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CONSUMER CONTRACTS IN ACTION

Meirav Furth-Matzkin*

I. INTRODUCTION

Scholars have long recognized the disparities between the law in books and law in action.¹ Yet, the disparities between the formal rules governing consumer transactions and their actual implementation remain understudied.²

In this Essay, I focus on the disparities between: (1) contract law and consumer contracting realities; (2) the legal protections accorded to consumers and consumers' perceptions of these rights and remedies; and (3) the written terms of consumer agreements and sellers' enforcement of such terms.

By elucidating these disparities, I hope to enable a more nuanced understanding of the role that contractual language, legal rules, and consumer psychology play in shaping sellers' ongoing relations with consumers, and in promoting, or threatening, consumer well-being. The primary goal of this Essay is to grapple with one key question: When and how should consumer contracts and markets be regulated? Ultimately, unraveling the disparities between "contracts-in-books" and "contracts-in-action" could assist policy-makers in devising regulation to enhance consumer welfare.

II. DISPARITIES BETWEEN CONSUMER CONTRACTS AND THE LAW

There is often a mismatch between the social reality of contracting and the law of contracts. One way in which these two diverge is the use of

* Associate Professor of Law, University of California, Los-Angeles School of Law. This Essay draws on the results of my recent and forthcoming work. This Essay was prepared for the Browning Symposium on Consumer Law in the 21st Century, hosted by the *Montana Law Review* on September 25, 2020, presented in a panel on "Real Problems for Real Consumers." I thank the Symposium Editor, Ms. Kelsey Dayton, for inviting and hosting me, the *Montana Law Review* editors for helpful comments, and the moderator, Mr. Chuck Munson, for helpful feedback and comments. The studies reported in this Essay were presented in the following publications: Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANAL. 1 (2017); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 4 ALA. L. REV. 1032 (2019); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020).

1. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

2. Commentators have recently begun calling for "studies of consumer contracts" to "move from looking almost exclusively at the terms of the paper deal to looking at the terms of the real deal." See Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts: Comment on the Work of Florencia Marotta-Wurgler*, 12 JRSL. REV. LEGAL STUD. 128, 129 (2015).

legally unenforceable contract terms.³ Although these terms contravene mandatory regulation and are unlikely to be upheld by courts, such terms are routinely included in standard form contracts.⁴ For example, in previous work, I found that unenforceable terms are frequently included in residential lease agreements.⁵ These included overbroad liability waivers, disclaimers of the landlord's implied warranty of habitability, unenforceable late fees or security deposit provisions, and clauses purporting to shift mandatory maintenance and repair duties from the landlord to the tenant.⁶

Unenforceable contract terms also play an important role in shaping consumers' expectations and beliefs.⁷ Even if consumers do not read contracts *ex ante*, before signing the contract, they may read relevant terms *ex post*, when facing a problem or dispute with the seller.⁸ For example, in a survey of 200 residential tenants, most respondents reported that the lease agreement was the main source of information about their rights and remedies.⁹ Therefore, these respondents acted in accordance with their signed agreements when rental disputes arose.¹⁰

A series of randomized experiments further demonstrated that after reading rental contracts containing unenforceable liability disclaimers, tenants were significantly more likely to bear costs that the law imposes on landlords than were tenants reading contracts with enforceable liability pro-

3. See, e.g., Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANAL. 1 (2017) (finding, based on a survey of residential tenants, that tenants often rely on the written lease agreements as their main, or only, source of information when disputes with the landlord arise); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117 (2017).

4. There is empirical evidence that unenforceable terms are included in various types of contracts, including lease agreements, insurance policies, sales of goods contracts, and employment agreements. See, e.g., Furth-Matzkin, *supra* note 3 (providing evidence in the context of residential lease agreements); Evan Starr et al., *Noncompete Agreements in the US Labor Force*, J. L. & ECON. (forthcoming) (providing evidence in the context of employment agreements); Robert L. Tucker, *Disappearing Ink: The Emerging Duty to Remove Invalid Policy Provisions*, 42 AKRON L. REV. 519 (2009) (providing evidence in the context of insurance policies); Jeff Sovern, *Report that Companies Include Provisions in Arbitration Clause that They Know the Arbitrator Won't Enforce—But that Might Suppress Claims Even More*, PUBLIC CITIZEN: CONSUMER LAW & POLICY BLOG (Mar. 8, 2018).

5. Furth-Matzkin, *supra* note 3, at 24–29.

6. *Id.*

7. See, e.g., Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 4 ALA. L. REV. 1032 (2019); Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, J.L. ECON. & ORG. (forthcoming); Wilkinson-Ryan, *supra* note 3; Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 91 (1997) (finding that exculpatory language had a deterrent effect on participants' willingness to seek legal recourse).

