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# Expanded Merchant Tort Liability, Democratic Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Part II)

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**EXPANDED MERCHANT TORT LIABILITY,  
DEMOCRATIC DEGRADATION, AND MASS  
MARKET STANDARD FORM CONTRACTS —A  
TWO-PART CRITIQUE OF *BOILERPLATE: THE  
FINE PRINT, VANISHING RIGHTS AND THE RULE  
OF LAW (PART II)***

STEVEN W. FELDMAN\*

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Analyzing a difficult subject that pervades contract law and which is vital to the national economy, many scholars have written about boilerplate contracts. With her 2013 book, *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law*, Professor Margaret Jane Radin weighs in on the discussion. In a complement to existing contract remedies against abusive boilerplate, she proposes a new tort that she calls “intentional deprivation of basic legal rights.” She also identifies another new tort theory that deems abusive boilerplate to be a defective “product” under the law of products liability.

Radin further contends that these merchant practices with their wide scale forfeiture of citizen rights threaten the democratic order previously maintained by the state’s legal rights regime. Radin terms this latter phenomenon “democratic degradation.” Radin’s tort reforms for alleviating this perceived degradation are the focus of this Article.

Although her book has achieved great renown, receiving high praise from a number of prominent commentators, with plaudits such as “groundbreaking,” “a great achievement,” and a “masterpiece,” I respectfully suggest that her reforms have problems on doctrinal and normative grounds. In my Article, I summarize the author’s argument, identify my concerns, and propose an alternative formulation. My counter-thesis is that expanded merchant tort liability is unnecessary and counterproductive. Case law and statutory law already provide courts with effective remedial tools; furthermore, these doctrines take a pro-consumer perspective in key areas of mass market standard form contracting.

#### I. INTRODUCTION

Commentators have stated that “[T]here is little doubt that the treatment of standard contracts is one of the most important puzzles facing modern contract law--and perhaps one of the most difficult.”<sup>1</sup> Other authors have observed that “[s]tandard form contracts pervade the consumer arena” and are “vital to the continued functioning of the economy.”<sup>2</sup> In her 2013 book, *Boilerplate: The Fine Print*,

<sup>1</sup> Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 26 (2012).

<sup>2</sup> *Id.* at 27; see also Eyal Zamir, *Contract Law and Theory—Three Views of the Cathedral*, U. CHI. L. REV. (forthcoming 2014) (available at SSRN: <http://ssrn.com/abstract=2343919>) (“Few topics in the past few decades have attracted more attention in contract scholarship than standard-form contracts, and rightly so.” Also stating “there is hardly a more pressing challenge facing contract law.”); Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 UCC L.J. 115, 115

*Vanishing Rights And The Rule Of Law*, Professor Margaret Jane Radin weighs in on the discussion, criticizing what she calls the widespread use of rights deletion “schemes.”<sup>3</sup> Radin’s book has achieved great renown in the legal and popular press, winning plaudits such as “thoughtfully crafted,” “groundbreaking,” “compelling,” “a great achievement,” “eloquent and powerful” and “a masterpiece.”<sup>4</sup> In her thesis,

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(1999) (“The use of standard-form documents pervades commercial transactions and is almost universal in consumer transactions.”). For some of the main works in this area, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Justin P. Green, Comment, *The Consumer-Redistributive Stance: A Perspective on Restoring Balance To Transactions Involving Consumer Standard Form Contracts*, 46 AKRON L. REV. 551 (2013).

<sup>3</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW* (2013); see *id.* at 198, 216, 244 (referring to “abusive” boilerplate); *id.* at 16, 17, 18, 33, 35 (making numerous references to “boilerplate rights deletion schemes”). Radin is the Henry King Ransom Professor of Law at the University of Michigan and William Benjamin Scott and Luna M. Scott Professor of Law, Emerita, at Stanford University.

<sup>4</sup> See, e.g., David Horton, *Mass Arbitration And Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 464 (2014) (a “dense and sprawling masterpiece”); Hugh J. Treacy, Book Review, 105 LIBR. J. 369, 376-77 (2013) (“[W]e now have a thoughtfully crafted work of scholarship that will challenge readers to achieve new understandings of contract law within our print and electronic boilerplate world.”) (also calling her book “a groundbreaking work”); Recent Publications, 126 HARV. L. REV. 1178, 1178 (2013) (“This insightful book engages with an omnipresent issue in the modern economy and will assist policymakers and courts alike in their attempts to protect consumers.”); Robert Nagel, *Devil’s in the Small Print*, WALL ST. J., Dec. 20, 2012, <http://online.wsj.com/news/articles/SB10001424127887323981504578177310628472592> (a “sophisticated and thought-provoking treatment”); Glenn C. Altschuler, *(Not So) Fine Print*, HUFFINGTON POST (Dec. 5, 2012, 11:36 AM), [http://www.huffingtonpost.com/glenn-c-altshuler/legal-boilerplate\\_b\\_2231026.html](http://www.huffingtonpost.com/glenn-c-altshuler/legal-boilerplate_b_2231026.html) (“Radin makes a compelling case that boilerplate constitutes a clear and present danger to our core values.”); Oren Bar-Gill, *Boilerplate Symposium VII: Oren Bar-Gill on Consent Without Reading*, CONTRACTSPROF BLOG (May 21, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-vii-oren-bar-gill-on-consent-without-reading-.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-vii-oren-bar-gill-on-consent-without-reading-.html) (“Professor Radin’s book is an eloquent and powerful critique of the fine-term, boilerplate contracts that pervade modern life . . . . Radin’s book is a great achievement.”); Theresa Amato, *Boilerplate Symposium II: Theresa Amato on Remedies to the Problems Posed by Boilerplate*, CONTRACTSPROF BLOG (May 14, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-ii-theresa-amato-on-remedies-to-the-problems-posed-by-boilerplate.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-ii-theresa-amato-on-remedies-to-the-problems-posed-by-boilerplate.html) (“Professor Radin’s masterpiece *Boilerplate* sets forth the intellectual underpinnings for an energetic movement to correct the imbalance of power between corporations and consumers in fine print contracts.”).

Several commentators have given Radin’s book lukewarm reviews. See Michelle A. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967 (2014); Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014). Radin’s rejoinder criticizes both reviewers as distorting and misinterpreting her book because of their bias for “old school Chicago economics.” See Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)* (Feb. 26, 2014). U of Michigan Public Law Research Paper No. 392; U of Michigan Law & Econ Research Paper No. 14-006, available at SSRN: <http://ssrn.com/abstract=2401720> or <http://dx.doi.org/10.2139/ssrn.2401720> (criticizing Ben-Shahar); Margaret Jane Radin, *Of Priors and Of Disconnects*, 127 HARV. L. REV. F. 259, 260 (2014) (criticizing Boardman) While this is suggested citation on the SSRN site, is this the correct BB citation?. Professor Brian Bix calls her book “impressive” and “provocative” but also questions whether some of her contentions are “overstated in ways that

Radin argues that traditional contract theories and existing judicial remedies have “failed” in addressing problematic boilerplate contracts.<sup>5</sup> She saves much of her criticism for the judicial approach to contractually-binding arbitration. New remedies are essential, Radin believes, because widespread boilerplate “schemes” improperly sacrifice core individual legal rights.<sup>6</sup>

To remedy such practices, Radin’s principal solution is to reconceptualize “some” improper boilerplate under the law of tort.<sup>7</sup> Therefore, Radin suggests the expansion of tort law as her centerpiece reform.<sup>8</sup> In a complement to existing contract remedies against “abusive” boilerplate, she proposes a broad new tort that she calls “intentional deprivation of basic legal rights.”<sup>9</sup> She also identifies another new tort theory that deems abusive boilerplate to be a defective “product” under the law of products liability.<sup>10</sup>

Her proposal to expand the tort law system to remedy boilerplate overreaching has attracted especially high praise from respected academic commentators. For example, Professor Omri Ben-Shahar of the University of Chicago Law School, while noting the plaintiff’s difficulties in proving harm, calls Radin’s suggestion on tort reform a “welcome new framework” and “an immensely creative idea, surely to become a legacy of the book, and it deserves careful attention . . . .”<sup>11</sup> In a second example, Professor Daniel Schwarz of the University of Minnesota Law School observes that “[o]ne of the most provocative arguments in Margaret Jane Radin’s bold and compelling book, *Boilerplate*, is that legal evaluation of contracts of adhesion should employ tort principles rather than contract principles.”<sup>12</sup> Yet another commentator, Hugh J. Treacy of the Whittier Law School, observes that “[h]er most significant solution . . . is to classify boilerplate rights deletions within the umbrella of tort law.”<sup>13</sup>

While I commend Radin for her accessible, thought-provoking writing style and for her numerous interesting discussions of economics, philosophy and ethics, I respectfully disagree with those commentators praising Radin’s proposed broad use of tort law. The reason is her suggested expansion of tort law has serious flaws on

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distort the analysis.” Brian H. Bix, *Freedom of Contract and “Democratic Degradation,”* 49 TULSA L. REV. 501, 501-02 (2013). None of the reviewers challenges in any depth Radin’s doctrinal descriptions and analysis.

<sup>5</sup> RADIN, *supra* note 3, at 17, 123-42.

<sup>6</sup> *Id.* at 16-18.

<sup>7</sup> *Id.* at 197-216 (targeting severe remedy deletions of consumer rights that are at least partially market inalienable under circumstances of non-consent).

<sup>8</sup> *Id.* at 213-15.

<sup>9</sup> *Id.* at 198, 211, 212, 216, 244.

<sup>10</sup> *Id.* at 198-99, 222-23.

<sup>11</sup> Ben-Shahar, *supra* note 4, at 902 .

<sup>12</sup> See Daniel Schwarcz, *Boilerplate Symposium VIII: Daniel Schwarcz on a Tort-Based Approach to Standard Form Contracts*, CONTRACTSPROF BLOG (May 21, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-viii-.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-viii-.html).

<sup>13</sup> Treacy, *supra* note 4, at 377

both doctrinal and normative grounds. For Radin's normative criticisms of the American legal system to be valid, she must first show that her criticisms of the underlying legal doctrines are correct. Absent such proof, her thesis is unpersuasive.

