cost to businesses and, to the extent the changes affect boilerplate terms the businesses use and rely upon daily, business might perceive the changes to be significant.

Increased price transparency is a chief benefit of this Article's proposal, particularly as it sheds light on the price of various

boilerplate terms. But businesses' objection to sharing that proprietary information explains why they are unlikely to allow opt outs to boilerplate terms, even if they can charge consumers more for doing so. Their hesitation to share pricing information about boilerplate terms explains why invitations to voluntarily allow consumers to opt out are likely to be unsuccessful and also why businesses are unlikely to start competing on that basis on their own. The businesses that rely on boilerplate are all able to benefit from its use and may not want to compete with each other on the basis of varying those terms to the extent they think the terms are beneficial or even necessary. They are all happy to keep their boilerplate and to prevent consumers from being able to avoid those terms within a given industry while competing on other dimensions of the products or services they provide.

2. Businesses Think Term Is Necessary

Businesses may have convinced themselves that certain terms are necessary to their profitability. For example, some ski resorts and trampoline parks would likely be unwilling to operate without enforceable liability waivers.[126] In most states, liability waivers for negligence are enforceable[127] but are often disfavored by courts and so narrowly construed against the drafter.[128] Still, businesses selling the opportunity to engage in inherently risky physical activities would like for consumers to take their own precautions, and ideally allow them

126. Though there are a number of ski resorts in Virginia where liability waivers for negligence are unenforceable. *See* Hiett v. Lake Barcroft Cmty. Ass'n, 418 S.E.2d 894, 896 (Va. 1992) (citing Johnson's Adm'x v. Richmond & Danville R.R. Co., 11 S.E. 829, 829 (Va. 1890)) (holding that under Virginia law, preinjury liability waivers for negligence are void as against public policy).

127. *See* Enforceability of Liability Waivers: Overview, Practical Law Commercial Transactions, W-026-1076 (2023); *see also* RESTATEMENT (SECOND) OF CONTS. § 195 cmt. a (AM. L. INST. 1981) ("[A] party to a contract can ordinarily exempt himself from liability for harm caused by his failure to observe the standard of reasonable care imposed by the law of negligence." (citing RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965))).

128. *See* RESTATEMENT (SECOND) OF CONTS. § 195 cmt. b (AM. L. INST. 1981) (noting that language exempting a party from liability for negligence "is scrutinized with particular care"); Moore v. Waller, 930 A.2d 176, 181 (D.C. 2007) (citing Maiatico v. Hot Shoppes, Inc., 287 F.2d 349, 351 (D.C. 1961)) ("A fundamental requirement of any exculpatory provision is that it be clear and unambiguous."); Lukken v. Fleischer, 962 N.W.2d 71, 79 (Iowa 2021) (citing Sweeney v. City of Bettendorf, 762 N.W.2d 873, 878 (Iowa 2009)) ("An intention to absolve a party from all claims of negligence must be clearly and unequivocally expressed in the waiver.").

to participate only at their own risk. Conversely, regulators would like those businesses to take reasonable precautions to prevent injuries to the extent possible. Consumers routinely sign liability waivers before engaging in such activities and may not consider them carefully. It is unlikely consumers would be willing to pay as much as businesses might want to charge to opt out of liability waivers and unlikely businesses would operate without leading most consumers to believe that they are not responsible for injuries consumers suffer. The cost associated with litigation for consumer injuries at, say, a ski slope or a go-kart track, are not just damage awards, but the cost of responding to unsuccessful suits as well. The liability waivers allow the businesses to prevent some litigation they would otherwise have to answer, even if the business did not engage in behavior that would lead to liability. It might be that for terms businesses hold dear, opt-out is not feasible. The opt-out may not be able to be priced affordably because the business may be unwilling to operate without it.

If businesses in an entire industry are unwilling to operate without a particular boilerplate term, then the effect of that term on consumers and society should be evaluated. It should not be treated as a matter of individual consumer consent. There is no benefit to the fiction in those circumstances. If regulators think that a term should be optional, but businesses will not operate without it, then there is a problem for lawmakers to solve about how the industry in question operates. If it is acceptable that an industry requires a circumstance in place before it is willing to operate, the law should take account of that specifically. For example, if ski resorts are unwilling to operate unless skiers agree to waive liability for resort negligence, then states with ski resorts should consider whether they should adjust their tort law to hold ski resorts to a lower standard of care. Those are decisions that should be made through the legislative process with a regard for the effects of the policies, rather than pretending that individual skiers are making a choice.