8. See, e.g., Furth-Matzkin, *supra* note 7, at 1040.

9. Furth-Matzkin, *supra* note 3, at 38–40.

10. *Id.*

visions.¹¹ Notably, the inclusion of unenforceable terms also discouraged tenants from searching online for information about their rights as renters;¹² and the terms misled even the minority of tenants who conducted online searches about their rights and remedies.¹³ What this suggests is that sellers include these clauses in their contracts because they are effective in shaping consumers' expectations and behavior, not in convincing courts.¹⁴

Taken together, these findings also suggest that current efforts to protect consumers are inadequate. Regulatory measures, including Unfair or Deceptive Acts or Practices Statutes ("UDAP laws") overly rely on consumers to discipline sellers by asserting their rights through private litigation. Yet, as long as consumers remain uninformed about the law and rely on contracts to ascertain scope of their rights, they are unlikely to challenge sellers who flout the law. It is therefore essential to reconsider current policy solutions. For example, it might be warranted to encourage (or require) sellers to use statutory form contracts in certain consumer markets.

III. DISPARITIES BETWEEN THE LAW AND CONSUMERS' PERCEPTIONS

Current research on unenforceable terms suggests that consumers believe they will be held to what is written in the contract, even when the law states otherwise.¹⁵ Put differently, there are often disparities between the legal reality governing consumer transactions and consumers' legal perceptions and intuitions.

In a series of randomized controlled experiments, Roseanna Sommers and I studied consumers' legal intuitions about the validity of contractual clauses that contradict salespeople's prior assertions. We presented participants with scenarios in which a salesperson makes a false representation that is later disclaimed in the contract, and the consumer signs the contract in reliance on the salesperson's representation without reading the terms or noticing the discrepancy.¹⁶ Across all experiments, we found that laypeople

11. *Id.* at 1043–1045.

12. *Id.* at 1049.

13. *Id.* at 1050.

14. *See, e.g.*, Furth-Matzkin, *supra* note 7, at 1058.

15. *See, e.g.*, Furth-Matzkin, *supra* note 7; Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020). This research contributes to a line of research documenting consumers' formalistic intuitions about contracts. *See, e.g.*, Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109 (2015); Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1281–98 (2015) (finding that laypeople put excessive weight on written terms compared to oral agreements, believe that contracts are formed primarily through formalities such as signature and payment, even though contract law does not require such formalities for a contract to be formed, and feel generally obligated to abide by terms that follow formalized assent processes); Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 5 (2012).

16. Furth-Matzkin & Sommers, *supra* note 15.

are contractual formalists, not only because they trust the representations in the contracts they sign are true but, more profoundly, because they believe all contracts, even those induced by fraud, are legally binding and not void.¹⁷

This common intuition reflects consumers' somewhat pessimistic view of the law. Even though most of the study's respondents believed it was unfair to hold consumers to terms they had been deceived into signing, respondents nonetheless assumed the law would enforce such contractual provisions.¹⁸ In fact, we found that in many cases, the fact that the contract contradicted what the consumer was promised prior to signing made almost no difference in laypeople's intuitions about whether the contract would, or should, be enforced as written.¹⁹ These findings hold true regardless of whether the misrepresentation was oral or written, and regardless of the importance of the transaction.²⁰

These results lead to a troubling conclusion: Consumers may be discouraged from challenging contracts induced by fraud, because they might blame themselves for failing to read the fine print.²¹

To mitigate the harms generated by these fraudulent practices, regulators could consider adopting regulation aimed at educating the public about their legal rights and remedies,²² or alerting consumers to the possibility that boilerplate provisions might be unenforceable, fraudulent, or void.²³

IV. DISPARITIES BETWEEN THE "PAPER DEAL" AND THE "REAL DEAL"

The third and final disparity this Essay addresses is that between the language of consumer contracts and sellers' actual practices. While researchers and policymakers have devoted considerable attention to the formal, written terms of consumer contracts (the "paper deal"),²⁴ efforts to

17. *Id.* at 520–522.

18. *Id.* at 521.

19. *Id.* at 532–536.

20. *Id.* at 542–543.

21. *See, e.g.*, Furth-Matzkin & Sommers, *supra* note 15, at 542.

22. *Id.* *See also* Furth-Matzkin, *supra* note 7, at 1063; Samuel Becher et al., *Seductive Oral Deals*, available at: <https://perma.cc/LHN4-RDRT>.

23. *See supra* note 22.

24. For example, scholars have observed that consumer contracts are difficult to read (e.g., Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B. C. L. REV. 2255 (2019)); are typically pro-seller (e.g., Florencia Marotta-Wurlger, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. LEG. STUD. 677 (2007)); and are frequently drafted in ways that exploit consumers' cognitive biases (e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003)). At the same time, considerably less attention has been given to how these contracts are implemented by sellers on the ground.

uncover how these contracts are implemented by sellers on the ground (the “real deal”) are surprisingly scarce.

This dearth of scholarly attention is puzzling, both because of the importance of the “real deal”—the ways in which sellers actually behave in the shadow of their formal agreements—to consumers, and because in the context of business-to-business transactions, there is increasing evidence the actual implementation of standardized agreements often differs from how these contracts appear on paper.²⁵ For example, in the 1960s legal sociologist Stewart Macaulay found that lawyers and businesspeople often deviate from the terms of their formal agreements in meaningful ways.²⁶ Since then, considerable scholarly attention has been devoted to how contracting parties behave in the realm of commercial agreements,²⁷ while little is known about how *consumer* contracts are enforced by sellers.