As I will show, Radin's explicit suggestion for a "tort takeover" of what she calls "abusive" mass market boilerplate<sup>14</sup> departs in a detrimental way from the fundamental principles of the tort compensation system. In my Article, I will summarize the author's argument, identify my concerns and propose an alternative approach. My counter thesis is that expanded tort liability is unnecessary and counterproductive because both case law and statutory law already provide courts with effective remedial tools. Radin also does not disclose that these existing doctrines take a vigorous pro-consumer perspective in key areas of mass market standard form contracting.

A detailed overview of Radin's thesis will aid the discussion. Radin begins with the concept that contracts inhabit Worlds A or B. Archetype "World A" contracts are the traditional "bargained-for exchanges" between two parties where each party consents voluntarily and exercises "free choice." This contract type is "typified" by a process of negotiation where, under the ideal of "freedom of contract," both parties are satisfied with the agreement.<sup>15</sup>

Archetype "World B" ("purported") contracts occur without "actual consent" where the consumer enters into contracts "without knowing it, or at least without being able to do anything about it." Radin posits that World B mass market boilerplate contracts lack the "indispensable" elements of a recognized contractual "bargain" and "voluntary" consumer choice and therefore are only "purported contracts."<sup>16</sup> World B contracts do not fit the "theory" or "rationale" of contract law.<sup>17</sup> These so-called contracts, she says, come in the form of documents "imposed upon consumers" where (1) the merchant asks the consumer to sign, (2) the contract contains terms that are binding without the consumer's signature, or (3) the consumer might not even know that he is entering a contract. In sum, "World B is the world of boilerplate"<sup>18</sup> and boilerplate "consistently shrinks legal rights to the vanishing point."<sup>19</sup> Thus, Radin concludes that a World B contract is one where

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<sup>14</sup> RADIN, *supra* note 3, at 198, 210, 216.

<sup>15</sup> *Id.* at 3, 14. Radin has argued that she does not place World A and World B in an "either-or" dichotomy but that these concepts are on a "continuum." See Radin, *Of Priors and Of Disconnects*, *supra* note 4, at 262 (responding to Boardman, *supra* note 4). To the contrary, as noted by a sympathetic reviewer, "While Professor Radin is right that there are distinguishable Worlds of contract, she does not make clear enough that the two Worlds are on a continuum; they are not so clearly dichotomous." Peter Alces, *Boilerplate Symposium I: Peter Alces on Consent*, CONTRACTSPROF BLOG (May 13, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-i-peter-alces-on-consent.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-i-peter-alces-on-consent.html).

<sup>16</sup> *Id.* at 3, 8, 10-12, 20, 22, 30, 158, 213; *see also id.* at 81 (World B contracts are based on a "distorted notion of voluntariness").

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.* at 9. Varieties of World B contracts include standardized adhesion contracts, offsite terms, shrinkwrap and clickwrap licenses, rolling contracts, and end user license agreements. *Id.* at 10-11.

<sup>19</sup> *Id.* at 30.

“contract theory becomes contract mythology” as it transports users “into an alternative legal universe.”<sup>20</sup>

Radin acknowledges that the law considers the boilerplate of World B to be a “valid method of contract formation.”<sup>21</sup> Nevertheless, she accuses the “defenders” of World B contracts of unsuccessfully trying to “shoehorn” [or gerrymander] them into the World A “paradigm of contractual consent.”<sup>22</sup> Radin further contends that these World B documents with their dense legalese often contain unfair terms that can keep the consumer in the dark (“sheer ignorance”) as these transactions unduly favor the seller.<sup>23</sup> Thus, a major component of Radin’s thesis is that the extensive presence of mass market boilerplate contracts in the economy has degraded the traditional elements of consent, agreement, and contract to the point where consumers are commonly being bound involuntarily.<sup>24</sup> Radin calls this effect “normative degradation.”<sup>25</sup>

Rejecting utilitarian notions that economic efficiency can justify the extensive use of such “abusive” boilerplate,<sup>26</sup> Radin’s guiding principle for reform is that mass market distribution contracts are improper when they accomplish severe remedy deletions of consumer rights that are at least partially market inalienable under circumstances of non-consent.<sup>27</sup> In Radin’s view, these subjugated rights include, but are not limited to, the right against oppressive forum selection clauses, the right to a jury trial, the right against exculpatory clauses that unduly favor the seller, and the right against overly restrictive limits on remedies in consumer sales.<sup>28</sup> She also believes that these merchant practices with their wide scale forfeiture of citizen rights threaten the democratic order previously maintained by the state’s legal rights regime.<sup>29</sup> Radin terms this latter phenomenon “democratic degradation.”<sup>30</sup> Radin’s reforms for alleviating this perceived degradation are the focus of this Article.

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<sup>20</sup> *Id.* at 7, 8, 12, 17, 210.

<sup>21</sup> *Id.* at 12, 30.

<sup>22</sup> *Id.* at 19, 31; *see also id.* at 82 (stating World B transactions use a “gerrymandered” concept of “agreement.”).

<sup>23</sup> *Id.* at 21-23, 30, 31, 92, 123, 128, 156, 163; *see also id.* at 83 (discussing this phenomenon with insurance policies).

<sup>24</sup> *Id.* at 15, 16, 18, 29-31 (discussing at length the “devolution of voluntary agreement” in modern consumer contracts).

<sup>25</sup> *Id.* at 15-16, 19-32. I have addressed this aspect of Radin’s book in a separate Article. *See* Steven W. Feldman, *Mutual Assent, Normative Degradation and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373 (2014).

<sup>26</sup> RADIN, *supra* note 3, at 64-66, 71-72, 102, 172, 174.

<sup>27</sup> *Id.* at 159, 164, 172, 198, 211. “Partial market inalienability” refers to where a court applies strict scrutiny to a person’s sale of his right. *Id.* at 157, 161, 172. “Market inalienable” means a legal right cannot be for sale at any price. *Id.* at 159.

<sup>28</sup> *See infra* Section IV.

<sup>29</sup> RADIN, *supra* note 3, at 16, 39-45.

<sup>30</sup> *Id.* at 33-51.

While Radin primarily presents a critique of current contract law on normative grounds, she also recites and criticizes numerous doctrinal principles of law. Thus, for example, Radin provides an in-depth treatment of current tort law doctrines in Chapter Eleven, “Boilerplate as a Tort.”<sup>31</sup> Radin herself acknowledges in Chapter Seven, “Evaluating Current Judicial Oversight,” that it is proper to see how well current legal doctrine deals with the validity of boilerplate before it can be decided whether her normative criticisms are valid and that reforms are needed.<sup>32</sup> Ironically, she leaves out a number of arguments that would have aided her cause to a degree, which I have included in various sections below.

By contrast, I will perform a balanced case law and statutory analysis demonstrating that her suggested tort remedies in a detrimental way contradict many established tort principles. Because she omits or incompletely states various legal doctrines, Radin presents an unpersuasive case for supplementing contract remedies with these new tort theories. Therefore, they have little or no chance of being accepted by courts or legislatures.

Regarding the organization of this Article, the first section considers the courts and their prerogatives to create new torts. This section will address which bodies—courts or legislatures—are best suited to recognize such new causes of action. The second section will examine the general theory behind her proposal to use tort remedies for solving contracting issues. Thus, the initial section will consider the general principles for judicial recognition of new torts. Subtopics include: tort, contract, and the availability of mass remedies; tort law as an alternative remedy for improper boilerplate; the divide between tort and contract; the necessary techniques for separating contract and tort; and the sound policies that distinguish contract from tort.

The next section address Radin’s centerpiece tort remedy, the proposed tort of intentional deprivation of basic legal rights. As I will demonstrate below, general tort doctrine fails to support her new theories in numerous respects. I will then consider four of Radin’s principal candidates for implementing this proposed tort: (1) forum selection clauses, (2) contractual jury trial waivers, (3) the rule under Uniform Commercial Code (U.C.C.) § 2-719(2) that where circumstances cause an exclusive or limited remedy “to fail of its essential purpose,” remedies may be had as allowed by the U.C.C., and (4) exculpatory clauses for consumer harms arising from seller negligence. The next section explores her suggestion that “boilerplate rights deletion schemes” qualify as a basis for products liability in tort.

I will then discuss Radin’s strong condemnation of contractually-binding arbitration and whether this technique is an engine of consumer oppression or a legitimate informal dispute resolution mechanism. The last topic in this section is the

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<sup>31</sup> Some of the topics she addresses in this Chapter (pp. 197-216) are the common law creation of new torts; the ability of tort law to address mass torts; products liability law; the distinction and border between tort and contract; blended tort and contracts principles in areas such as fraud or misrepresentation, medical malpractice, bad faith breach of contract; warranty, with special emphasis on the implied warranty of habitability in residential leases; damages in areas such as punitive damages, emotional distress and pain and suffering; proximate cause; impact of the Uniform Commercial Code; and the doctrine of assumption of the risk. *Id.* at 197-216.

<sup>32</sup> *Id.* at 123 (“Before considering what is to be done about boilerplate, we should take a look at what is now being done about it.”).



U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,<sup>33</sup> which Radin believes improperly restricts class action relief for abusive boilerplate.

In sum, if enacted, Radin's tort reforms would inappropriately result in the full or partial "tortification" of the remedies available under the American mass market contracting system. The actual state of legal doctrine in the United States does not support Radin's claimed view of democratic degradation. This sea change also carries a high risk of significant unintended (and adverse) consequences.<sup>34</sup> One such consequence would be that merchants facing greater liabilities would charge consumers higher prices, the same consumers that Radin champions so passionately. As I will demonstrate, these unintended harms also carry a high potential for seriously damaging both tort and contract law doctrine when one considers that approximately ninety-nine percent of all contracts in the United States economy are standard form mass market consumer contracts.<sup>35</sup>

## II. COURTS AND THE CREATION OF NEW TORTS

Radin contends that common law courts have residual authority to create new torts when "[t]he need arises to recognize a category of injury."<sup>36</sup> Radin gives the example that after a famous 1890 law review article by Samuel Warren and Louis Brandeis, courts exercised their common law authority to recognize new torts protecting personal privacy, such as proscribing the unauthorized use of a person's name and likeness.<sup>37</sup> Because of this residual authority in tort, Radin believes that courts can examine abusive boilerplate contracts and create a new tort of "intentional deprivation of basic legal rights."<sup>38</sup> She also endorses the expansion of the law of products liability to designate abusive boilerplate as a defective product.<sup>39</sup> Radin could have further emphasized that although her theory is novel, the mere fact a tort theory attempts to fill what Radin sees as an "open space in the law" does not necessarily render it without merit.<sup>40</sup>

While Radin is correct that a court may define and change common law tort principles, I will show that Radin's description of a court's common law authority is

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<sup>33</sup> 131 S. Ct. 1740 (2011).