3. Consumers Will Not Help Themselves

Consumers facing such mandatory terms can only decide whether they want to participate in the activity or buy a good or service or not. The boilerplate term is a condition for entry. Consumers almost uniformly decide to accept the term so they can participate in commerce, complete the plan they had for the present moment, go along with friends they were planning to join. In doing so, they assume that the

probability that an undesirable term will matter is low.[129] In potentially dangerous activities, participants assume the risk of injury is low or worthwhile and is already priced into the decision to engage in the activity in the first place. Similarly optimistic calculations also likely explain acquiescence to terms that would impose expensive late fees, mandate binding arbitration, or waive sellers' liability. Because of the willingness-to-pay/willingness-to-accept gap, consumers could be "duped" into taking a discount to opt into a term they would do better to avoid.[130] As discussed above, cognitive biases might keep consumers from making the choices that best serve their interests.

A reasonable objection to making some boilerplate terms optional is that consumers will not make different choices or will not make choices that are better for them. Businesses will have the upper hand in framing optional terms in such a way that consumers will be more likely to make the choice businesses would prefer. Some boilerplate terms are simply the price of entry for some transactions. If consumers are willing to agree to the terms now, however unwittingly, and are happy to engage in commerce despite the prevalence of boilerplate, then it might be reasonable to doubt whether they would change their behavior if they had the choice.

It will take time for consumers to understand the impact of boilerplate terms and then learn to make optimal decisions. Making the terms more salient to consumers is an important first step in allowing them to make the choices that best suit their interests. Highlighting certain important boilerplate terms will allow consumers, and the market, to learn about those terms and to gauge how those terms are likely to affect them. Eventually, businesses will be able to compete on the basis of the terms that are important to consumers. But consumers will need time to learn about the terms and explore them. The market will respond eventually, but perhaps not immediately. Early stages of requiring that some terms be optional will be a learning exercise.

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129. *See* Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311,1338–39 (2015) ("Consumers . . . irrationally underweigh contract terms about which they are aware. They incorrectly assume non-salient terms will benefit them even though that is untrue." (footnotes omitted)); *see also* BEN-SHAHAR & SCHNEIDER, *supra* note 115, at 724–25 (discussing consumers' estimation difficulties in the mandatory disclosure context).

130. *See supra* Parts IV.A, IV.B.

4. Too Many Unknowns

The fact that we know relatively little about how consumers will respond to new optional terms or about how businesses will price them leads to the final objection I will consider: that we do not know enough yet to be able to implement a new regulatory scheme effectively. That is a valid concern. The regulation would operate better if the FTC had more information about how businesses and consumers value particular terms. A period of experimentation would be sensible in order to determine which terms should be optional, how the choices should be framed, and how to price the optional terms.[131]

Such experimentation usually varies by state, but the states are not the best laboratories here. The companies that use the most boilerplate terms are those that operate nationally, and consumers expect the same business to operate the same way in different states. They certainly do not expect a wide variation in significant terms. Further, the significance and frequency of use of particular terms varies most by industry, rather than by state. For example, gyms and subscription services are most likely to use automatic renewal and car companies and other manufacturers of durable goods are most likely to have products liability or class action exposure, and so seek class action waivers or require arbitration. Still other firms are more likely to collect personal information that might violate privacy if shared.

The FTC could study the use of boilerplate terms in consumer contracts and perhaps pilot a study about how those terms are perceived by consumers or businesses before initiating rulemaking. It might even design experiments to allow businesses to try various means of allowing consumers to opt out of terms before issuing final regulations. The object of the experimental period would be to see which terms consumers seem to care about, how much consumers value the ability to opt out, how businesses would like to respond to their experiences in the experiment (i.e., are they inclined to stop including some terms entirely?), and whether certain consumer protection litigation seems to decline. Making certain terms more salient will allow consumers to respond directly to the terms and their prices, allowing a market reaction to be swift, noticeable, and effective. The process of trial and error can help us begin to see which terms should

131. *See* Kelli A. Alces, *Legal Diversification*, 113 COLUM. L. REV. 1977, 1992–93 (2013); Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 278–79, n.237 (2009); Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 214–18 (2006).

be optional and which terms are safely buried within boilerplate language because they do not pose a substantial risk to unwitting consumers.

CONCLUSION

Consent has long been an essential part of contract doctrine. Today, much of consent in consumer contracting is the stuff of legal fiction. There are tools available in modern contracting that will allow businesses to offer a large variety of terms and offer consumers meaningful choices. Consumers have different preferences about different terms and may happily acquiesce to some business-preferred terms while expressing a strong preference against others. The power of consumer choice to protect consumers is limited by consumers' rationality and pricing of optional terms may prove difficult for both consumers and businesses. But, a regime in which consumers can make more meaningful choices in contracting rather than less will enhance the value of both legal and market protections of consumer interests.