Commentators have recently begun calling for “studies of consumer contracts” to shift “from looking almost exclusively at the terms of the *paper deal* to looking at the terms of the *real deal*,”²⁸ suggesting the distinction between formal agreements and their actual implementation may also be relevant to business-to-consumer contracts.²⁹ Nonetheless, far too little is known about whether, when, and why sellers depart from their contracts in meaningful ways.

My working paper on *Selective Enforcement of Consumer Contracts* explores the discrepancies between how consumer contracts appear on paper and how they operate on the ground through a large-scale field study of product returns.³⁰ The study uses an audit technique in which testers are sent to return non-defective goods to stores with different return policies

25. I borrow the terms “paper deal” and “real deal” from Stewart Macaulay, who used these terms in his work on divergences between formal agreements and their actual implementation in business-to-business transactions. *See, e.g.*, Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 79 (2003); Stewart Macaulay & William Whitford, *The Development of Contracts: Law in Action*, 87 TEMPLE L. REV. 793 (2014). *See also* Bernstein & Volovsky, *supra* note 2.

26. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

27. *See e.g.*, Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1787–88 (1996) (showing that “sophisticated merchant-transactors” often depart from official terms of agreements because of social norms, commercial custom, trust, or fear of non-legal sanctions, such as reputational damages); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1994) (studying how disputes are resolved in the cattle industry).

28. *See* Bernstein & Volovsky, *supra* note 2, at 129.

29. *See e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006).

30. Meirav Furth-Matzkin, *Selective Enforcement of Consumer Contracts: Evidence from the Retail Market* (working paper, 2021).

and report their return outcomes. The study's main goal is to test whether sellers accept returns when they are not obligated to do so according to their formal policies.³¹

I find sellers' enforcement of supposedly rigid, bright-line contractual provisions is, in practice, considerably more lenient and flexible. Across a wide variety of stores, a significant proportion of sellers departed from their formal contractual requirements in favor of consumers by accepting their returns, either upon their initial requests or after a formal complaint.

These findings indicate that sellers may prefer to complement their formal contractual terms with a policy of allowing concessions not required by the contract, rather than writing all the contingencies into the contract and abiding by it. This approach can be preferred by sellers because the existence of clear and unconditional terms allows them to deter opportunistic buyers, who would exploit more detailed (or flexible) contractual language to extract gains that sellers did not intend to offer.³² The strategy of adopting a non-customer-facing policy allowing employees discretion to deviate from the "paper deal" can be seen as an attempt to meet the expectations of most good faith consumers, while preventing opportunistic buyers from taking advantage of more lenient terms.

Yet, what are the implications of selective enforcement for consumers? On one hand, it enables good faith buyers to enjoy better treatment than that for which they originally contracted, while sellers are able to keep prices low by screening out the "bad apples" who would take advantage of a more lenient or flexible term in writing. On the other hand, consumers, to the extent they are uninformed about sellers' on-the-ground practices, might refrain from bringing a just claim to the seller, because they might not real-

31. A preliminary question is whether return policies are legally binding contracts, given that they are typically presented on the back of the receipt, or on the store's "terms and conditions" webpage, and are not always displayed on an in-store sign that the consumer can review prior to purchase. "Pay-now-terms-later" or "shrink wrap" agreements are generally recognized as legally binding contracts, as long as the consumer had a reasonable opportunity to cancel the transaction after the terms were made available for review. *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Bischoff v. DirectTV, Inc.*, 180 F. Supp. 2d 1097, 1101 (C.D. Cal. 2002); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 308 (Wash. 2000); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998).

32. *See, e.g.,* Bebchuk & Posner, *supra* note 12, at 827–28 ("A seller concerned about its reputation can be expected to treat consumers better than is required by the letter of the contract."); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 704–12 (2004) (suggesting that sellers may use a "contract clause that assigns an entitlement to the seller" to protect themselves from consumer misbehavior); 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, 858 (2006); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69 (2019).

ize that they may receive more than what the contract allows.³³ While sellers may use complaint-based segmentation to identify high-value consumers, good-faith consumers might be discouraged from complaining even if they have a meritorious claim.

VI. CONCLUSION

As this Essay reveals, there is still much to be discovered about the disparities between consumer contracts on paper, in action, and in the law. There is even more to be learned about the implications of these disparities for consumers and social welfare. This Essay calls on scholars and policy-makers to shift their focus from the terms of the “paper deal” to the “real deal.”

33. Marketing and social psychology research suggests that lower-income consumers and minority group members typically feel less entitled and are less likely to complain than higher-income consumers or those belonging to majority groups. *E.g.*, Vincent C. S. Heung & Terry Lam, *Customer complaint behavior towards hotel restaurant services*, 14 INT’L J. OF CONTEMP. HOSPITALITY MGMT. 283 (2003); Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement and Narcissism*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 34 (2014). This means that upper-class white customers might disproportionately benefit from selective enforcement of contracts compared to lower-class, non-white customers. In addition, sellers themselves might use their discretion to deviate from the formal agreement in a discriminatory manner.