<sup>34</sup> Konrad J. Friedemann defines the law of unintended consequences as "the proposition that every undertaking, however well-intentioned, is generally accompanied by unforeseen repercussions that can overshadow the principal endeavor." See GOOGLE ANSWERS (Mar. 14, 2003), <http://answers.google.com/answers/threadview?id=176107>; see also Rob Norton, *Unintended Consequences*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2008), <http://www.econlib.org/library/Enc/UnintendedConsequences.html> ("The law of unintended consequences . . . is that actions of people—and especially of government—always have effects that are unanticipated or unintended.").

<sup>35</sup> See *Cate v. Dover Corp.*, 790 S.W.2d 559, 565 (Tex. 1990) (citing W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971)).

<sup>36</sup> RADIN, *supra* note 3, at 198.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *Clark v. Associated Retail Credit Men*, 105 F.2d 62, 64 (D.C. Cir. 1939).

incomplete. One of those omissions is that courts are divided on their prerogative to create or expand torts. Therefore, before embarking on deciding whether her new tort theories have merit, Radin should have analyzed why and whether a court may exercise this power in the first place. The second major gap in her exposition of the law is that when a court exercises this authority, most jurisdictions apply a multi-factor test for determining whether they should accept a new cause of action in tort.

#### *A. Judicial v. Legislative Competence*

In my first concern, noted above, Radin does not mention that some courts decline altogether to create a new action in tort. Their rationale is that legislatures have better institutional capability than courts to assess the competing public policy considerations that go with the task of allowing new forms of liability.<sup>41</sup> The New York Court of Appeals has pointed to the greater efficiencies for this task associated with legislative versus judicial action:

The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

....

[If liability is to be expanded,] it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.<sup>42</sup>

As Hans Linde, a prominent former Oregon Supreme Court justice, has observed regarding judges and the reformulation of tort law, “[j]udges gain nothing for the law by entering the marketplace for policymakers.”<sup>43</sup>

By contrast, other jurisdictions more freely recognize that courts may create new torts. Some courts claim the inherent authority to do so, which power may come from a state constitution, a statute or the common law.<sup>44</sup> A few of these courts claim an especially broad common law power to create new law. For this proposition, the Oregon Supreme Court’s 1975 decision in *Nees v. Hocks* (which remains good law) is noteworthy. In considering the proposed new tort of wrongful employee discharge, the *Nees* court commented “[w]e have not hesitated to create or recognize

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<sup>41</sup> *Murphy v. Am. Home Prods Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983); *Accent Store Design v. Marathon House*, 674 A.2d 1223, 1226 (R.I. 1996) (“We have long held . . . that the creation of new causes of action is a legislative function.”). The Chief Justice of the Alabama Supreme Court has written extensively on this point, arguing that the creation of a new cause of action is a legislative function and that the state Constitution under the separation of powers forbids courts desirous of recognizing a new tort from exercising legislative powers. *State Farm Fire & Cas. Co. v. Brechbill*, 144 So. 3d 248 (Ala. 2013) (Moore, C.J., concurring specially).

<sup>42</sup> *Murphy*, 448 N.E.2d at 89-90.

<sup>43</sup> Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?*, 28 VAL. U. L. REV. 821, 855 (1994).

<sup>44</sup> *E.g.*, *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1173 (Conn. 2006).

new torts when confronted with conduct causing injuries which we feel should be compensable.”<sup>45</sup> More specifically, in accepting the new tort cause of action, the Oregon high court said the issue comes down to two factors. The two factors the Oregon Supreme Court considered were whether “[f]or want of a precedent [the courts] are impotent to grant redress for injury resulting from conduct which universal opinion in a state of civilized society would unhesitatingly condemn. . .” or whether “[t]he common law, with its capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, contains within itself the resources of principle upon which relief in such a case can be founded.”<sup>46</sup>

Based on *Nees v. Hocks*, a high bar exists that even in a generous jurisdiction such as Oregon considering new tort liability, there must be a “universal opinion” in a “civilized society” that the conduct at issue should be “unhesitatingly condemned.”<sup>47</sup> No “universal” consensus exists that “abusive” boilerplate is such a detrimental practice; Radin concedes as much as she writes disparagingly of the so-called “apologists”—including courts—that defend the current system.<sup>48</sup>

### B. The Courts’ Multi-Factor Test

In my second concern with Radin’s brief summary of the law, she oversimplifies matters greatly as she fails to disclose that most state courts claiming the power to create new theories of tort liability follow a complex multi-factor test. These jurisdictions “tread cautiously” in creating new torts, citing the need to discourage both duplicative litigation and the inefficient relitigation of issues “better handled within the context of the core cause of action.”<sup>49</sup>

While moral and logical judgments for these jurisdictions are significant elements of the decision to create a new tort,<sup>50</sup> most courts put more emphasis on carefully balancing the needs to (1) compensate the victim, (2) admonish the wrongdoer and (3) impose liability for consequential damages ensuring that otherwise proper conduct will not be unduly impacted.<sup>51</sup> For these judges, perhaps the most difficult task is drawing a line between “[p]roviding a remedy to everyone who is injured and of extending exposure to tort liability almost without limit.”<sup>52</sup> A California court lists the major criteria as:

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<sup>45</sup> *Nees v. Hocks*, 536 P.2d 512, 514 (Or. 1975).

<sup>46</sup> *Id.* Interestingly, the *Nees* court acknowledged that “[s]ome portions of the bench and bar are of the opinion that the court has been too unrestrained” in recognizing a new tort. This passage shows that the Oregon court might have doubted the wisdom of the breadth of its authority. *Id.* at 514 n.1. A related critique is that Radin rarely identifies these so-called apologists or includes their exact arguments.

<sup>47</sup> *Id.* at 514.

<sup>48</sup> RADIN, *supra* note 3, at 198.

<sup>49</sup> *E.g.*, *Paulino v. QHG of Springdale, Inc.*, 386 S.W.3d 462, 468 (Ark. 2012); *Rees v. Smith*, 301 S.W.3d 467, 471 (Ark. 2009).

<sup>50</sup> *Mulvey v. Cuvillo*, 687 N.Y.S.2d 584, 587 (Sup. Ct. 1999).

<sup>51</sup> *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1173-74 (Conn. 2006).

<sup>52</sup> *Mulvey*, 687 N.Y.S.2d at 587.

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>53</sup>

Numerous other principles of restraint govern the courts' decision making in this area. Most courts considering a new tort will weigh the need to meet society's changing requirements against the prospect of boundless claims in an already crowded judicial system.<sup>54</sup> In another policy, courts "[w]ill decline to recognize a new cause of action if there are sufficient other avenues, short of creating a new cause of action, that serve to remedy the situation for a plaintiff."<sup>55</sup> Yet another restriction, according to some decisions, is where a statute identifies a specific civil remedy for a violation; that legislative choice will pre-empt an implied cause of action in tort.<sup>56</sup> Addressing the problems inherent for measuring loss is also part of the analysis.<sup>57</sup> The result is that creating a proposed new cause of action in tort must accord with the reason for the tort liability system<sup>58</sup> and the felt need of the common

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<sup>53</sup> *Burns v. Neiman Marcus Grp., Inc.*, 93 Cal. Rptr. 3d 130 (Ct. App. 2009) (listing considerations). Several other states follow different criteria in applying their multi-factor test. For example, Minnesota follows a set of other factors. *See Larson v. Wasemiller*, 738 N.W.2d 300, 304 (Minn. 2007) ("In deciding whether to recognize a common law tort, this court looks to (1) whether the tort is inherent in, or the natural extension of, a well-established common law right, (2) whether the tort has been recognized in other common law states, (3) whether recognition of a cause of action will create tension with other applicable laws, and (4) whether such tension is out-weighed by the importance of the additional protections that recognition of the claim would provide to injured persons.").

<sup>54</sup> *Rees*, 301 S.W.3d at 471. *But see Dale v. Dale*, 78 Cal. Rptr. 2d 513, 522 (Ct. App. 1998) ("[A]nticipated flood of trifling lawsuits are not relevant in an intentional tort case.").

<sup>55</sup> *Rees*, 301 S.W.3d at 471; *see also Neelthak Dev. Corp. v. Twp. of Gloucester*, 639 A.2d 1141, 1144 (N.J. Super Ct. App. Div. 1994) ("Where existing concepts of law provide the claimant with the potential for full recovery in a pending proceeding, no such need exists [to recognize a new cause of action in tort]."); *Standard Pipeline Coating Co. v. Solomon & Teslovich, Inc.*, 496 A.2d 840, 843 (Pa. Super. Ct. 1985). Georgia courts are reluctant to approve new torts, even if other states have accepted them, when a "full and adequate remedy" already exists for the injury. *Kaye v. Dupree (In re Avado Brands, Inc.)*, 358 B.R. 868, 887 (Bankr. N.D. Tex. 2006) (applying Georgia law).

<sup>56</sup> *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 538 (Utah 2002).

<sup>57</sup> *Burns*, 93 Cal. Rptr. 3d at 136.

<sup>58</sup> *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998) ("The common thread woven into all torts is the idea of unreasonable interference with the interests of others."); *Waters v. N.Y.C. Hous. Auth.*, 69 N.Y.2d 225 (1987) ("At its foundation, [the common law of torts is] a means of apportioning risks and allocating the burden of loss."); *OMI Holdings v. Howell*, 918 P.2d 1274, 1293 (Kan. 1996) (decision to recognize a new tort should involve consideration of the circumstances of all potential plaintiffs).

law to adjust to changing social conditions.<sup>59</sup> Radin's brief analysis of tort law captures none of these nuances.

In light of the above principles, her proposals cannot pass muster under the multi-factor test. First, her proposed tort takeover of the mass market contracting system would likely create a wave of boundless claims in an already crowded judicial system and an undue financial burden upon prospective defendants and the community at large. Second, the merchant's mere use of boilerplate is morally blameless because courts properly reason that "[t]he very ubiquity of the practice precludes a conclusion that the use of a nonnegotiable contract, on its own, is in any way unethical."<sup>60</sup> Third, the law recognizes numerous adequate contract defenses to abusive boilerplate, such as laches, estoppel, waiver, fraud, duress, reasonable expectations, public policy, and unconscionability.<sup>61</sup> This comprehensive choice of existing remedies is fully able to address all boilerplate deficiencies—which differ from whether a particular plaintiff can meet its burden of proof.

Given the high bar for judicial acceptance of new causes of action, when a party seeks to convince a court to bring a new tort cause of action into the legal world, the usual outcome is "countless refusals" by judges.<sup>62</sup> By emphasizing the relatively few instances where courts have created new torts, and by leaving out the many times where courts reject proposed new tort causes of action, Radin's description of the common law landscape is incomplete. Accordingly, courts and legislatures should carefully consider all the ramifications before adopting Radin's plan to hamper the use of standard form contracts, a business tool (when legitimate) that "[i]s essential to the functioning of the economy."<sup>63</sup>

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<sup>59</sup> *Ortega v. Flaim*, 902 P.2d 199, 203 (Wyo. 1995) ("[T]he common law is dynamic and a court can modify it to meet changing conditions.") (rejecting proposed tort theory of an implied warranty of habitability for rental premises in the law of landlord-tenant); *Koster v. Scotch Assocs.*, 640 A.2d 1225, 1229 (N.J. Super. Ct. 1993) (indicating that tort law develops based on the "felt needs" at the time); *Steigman v. Outrigger Enters., Inc.*, 267 P.3d 1238, 1246 (Haw. 2011) ("Tort law is primarily designed to vindicate social policy.").

<sup>60</sup> *Vasquez v. Greene Motors, Inc.*, 154 Cal. Rptr. 3d 778, 787 (Ct. App. 2013).

<sup>61</sup> *See infra* note 402 and accompanying text. The Utah Supreme Court has recognized a number of equitable doctrines that can remedy merchant over-reaching in the use of adhesion contracts, including the doctrines of estoppel, waiver, unconscionability, breach of the implied duty of good faith and fair dealing, and the rule of construction that ambiguous language is to be resolved against the drafter. *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 805-07 & nn.11-16 (Utah 1992).

<sup>62</sup> Anita Bernstein, *How To Make A New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1546 n.38 (1997) (citing decisions). Federal judges are usually reluctant to create new torts under state law. *See Great Cent. Ins. Co. v. Ins. Servs. Office*, 74 F.3d 778, 785-86 (7th Cir. 1996) (Posner, C.J.) ("[W]hat Great Central really wants . . . is for us to create in the name of Illinois law a new tort . . . . We keep warning the bar that a plaintiff who needs a common law departure or innovation to win should bring his suit in state court rather than in federal court."). *But see Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 495 (2d Cir. 1977) ("In appropriate cases, federal courts may recognize or create common-law torts.").

<sup>63</sup> *See* 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.4 (rev. ed. 1993).

## III. TORT AS A REMEDY FOR “ABUSIVE” BOILERPLATE

Radin argues that tort is a better conceptual fit than contract to address mass market boilerplate abuse. She indicates that boilerplate deletion of key consumer rights renders the product defective because it makes the legal features non-functional and the merchant immune from liability and insensitive to its clientele’s interests. Accordingly, she claims, the overall purchase is less safe for the consumer.<sup>64</sup> The sections below will address these aspects of Radin’s proposals in light of the competing policy considerations.

## A. Tort, Contract and Mass Remedies

One reason that Radin asserts tort superior to contract is that the former has an “infrastructure” for dealing with mass torts “[w]hereas contract law has not developed an infrastructure for dealing with mass contracts.”<sup>65</sup> Because of her general belief in the superiority of collective over individual action in making legal challenges, a fair reading of Radin’s book is that she favors class actions wherever possible.<sup>66</sup> Thus, she spells out how “boilerplate rights deletion schemes” often deprive consumers of their “right” and “entitlement” to the legal availability of class actions.<sup>67</sup>

Her position is unsupported—no stand-alone substantive right or entitlement exists to a class action remedy. As the courts have held, absent a statute or a contract term, there is “no right” to bring a class action. In almost all instances, the “right” to bring a class action is merely a procedural one that arises from the *Federal Rules of Civil Procedure*.<sup>68</sup>

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<sup>64</sup> RADIN, *supra* note 3, at 198, 211, 222, 248, 253 n.11.

<sup>65</sup> *Id.* at 198.

<sup>66</sup> Radin properly points out that class actions can be an effective method of vindicating individual legal rights, especially when the damages in question are small for each class member. *Id.* at 134, 290. While she believes that defendants gain a “financial advantage” when courts disallow “aggregative procedures,” she gives little or no weight to the potentially coercive nature of some class action suits. *Id.* at 133-34. In contrast to Radin, numerous courts point out the potential “downside” of class actions. *See, e.g.,* Thorogood v. Sears, Roebuck and Co., 547 F.3d 742, 744-45 (7th Cir. 2008) (noting these “downsides”); CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011) (“Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit.”) (citing decisions) (also citing the 1998 Advisory Committee Notes to FED. R. CIV. P. 23(f) for the proposition that “[A]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”). Radin’s book would have been improved had she made a more balanced presentation on the legitimate rights and interests of merchants regarding class actions.

<sup>67</sup> *See, e.g.,* RADIN, *supra* note 3, at 85; *see also id.* at 101 (arguing against contract clauses that involve “relinquishing one’s right to bring a class action in court”); *id.* at 130 (arguing for a “right to aggregative remedies”) (either class actions or class wide arbitration); *id.* at 173 (mass market contracts that exclude class actions use private tools to dispose of a public “right” of redress).

<sup>68</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684-85 (2010) (“[A] party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”); *AutoNation USA*

The next response, one that Radin herself admits, is that if a plaintiff successfully challenges a class action waiver, then courts in contract cases do indeed have a “[p]rocedure for addressing the social effect of a [rights deletion scheme.]”<sup>69</sup> Radin does not reconcile this inconsistency and does not mention contract has an ideal infrastructure for dealing with mass contracts.

To this end, courts have frequently certified class actions involving consumer claims on form contracts.<sup>70</sup> Thus, in *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare*,<sup>71</sup> the United States Court of Appeals for the Eleventh Circuit observed that “[i]t is the form contract, executed under like conditions by all class members, that best facilitates class treatment.” This case supports the argument that contract is actually *superior* to tort to support class actions because the facts giving rise to liability will be more manageable with boilerplate contracts than in mass tort cases.<sup>72</sup> Moreover in *Dupler v. Costco Wholesale Corp.*,<sup>73</sup> the United States District Court for the Eastern District of New York collected cases for the proposition that class certification is typically appropriate in cases involving form contracts.

These cases remain good law in their respective jurisdictions. Because standard form contracts are usually more adaptable than mass torts in accommodating

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Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App. 2003) (enforcing arbitration clause which prohibited class-action claims, stating that “there is no entitlement to proceed as a class action”); *accord* Blaz v. Belfer, 368 F.3d 501, 504 (5th Cir. 2004); *see also* Johnson v. W. Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000):

Though the statute [the Truth in Lending Act] clearly contemplates class actions, there are no provisions within the law that create a right to bring them, or evince an intent by Congress that claims initiated as class actions be exempt from binding arbitration clauses. The “right” to proceed to a class action . . . is a procedural one that arises from the Federal Rules of Civil Procedure.

*See* FED. R. CIV. P. 23.

Courts frequently state that the use of class action procedures is not a substantive right. *See* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ [Fed. R. Civ. P.] 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

<sup>69</sup> RADIN, *supra* note 3, at 182. One pair of commentators cogently observes that “[t]echnically, provisions addressing class relief are class *arbitration* waivers, not class action waivers.” Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 965 (2014). Radin uses the similar description “relinquishing one’s right to bring a class action in court.” RADIN, *supra* note 3, at 101. Because many cases and a number of commentators use the terminology “class action waivers,” *id.*, this Article will do the same.

<sup>70</sup> *Infra* notes 71-73.

<sup>71</sup> 601 F.3d 1159, 1171 (11th Cir. 2010), analyzed in Martin H. Drake, Comment, *Sacred Heart Health Systems v. Humana Military Healthcare Services: May Plaintiffs Be Properly Certified As a Class Pursuant to Rule 23(b)(3) In the Absence Of a Standard Form Contract?*, 34 AM. J. TRIAL ADVOC. 669 (2011).

<sup>72</sup> 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:74 (5th ed. 2013).

<sup>73</sup> 249 F.R.D. 29, 37 (E.D.N.Y. 2008); *see also* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:24 (5th ed. 2013) (same).

collective lawsuits, Radin's failure to mention this aspect of mass contracts is a material omission in her thesis.

### B. *The Divide Between Tort and Contract*

#### 1. Is There A Clear Border?

General theories of tort law are an awkward method to remedy a contract dispute and Radin errs in suggesting otherwise. In a prominent example of her doctrinal analysis, Radin states that the borderline between contracts and torts "has always been malleable, because the legal categories overlap, and their contours have evolved as the need for them shifted over time."<sup>74</sup> She also argues that history, theory, and practice "demonstrate the lack of a clear cut boundary between contracts and torts."<sup>75</sup> She even offers the undocumented opinion that "very few [persons] suppose that contract doctrines can be gathered up into a deductive and logical unified system."<sup>76</sup> In this manner, Radin's Chapter Eleven—entitled "Reconceptualizing (Some) Boilerplate under Tort Law"—makes her case for new non-contractual remedies to combat boilerplate divestments of core consumer rights.

My first response is that Radin overstates the malleable or shifting nature of the general borderline between tort and contract causes of action.<sup>77</sup> True enough, some cases have used colorful language to this effect, but such words are commonly taken out of context.<sup>78</sup> Under the decisions, the borderline is uncertain primarily in that parties to a contract may not sue each other in tort absent a violation of an "independent duty" in tort.<sup>79</sup> As the United States Court of Appeals for the Second Circuit has observed,

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<sup>74</sup> RADIN, *supra* note 3, at 199; *see also id.* at 199, 201 (doctrines "overlap or are interlocking").

<sup>75</sup> *Id.* at 199.

<sup>76</sup> *Id.* at 201. To the contrary, Judge Richard Posner has said that both contract and tort reflect a "logical system of law." Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 328 (1988). The former Chief Justice of the Alabama Supreme Court has said more forcefully that "[c]ontract is perhaps the most concrete and predictable body of legal doctrine." *See infra* note 193 and accompanying text.

<sup>77</sup> One of several questionable arguments on this point is her contention regarding the basis of promissory estoppel. Radin argues that the original *Restatement of Contracts* applied a contract (promissory) basis whereas the current *Restatement (Second) of Contracts* applies a tort (reliance) basis. RADIN, *supra* note 3, at 200-01. Taking a different view, Professors Edward Yorio and Steve Thel have shown in exhaustive detail the promissory basis of the current *Restatement*. *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 111 (1991) ("This Article shows that the prominence of reliance in the text of Section 90 and in the commentary on the section does not correspond to what courts do in fact. Judges actually enforce promises rather than protect reliance in Section 90 cases."). *But see* Robert A. Hillman, *Questioning the "New Consensus" On Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998) (disputing Yorio and Thel's thesis).

<sup>78</sup> *See* Carvel Corp. v. Noonan, 350 F.3d 6 (2d Cir. 2003).

<sup>79</sup> *Id.* at 16.



Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult.... [Commentators have described a tort] in general as “a wrong independent of contract.” And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with a contract, and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract.<sup>80</sup>

Based on the foregoing decisions, the better view regarding the overlap between contract and tort causes of action is that courts generally allow a tort claim if an independent tort arises out of a contractual relationship, typically fraud, breach of fiduciary duty, intentional infliction of emotional distress, or negligence in a personal injury case.<sup>81</sup> In special situations where the tort exists on facts separate from the contract, the law preserves the distinction between tort and contract but does not bar a valid tort complaint just because it arose in a contractual setting.<sup>82</sup> In other words, the cases that distinguish tort claims from contract claims consider the gravamen or gist of the cause of action, described in the section below.<sup>83</sup>

The above explanation further addresses Radin’s comment about the relation of tort and contract in areas such as attorney malpractice where she says “malpracticing . . . attorneys are frequently held liable in tort to clients with whom they have contracts.”<sup>84</sup> The actual state of the law on this topic, however, is more nuanced than Radin’s broad generalization. Under the decisions, “[w]here an act of an attorney complained of is a breach of the specific terms of an attorney-client contract, the action is in contract, but where the gravamen of the action is a breach of a legal duty, the action is in tort.”<sup>85</sup> Thus, it can be seen that even in Radin’s attorney malpractice example proffered as showing the overlapping of tort and contract, courts actually apply the gravamen or gist of the cause of action in selecting between these two

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<sup>80</sup> *Id.* (quoting *Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 390 (1882)).

<sup>81</sup> Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 *SETON HALL L. REV.* 390, 408 (1997) (noting tort actions permit recovery of emotional distress and punitive damages; extensive comparison of tort and contract remedies). Professor Farnsworth notes several other intersections of tort and contract, but none support Radin’s thesis that a consumer can convert a contract claim into a tort claim. For example, he notes that “[t]here has been an enhanced recognition of reliance on a promise as a basis for legal rights.” E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 1.6 at 26 (3d ed. 2004).

<sup>82</sup> *See Solid Gold Jewelers v. ADT Sec. Sys.*, 600 F. Supp. 2d 956, 960 (N.D. Ohio 2007) (tort liability exists only where a party breaches a duty which he owes to another that exists independently of the contract, i.e., a duty that exists even without a contract).

<sup>83</sup> *See infra* Section III.C.

<sup>84</sup> RADIN, *supra* note 3, at 209.

<sup>85</sup> 1A C.J.S. *Actions* § 150 (2013).

theories of liability. This technique is the traditional method for separating tort and contract and identifying the basis of the cause of action.<sup>86</sup>

The second instance where the contract-tort border is sometimes said to be “blurred” is where courts apply the “economic loss” doctrine.<sup>87</sup> Radin oversimplifies the definition of the doctrine when she states it “[o]perates to limit tort remedies in negligence actions” and “[p]recludes relief in [tort] actions for consequential losses that are merely economic.”<sup>88</sup> More fully defined, the economic loss doctrine is a judicial creation that prohibits purchasers of products from recovering purely economic damages under negligence or products liability theories. The rationale is that, absent personal injuries or property damage, a defective product has not performed as expected. For this reason, claims for damage to the product itself are best understood as a U.C.C. warranty claim rather than a tort claim.<sup>89</sup> Therefore, courts rule that contract, which traditionally protects expectation interests, and not tort, should govern the buyer’s remedy in this setting.<sup>90</sup>

Radin leaves out that the economic loss doctrine helps safeguard the “historical distinction” between tort and contract.<sup>91</sup> In this way, the criteria for applying the economic loss doctrine rely upon the “traditional differences” between tortious and contractual liability. Courts have observed, “[the] purpose of the economic loss doctrine . . . is ‘maintaining the *separate spheres* of the law of contract and tort.’”<sup>92</sup> Accordingly, the economic loss doctrine “provides a rule that is straightforward and predictable and that establishes a logical demarcation between cases properly pursued as tort actions and those which are warranty claims.”<sup>93</sup> Along similar lines,

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<sup>86</sup> See *infra* Section III.C. The same general test applies to medical malpractice, 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 286 (2013), and accountant malpractice, 1 AM. JUR. 2D *Accountants* § 21 (2013), which categories Radin identifies in a very general way as supporting her thesis. RADIN, *supra* note 3, at 209, 297 n.1, 299 n.17.

<sup>87</sup> *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1048 (D.S.C. 1993), *aff’d*, 46 F.3d 1125 (4th Cir. 1995).

<sup>88</sup> RADIN, *supra* note 3, at 214 (also arguing the economic loss doctrine should not protect World B contracts).

<sup>89</sup> *Myrtle Beach*, 843 F. Supp. at 1049. “Remedies for breach of warranty ‘sufficiently protect[ ] the purchaser by allowing it to obtain the benefit of its bargain,’ and thus place the purchaser in the same position it would have been in had the product functioned properly.” *Id.* (quoting *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986)); see also *Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 62 (Tex. App. 2013) (“When injury is only economic loss to subject [ ] of contract itself, [ ] action sounds in contract alone.”).

<sup>90</sup> *Myrtle Beach*, 843 F. Supp. at 1053-54; *Hansen v. Liberty Partners, LLC*, 2005 WL 3527162, at \*11 (M.D. Tenn. Dec. 22, 2005). “Economic loss” is loss of a bargained-for product based on a commercial transaction versus loss resulting from physical injury to person or other property because of negligence or strict liability. *Myrtle Beach*, 843 F. Supp. at 1050.

<sup>91</sup> *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848, 851 (6th Cir. 2002). *Cf.* RADIN, *supra* note 3, at 214-16.

<sup>92</sup> *N.Y. State Elec. & Gas Corp. v. Westinghouse Elec. Corp.*, 564 A.2d 919, 925 (Pa. Super. Ct. 1989) (emphasis added).

<sup>93</sup> *David v. Hett*, 270 P.3d 1102, 1110 (Kan. 2011) (citing *Koss Constr. v. Caterpillar, Inc.*, 960 P.2d 255 (Kan. Ct. App. 1998)); see also *Zimmerman v. Logemann*, 2009 WL 4407205,

the rule provides a “bright line rule of damage to a proprietary interest” where it is only those “cases at its edge” that can cause analytical difficulty.<sup>94</sup>

Radin argues that the economic loss doctrine is inapplicable to her new tort of intentional deprivation of basic legal rights. While Radin contends that the deployment of harmful boilerplate is an intentional wrong and that the economic loss rule is inapplicable to intentional torts,<sup>95</sup> the truth is that courts have split on whether the economic loss rule applies to intentional torts.<sup>96</sup> Radin further argues the economic loss doctrine does not control her new tort because the loss to the recipient is fully compensable for both an economic and non-economic loss, such as where the consumer also loses the benefit of the right to a jury trial.<sup>97</sup> The problem with Radin’s second argument is that a consumer would merely need to allege a non-economic harm accompanying the economic harm and thereby easily circumvent this important method for keeping tort and contract confined to their separate spheres.<sup>98</sup>

## 2. The Implied Warranty of Habitability as Case Study

In further developing her theory of interlocking categories between tort and contract, Radin’s most prominent example is her “case study” of the implied warranty of habitability in residential leases.<sup>99</sup> As it turns out, however, the cases, for the most part, rebut rather than support her thesis.

The common law was originally very harsh on tenants, holding that as a general rule, because a lease was a conveyance, the landlord was exculpated and owed no duty to the tenant or to the tenant’s guests even for dangerous or defective conditions on the premises.<sup>100</sup> Radin recites that courts first began modifying this rule by

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at \*7 (W.D. Wis. Nov. 30, 2009) (general idea behind the doctrine is “straightforward and uncontroversial”). *But see* Aliko Foods, LLC v. Otter Valley Foods, Inc., 726 F. Supp. 2d 159, 164 (D. Conn. 2010) (“While simply stated, the doctrine and relevant case law can be confusing.”).

<sup>94</sup> State of La. *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985).

<sup>95</sup> RADIN, *supra* note 3, at 215-16.

<sup>96</sup> First Republic Bank v. Brand, 50 Pa. D. & C.4th 329 (Pa. Com. Pl. 2000) (summarizing cases); *see also* DAN B. DOBBS ET AL., THE LAW OF TORTS § 613 n.1 (2d ed. 2013) (“Even some intentional torts may be protected by the economic loss rule in some instances.”).

<sup>97</sup> RADIN, *supra* note 3, at 216.

<sup>98</sup> *See also* Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1081 (2008) (“[W]hen the defective product causes economic, non-economic damages, or both, the economic loss doctrine comes into application.”).

<sup>99</sup> Although Radin gives the impression that the courts universally accept the implied common law warranty, *see* RADIN, *supra* note 3, at 204-06, a significant minority of jurisdictions reject this doctrine. *See* 25 MARK S. DENNISON, CAUSES OF ACTION § 3 (2d ed. 2004 & Supp. 2013) (citing cases from Alabama, Colorado, Connecticut, Indiana, Kentucky, Mississippi, Nebraska, South Carolina, and Wyoming). This subsection assumes that the lease at issue has no express clause covering a warranty of habitability.

<sup>100</sup> Ortega v. Flaim, 902 P.2d 199, 202 (Wyo. 1995).

reading into leases an implied warranty of habitability based on housing codes.<sup>101</sup> The injured tenant's remedy was that his promise to pay rent became dependent upon the landlord's implied promise to deliver habitable premises.<sup>102</sup> At a later time, it became clear that the warranty did not necessarily track the codes in detail and so in various (but not all) jurisdictions the implied warranty became effective by statute.<sup>103</sup>

She then notes that courts further developed the implied warranty through specific standards of habitability and formulas for tenant relief. For example, under a commonly-used rent abatement formula, courts may reduce the tenant's rental obligation commensurate with the percentage downgrade of habitability.<sup>104</sup> Noting that the *Restatement (Second) of Property* adopts this formula, Radin avers, "[c]ourts often speak of this [approach] as a contractual remedy, but it is actually a hybrid between contract and tort, with emphasis on the tort side."<sup>105</sup> Radin draws this conclusion because she believes courts in this circumstance are not necessarily enforcing a contract. Her rationale is the reduction in rent is compensation to the tenant akin to a tort remedy because the landlord has "wronged" him by putting a substandard unit on the market.<sup>106</sup>

Radin cites no authority for her argument that courts in this situation are essentially compensating the tenant in tort for the landlord's wrong. It turns out, however, that there are indeed two schools of thought on whether this implied warranty of habitability sounds in contract or in tort.

Most decisions follow the rule of keeping tort and contract remedies separate (and the tort here usually refers to the tenant's personal injury or property damage resulting from defective premises).<sup>107</sup> This line of cases says "[a] residential landlord's warranty of habitability is a contract duty, not a duty grounded in tort."<sup>108</sup> This view is correct because it recognizes that "a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent."<sup>109</sup>

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<sup>101</sup> RADIN, *supra* note 3, at 206.

<sup>102</sup> *Id.*

<sup>103</sup> RADIN, *supra* note 3, at 205.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 205 & n.26 (citing RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 11.1 (1977)).

<sup>106</sup> *Id.* at 205-06.

<sup>107</sup> RADIN, *supra* note 3, at 206.

<sup>108</sup> *E.g.*, Steward *ex rel.* Steward v. Holland Family Props., LLC, 726 S.E.2d 251, 255 (Va. 2012); Weiler v. Hooshiari, 19 A.3d 124, 128 (Vt. 2011). The Uniform Residential Landlord and Tenant Act's cause of action for damages ensures that the premises are habitable and does not create a tort action for damages which did not previously exist. Tighe v. Cedar Lawn, Inc., 649 N.W.2d 520, 527 (Neb. Ct. App. 2002) (construing NEB. REV. STAT. § 76-1419 (2014)).

<sup>109</sup> Weiler, 19 A.3d at 126; McIntyre v. Phila. Hous. Authority, 816 A.2d 1204, 1208-09 (Pa. Commw. Ct. 2003). The Weiler court also stated:

The following statement from the Wisconsin Supreme Court captures one aspect of why tort law is the wrong fit for the implied warranty:

A tenant's claim for breach of the implied warranty of habitability is a breach of contract claim for contractual damages. An injured party's claim for personal injuries is a tort claim in negligence for compensatory damages. Such claims may coexist, they may be caused by the same act, and they may be owned by the same party if it is the tenant who was injured. It is not the breach of warranty, however, that gives rise to the cause of action for the personal injury. Instead, it is the negligent act or omission.<sup>110</sup>

Further, a Virginia case cautions that a landlord's breach of contract is not a tort:

Such injuries resulting not directly from a breach of the contract, but from physical conditions existing apart from the contract, which the contract merely undertook to eliminate, cannot well be regarded as a proximate result of the breach of the contract, within the contemplation of the parties at the time of the making thereof. To allow a recovery for such injuries is to allow a recovery as for tort on account of a breach of contract.<sup>111</sup>

Because of these doctrinal barriers against tort, the majority view is that "[d]amages for personal injuries [are] not allowed for breach of implied warranty of habitability unless accompanied by tortious conduct."<sup>112</sup> Once again, courts are merely applying the independent tort/gist of the action doctrine (see Section III). Therefore, plaintiffs incurring personal injury or property damage from a condition on the premises frequently will assert in the alternative that breach of an implied warranty of habitability proves negligence or negligence per se stemming from the landlord's breach of a common law or statutory duty to keep the leased property free of hazards.<sup>113</sup>

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Leases are contracts, and damages for breach generally turn on the respective promises of the parties and are limited to recovery of the benefit of the bargain. Claims for personal injury or property damage sound in tort, typically in an action for negligent breach of a duty of care, and depend on comparative degrees of fault. *[T]he habitability warranty is a creature of contract . . .* (emphasis added).

*Id.*

<sup>110</sup> Antwaun A. *ex rel.* Muwonge v. Heritage Mut. Ins. Co., 596 N.W.2d 456, 469 (Wis. 1999).

<sup>111</sup> Caudill v. Gibson Fuel Co., Inc., 38 S.E.2d 465, 469-70 (Va. 1946), *approved in* Steward *ex rel.* Steward v. Holland Family Props., LLC, 726 S.E.2d 251, 254 (Va. 2012) (also noting an exception for where the landlord was guilty of fraud or concealment). Elsewise, Wyoming properly puts the emphasis on whether a duty should be recognized to support a new tort. Ortega v. Flaim, 902 P.2d 199, 206 n.3 (Wyo. 1995) ("Factors to consider in imposing a duty on a landlord include weighing the relationship of the parties against the nature of the risk and the public interest in the proposed solution, as well as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on a defendant.").

<sup>112</sup> 25 MARK S. DENNISON, CAUSES OF ACTION § 31 (2d ed. 2004 & Supp. 2013).

<sup>113</sup> *Id.* at § 15 and cases cited therein.

The final reason Radin uses to support her ‘tort over contract’ interpretation of the implied warranty is that the rent abatement remedy compensates for the diminution in rent for the corresponding shortfall in habitability.<sup>114</sup> Her argument is not persuasive because a leading California appellate case cited this same diminution in rent formula in an implied warranty of habitability case. In that decision, the court repeatedly stated that the plaintiff was pursuing a contractual remedy.<sup>115</sup> Further, none of the policies for granting tort damages apply to the remedy of rental abatement. Here, the court is simply giving the injured party the reduced value of the benefit of the bargain. If the action were truly in tort, the plaintiff would be restored to its former position, but instead the court is awarding a sum that is the equivalent of performance of the bargain—the objective to put the tenant in the position he would be in if the contract had been properly performed.<sup>116</sup> Thus, the rental abatement formula protects the tenant’s expectation interest in contract versus the restoration interest in tort by compensating the tenant for the lost value of the leasehold.<sup>117</sup>

As stated above, a second line of decisions (uncited by Radin) provides that the implied warranty “[a]llows recovery not only under contract law but also tort law.”<sup>118</sup> On their surface, these decisions support Radin’s argument that the implied warranty partakes of both contract and tort. Therefore, Radin might contend that the implied warranty of habitability does properly subject the landlord to possible tort liability for a dangerous condition that caused either property damage or personal injuries to tenants or their guests.<sup>119</sup>

These cases, conflicting with the weight of authority, are not persuasive. The reason is they misapprehend that contract terms do not create sources of duties in tort and a breach of contract ordinarily is distinct from a tort.<sup>120</sup>

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<sup>114</sup> RADIN, *supra* note 3, at 206.

<sup>115</sup> *Cazares v. Ortiz*, 168 Cal. Rptr. 108, 112 (Cal. App. Dep’t Super. Ct. 1980) (noting that tenant in the case did not plead a cause of action in tort).

<sup>116</sup> *Rathke v. Roberts*, 207 P.2d 716, 720-21 (Wash. 1949).

<sup>117</sup> *See Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972) (“For the balance of the term, tenant has lost the benefit of his bargain, assuming he had an advantageous lease.”).

<sup>118</sup> *Sample v. Haga*, 824 So. 2d 627, 631 (Miss. Ct. App. 2001); *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968) (suggesting that breach of the implied warranty of habitability, from which the warranty of suitability is derived, is an action in tort rather than in contract); *see also Scott v. Garfield*, 912 N.E.2d 1000, 1005 (Mass. 2009) (“[I]mplied warranty of habitability . . . is a multi-faceted legal concept that encompasses contract and tort principles.”).

<sup>119</sup> *Scott*, 912 N.E.2d at 1005.

<sup>120</sup> *See Gagnon v. W. Bldg. Maint., Inc.*, 306 P.3d 197, 200 (Idaho 2013) (“The source of a tort duty simply does not arise from the duty of contractual performance.”) (also stating that “[o]rdinarily, breach of contract is not a tort.”); *see also DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 435-36 (Utah 1983) (explaining that tort and contractual duties are distinct and that tort liability does not necessarily follow directly from a contractual breach, although a contractual relationship may give rise to a relationship on which a tort duty is premised); *Harrell v. Minn. Mut. Life Ins. Co.*, 937 S.W.2d 809, 810 (Tenn.1996) (“[T]here is a fundamental flaw in analyzing insurance contract terms under tort principles.”).

This tort theory of the implied warranty further overlooks basic principles governing tort and contract damages. Leases are contracts and determining damages for breach of contract generally depend on the parties' promises and the injured party's expectation interest as limited by the benefit of the bargain. Tenant claims against landlords for their negligently maintained premises causing personal injury or property damage are independent tort claims and (usually) depend on comparative degrees of fault.<sup>121</sup> Thus, the Wyoming Supreme Court got it right when it indicated in applying the implied warranty of habitability that those courts imposing a duty in tort outside the independent duty rule have done so less on legal principles and more on "social policy" to improve tenant living conditions.<sup>122</sup> Therefore, in contrast with Radin's analysis, the better-reasoned cases on the implied warranty of habitability exemplify how tort and contract do not overlap.

### 3. Other Principles Demonstrating a Clear Boundary

The analysis in this section thus far addresses Radin's theories that she says support her proposed tort "takeover" of contract. Throughout her Chapter Eleven on the suggested expansion of tort liability for merchants, Radin does not cite numerous legal doctrines that support the "fundamental distinction between tort and contract"<sup>123</sup> and their "divergent" policy objectives.<sup>124</sup> Accordingly, the law counteracts the danger that contract law could "swallow" tort law<sup>125</sup> just as the law equally protects contract from drowning in a "sea of tort."<sup>126</sup> Radin only briefly adverts to this doctrine, mostly in one footnote.<sup>127</sup>

This section of the Article will cite those same uncited doctrines that prove how highly courts value a strong contract-tort boundary.

According to the Tennessee Court of Appeals, contract and tort are two "wholly distinct and separate" fields of law wherein contract liability is "completely irrelevant" to tort liability.<sup>128</sup> The reasons for the gulf between the two fields arise from the substantive differences between tort and contract. Tort actions stem from the breach of duties imposed by law as a matter of public policy whereas contract actions derive from the breach of duties imposed by mutual consent.<sup>129</sup> Another way

<sup>121</sup> See *Weiler v. Hooshiari*, 19 A.3d 124, 128 (Vt. 2011).

<sup>122</sup> *Ortega v. Flaim*, 902 P.2d 199, 204 (Wyo. 1995).

<sup>123</sup> *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 242 (Wis. 2004).

<sup>124</sup> *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988); see also *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1253 (Del. Ch. 2010); *Deli v. Univ. of Minn.*, 578 N.W.2d 779, 782 (Minn. Ct. App. 1998) (similar comments).

<sup>125</sup> *Deli*, 578 N.W.2d at 782.

<sup>126</sup> *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986); *La Pesca Grande Charters, Inc. v. Moran*, 704 So. 2d 710, 712 (Fla. Dist. Ct. App. 1998).

<sup>127</sup> RADIN, *supra* note 3, at 297 n.1.

<sup>128</sup> *De Ark v. Nashville Stone Setting Corp.*, 279 S.W.2d 518, 522 (Tenn. Ct. App. 1955).

<sup>129</sup> E.g., *Goldstein v. Elk Lighting, Inc.*, 2013 WL 790765, at \*3 (M.D. Pa. Mar. 4, 2013); *Foley*, 765 P.2d at 389; *Town of Alma v. Azco Const., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000). Radin does mention this point, see RADIN, *supra* note 3, at 201, 209, but also claims it is "simplistic" and in need of modification.

of looking at the same issue is that tort law focuses on the relationship between society and the individual, which coverage is potentially extremely wide-ranging, whereas contract is concerned with the relationship between specific parties voluntarily entering a transaction, which coverage is always much narrower.<sup>130</sup> A related distinction is that with contract, courts intervene primarily to enforce the contractual benefit of the bargain or to give meaning to the contract terms once a dispute develops.<sup>131</sup>

In another instance where Radin barely acknowledges the tort-contract divide, settled doctrine<sup>132</sup> provides that, as a matter of policy, the law disallows parties from using tort law to alter or avoid their contractual obligations.<sup>133</sup> The preceding section on the implied warranty of habitability nicely illustrates this point. Further, courts agree that a “contractual obligation, by itself, does not create a tort duty”<sup>134</sup> because “all contract duties and breaches of those duties . . . must be enforced pursuant to contract law.”<sup>135</sup> Courts also reason that “[p]ermitt[ing] parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit [primarily higher damages] that was not part of the bargain.”<sup>136</sup>

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<sup>130</sup> See *Foley*, 765 P.2d at 389; *Azco Const.*, 10 P.3d at 1262.

<sup>131</sup> *Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 968–69 (E.D. Wis.1999); *Wausau Tile, Inc. v. Cnty. Concrete Corp.*, 593 N.W.2d 445, 451-52 (Wis. 1999) (“In contract law, the parties’ duties arise from the terms of their particular agreement; the goal is to hold parties to that agreement so that each receives the benefit of his or her bargain.”).

<sup>132</sup> RADIN, *supra* note 3, at 209 (noting that the “presence of a contract . . . excludes application of tort law with respect to claims of one of the parties.”).

<sup>133</sup> 17A AM. JUR. 2D *Contracts* § 712 (2008) (“As a general matter of policy, tort law should not be used to alter or avoid a bargain made in a contract.”); see also *In re Consol. Vista Hills Retaining Wall Litig.*, 893 P.2d 438, 446 (N.M. 1995) (same).

<sup>134</sup> *Jones v. Hyatt Ins. Agency, Inc.*, 741 A.2d 1099, 1107 (Md. 1999); see also *Silk v. Flat Top Constr., Inc.*, 453 S.E.2d 356, 360 (W. Va. 1994) (“Tort law is not designed . . . to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.”) (quoting *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438 (4th Cir. 1990)). (“[T]he controlling policy consideration underlying the law of contracts is the protection of expectations bargained for.”) (internal quotation marks omitted) (quoting *Sensenbrenner v. Rust, Orling & Neal, Architects, Inc.* 374 S.E.2d 55 (Va. 1988)). By contrast, if the “tort” action is actually for breach of contract, the action in tort will not lie. *E.g.*, *Tiffin Motorhomes, Inc. v. Superior Court*, 136 Cal. Rptr. 3d 693, 698 (Ct. App.2011).

<sup>135</sup> *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617-18 (Tex. 1986) (“When the injury is only the economic loss that is the subject of a contract, the action sounds in contract alone.” (citing *Mid-Continent Aircraft Corp. v. Curry Cnty. Spraying Serv.*, 572 S.W.2d 308, 312 (Tex. 1978))); see also *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 11 (Utah 2003) (“Tort law should govern the duties and liabilities imposed by legislatures and courts upon non-consenting members of society, and contract law should govern the bargained-for duties and liabilities of persons who exercise freedom of contract.”); accord *In re Brooke Corp.*, 467 B.R. 492, 501 (Bankr. D. Kan. 2012) (“The well-established rule . . . is the existence of a contractual relationship bars the assertion of tort claims covering the same subject matter as that governed by the contract.”).

<sup>136</sup> *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 848 (Wis. 1998); see also *Grynberg*, 70 P.3d at 11 (“[P]arties are not permitted to assert actions in tort in an attempt to circumvent the bargain they agreed upon.”).



The next important tort/contract difference concerns the related issue of plaintiff compensation. “A bright line distinction between the remedies offered in contract and tort with respect to economic damages . . . encourages parties to negotiate toward the risk distribution that is desired or customary.”<sup>137</sup> In light of this distinction, the law more generously compensates a prevailing tort claimant for all damages proximately caused by the tortfeasor and further permits recovery (as justified) of emotional distress damages and punitive damages.<sup>138</sup> The compensation standard for breach of contract is more stringent; the defendant will be liable for economic loss damages only when they were reasonably foreseeable at the time of contract formation, and likely to result.<sup>139</sup> Punitive damages and emotional distress damages are much less available in contract than in tort.<sup>140</sup> The tort “proximately caused” standard is more generous than the contract “likely to result” doctrine.<sup>141</sup> Therefore, courts are cognizant that they must not permit an aggrieved party to select tort over contract and thereby recover an undeserved benefit—the greater monetary relief allowed in tort—outside the terms of the contract.<sup>142</sup>

Radin does not cite the principles in the preceding section and further omits several other guiding philosophies regarding tort and contract. First, courts consider that “predictability about the cost of contractual relationships plays an important role in our commercial system.” Second, “[c]ourts traditionally have awarded damages for breach of contract to compensate the aggrieved party rather than to punish the

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<sup>137</sup> *Alejandro v. Bull*, 153 P.3d 864, 868 (Wash. 2007) (quoting *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994)).

<sup>138</sup> *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 250 (Colo. 2003) (Bender, J., concurring).

<sup>139</sup> *Id.* at 249; 24 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 64:7 (4th ed. 2002).

<sup>140</sup> *See* 22 AM. JUR. 2D *Damages* § 590 (2013) (“As a general rule, courts hold that punitive damages are not available as a remedy for breach of contract, without an underlying tort.”); LORD, *supra* note 139 (“Mental suffering caused by a breach of contract, although it may be a real injury, is not generally considered as a basis for compensation in contractual actions.”) (also noting some qualifications). To her credit, Radin specifically mentions these differences. RADIN, *supra* note 3, at 206 (emotional distress damages); *Id.* at 147, 206, 221 (punitive damages).

<sup>141</sup> *See* RADIN, *supra* note 3, at 297 n.1.

<sup>142</sup> *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 847-48 (Wis. 1998). Radin’s proposed compensation for the consumer is statutory damages and attorney fees. RADIN, *supra* note 3, at 213, 244. She also proposes that “[a] remedy should apply to everyone who was a recipient of a particular offending set of boilerplate.” *Id.* at 212. Given that Radin advocates statutory damages, and likely on a class action basis, she appears to concede that the measurable harm to a particular consumer could be minimal or even non-existent with most adhesive contracts. *See also* *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1060 n.6 (9th Cir. 2007) (per curiam) (citing cases suggesting that in general “statutory damages do not require proof of injury”). At the same time, statutory liquidated damages are remedial and not punitive and so it is not clear how Radin could meet this policy if the damage is nominal to individual plaintiffs. *Cf. Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258, 268 (Mo. 2013) (statutory damages are remedial and not a penalty for public wrongs). Radin’s strong implication is that a class action in tort should punish and deter merchants using improper boilerplate. *See* RADIN, *supra* note 3, at 216 (noting that her tort regime is designed to “deter the worst instances of boilerplate overreaching”).

breaching party.”<sup>143</sup> These two principles override Radin’s new tort remedies and counsel restricting the consumer to its contract remedies.

The reason is that Radin inappropriately assigns moral blame for the merchant’s supposed contractual wrongs when the law is clear that “contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.”<sup>144</sup> By contrast, tort law does consider the issue of moral blame: “[o]ne factor affecting the development of tort law is the moral aspect of the defendant’s conduct—the moral guilt or blame to be attached in the eyes of society to the defendant’s acts, motives, and state of mind.”<sup>145</sup> Radin’s proposal therefore is unwarranted because it clouds the predictability of contract relationships and unduly merges the function of tort and contract as her tort-based approach primarily expresses moral disapproval of the merchant’s ethically and legally-permissible use of mass market boilerplate.

In her advocacy of tort over contract, Radin concludes unpersuasively that “[t]here is nothing especially odd or radical about the proposal I . . . offer.”<sup>146</sup> In actuality, her suggestion dangerously undermines the goal that contracting parties must be confident that they will not face the possibility of unintended liability outside their bargain and beyond the cost considerations each side built into the perceived contract risks.<sup>147</sup> Accordingly, Radin’s advocacy for a tort “takeover”<sup>148</sup> of abusive boilerplate is not a valid legal reform but is instead a mere social engineering policy preference aiding consumers over merchants.

### C. Techniques For Separating Contract And Tort

As indicated above, the classification of an injured party’s remedial theory of damages is a major technique the law uses to keep tort and contract separate. One principal way the law uses to accomplish this goal is that where the same transaction constitutes a breach of contract, express or implied, and a tort, the plaintiff may waive the tort and maintain an action in contract.<sup>149</sup> The law follows still other safeguards to prevent the undue merger of tort and contract.

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<sup>143</sup> *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988).

<sup>144</sup> *In re Borges*, 485 B.R. 743, 772 (Bankr. D.N.M. 2012) (citing 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 190 (1990)); *see also supra* note 60 and accompanying text (use of boilerplate is not morally offensive).

<sup>145</sup> *Corl v. Huron Castings, Inc.*, 544 N.W.2d 278, 281 n.14 (Mich. 1996).

<sup>146</sup> RADIN, *supra* note 3, at 203.

<sup>147</sup> *See Town of Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000)

Limiting the availability of tort remedies in these situations holds parties to the terms of their bargain. In this way, the law serves to encourage parties to confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties’ efforts to build these cost considerations into the contract.

*Id.*

<sup>148</sup> *See supra* note 14 and accompanying text.

<sup>149</sup> 1A C.J.S. *Actions* § 160 (2013); *see also id.* at § 170 (party may waive tort of fraud and sue in contract for breach).

Primarily, Radin never mentions the established line of authority that the gist or gravamen of the cause of action is determinative for deciding whether the action lies in contract or tort.<sup>150</sup> In deciding whether a contract claim is “masquerading as a tort,” this test considers whether the “parties’ obligations are defined by the terms of the contract [or] by the larger social policies embodied by the law of torts.”<sup>151</sup> Stated another way, the prevailing test for enforcing tort liability when the parties have a contract is whether the wrongdoer also breaches an independent duty to the injured party owed separately from the contract.<sup>152</sup> Thus, where the defendant has damaged the person or property of the plaintiff, but where these parties also have a contract, the contract under many decisions must be collateral to the complained-of activity to support tort liability.<sup>153</sup>

With Radin’s proposed cause of action in tort for improper boilerplate, the contract is not collateral. Under her theory, Radin overlooks that the proposed tort liability arises solely from the contractual relationship between the parties and the alleged duties breached are all grounded in the contract itself.<sup>154</sup> By leaving out this important restraint, Radin continues to present an incomplete picture of the wisdom and feasibility of transforming a matter of contract into one of tort.

Furthermore, Radin’s proposal to provide relief in tort as redress for what is solely a controversy in contract adds undue complexity and confusion to the administration of civil remedies. As a leading treatise announces, the law should reduce the dual availability of tort and contract remedies for the same loss so that the rules will be simplified and a reduction will occur in litigation costs.<sup>155</sup> In those rare instances where the courts expand common law tort liability, they prefer broadening an existing tort rather than creating a new cause of action.<sup>156</sup> By contrast, Radin’s

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<sup>150</sup> 1A C.J.S. *Actions* § 136 (2013); *see also* Green v. Moore, 2001 WL 1660828, at \*3 (Tenn. Ct. App. 2001) (“The gravamen of an action is in tort and not in contract, however, when an act constituting a contractual breach also constitutes a breach of a common law duty independent of the contract.” (citing 86 C.J.S. *Torts* § 4 (1997))). Some courts apply an even stricter test, requiring proof of a separate set of facts from those forming the basis of the contract claim for a plaintiff to sue in tort. Dorff, *supra* note 81, at 407-08. “Other courts have applied a looser test, allowing the plaintiff to choose between suing in tort or contract if the same set of facts could support either type of claim.” *Id.*

<sup>151</sup> Goldstein v. Elk Lighting, Inc., 2013 WL 790765, at \*3 (M.D. Pa. Mar. 4, 2013).

<sup>152</sup> Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 684 N.E.2d 1261, 1270 (Ohio Ct. App. 1996).

<sup>153</sup> Goldstein, 2013 WL 790765, at \*3. More elaborately, the “gist of the action” doctrine bars tort claims arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. *Id.*; Bruno v. Bozzuto’s, Inc., 850 F. Supp. 2d 462, 466-67 (M.D. Pa. 2012).

<sup>154</sup> Goldstein, 2013 WL 790765, at \*3-4.

<sup>155</sup> DAN B. DOBBS, ET AL., PROSSER AND KEETON ON TORTS § 92, at 655 (5th ed. 1984).

<sup>156</sup> *See, e.g.*, Bandag of Springfield, Inc. v. Bandag, Inc., 662 S.W.2d 546, 553 (Mo. Ct. App. 1983) (“[I]f there are categories of legally protectable interests which are now redressed, but inadequately so, the much preferable course is to revise traditional doctrine so as to protect the interest which has gone unprotected.”).

undue merger of tort and contract remedies “[u]ndermines the goals and basic principles of contract law and unacceptably blurs the distinction between contract and tort.”<sup>157</sup>

Based on the multi-faceted divide between the two legal fields, the state of current law could not contradict more Radin’s broad assertion that law can accommodate her proposals because the contract/tort border is “malleable,” “overlapping” and “shifting.”<sup>158</sup>

#### D. Existing Alternatives to Creating New Torts

Certainly, merchant abuses of the imbalance of bargaining power have and will occur with adhesion contracts and related instruments. For that reason, this Article unreservedly agrees that the law should not support unethical or improper practices where inconsistent with legal norms and endorses the common statement that courts should examine adhesion contracts “with greater scrutiny.”<sup>159</sup>

It is also possible, however, to overstate the incidence of such abuses, poor practices, or merchant overreaching. Other writers question certain notions that Radin takes as a given, namely the propositions that (1) merchants exploit consumers by inserting into standard-form contracts terms that systematically exploit buyers and (2) consumers commonly ignore or fail to understand the terms of standard form contracts.<sup>160</sup>

On the first point, a commentator argues sellers have incentives to avoid the exploitation of consumers:

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<sup>157</sup> See also *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 252 (Colo. 2003) (Bender, J., concurring) (making similar comment about the relation of Colorado contract and tort law). In the related circumstance of breach of contract, the California Supreme Court has aptly summarized the reasons for disallowing contract cases to sound in tort:

[T]he different objectives underlying tort and contract breach; the importance of predictability in assuring commercial stability in contractual dealings; the potential for converting every contract breach into a tort, with accompanying punitive damage recovery, and the preference for legislative action in affording appropriate remedies.

*Id.*

*Erlich v. Menezes*, 981 P.2d 978, 984 (Cal. 1999).

<sup>158</sup> RADIN, *supra* note 3, at 199-201.

<sup>159</sup> *Wilkerson ex rel. Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005); see also *First Alabama Bank v. First State Ins. Co., Inc.*, 1988 WL 192452, at \*11 (N.D. Ala. 1988) (adhesion contracts “[h]ave always been subjected to careful judicial scrutiny to avoid injury to the public.”); *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 228 (W. Va. 2012) (“A contract of adhesion should receive greater scrutiny than a contract with bargained-for items to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.”); *Martin v. Educ. Testing Serv., Inc.*, 431 A.2d 868 (N.J. Super. Ct. Ch. 1981), *overruled on other grounds*, *Brady v. Dep’t of Pers.*, 693 A.2d 466 (N.J. 1997) (“[A] contract of adhesion must at very least be closely scrutinized by the court to determine its reasonableness.”).

<sup>160</sup> Clayton P. Gillette, *Pre-Approved Contracts For Internet Commerce*, 42 HOUS. L. REV. 975, 977-79 (2006).

[S]ellers who attempt to capture the marginal buyer, who face reputational constraints, or who cannot distinguish readers from nonreaders, will face competitive pressures inconsistent with efforts to exploit nonreaders. Such sellers will be more likely to price terms that allocate risks to buyers and to enforce ostensibly oppressive terms only in the face of serious buyer misbehavior.<sup>161</sup>

While conceding that improper seller practices are always “plausible,” the same commentator also notes that “[i]nstances of systematic exploitative behavior are difficult to document or to assess. The little empirical evidence that exists suggests less obvious seller misbehavior than theory might predict.”<sup>162</sup>

On the second point, the commentator states “[t]here are reasons to believe that [buyer] ignorance is less pervasive than feared.”<sup>163</sup> As he points out,

Under relatively weak assumptions about competition, sellers have incentives to make certain favorable terms salient to consumers, including comparisons between terms available from different competitors. Consumers who have negative experiences with a seller in one context have incentives to publicize their experiences, inducing sellers to avoid adverse reputational gossip. The ubiquity of websites (for example, eBay’s “Feedback Forum,” eopinions.com, and tripadvisor.com) that permit consumers to post evaluations of products and services they have received significantly reduces the search costs for other consumers who desire to compare quality before making similar purchases. Consumers who suffer losses in one context may also translate what they have learned to other contexts.<sup>164</sup>

Notably, Radin does not attempt to rebut these arguments.<sup>165</sup>

In a point of particular concern, her apparent plan to implement her proposed tort reforms that would overhaul boilerplate contracting in an abrupt and wholesale manner comes with insufficient assurances that they could succeed.<sup>166</sup> Literally construed, Radin’s approach would potentially jeopardize, among many others, the enforceability of every major credit card contract, residential real estate contract, automobile purchase (or rental) agreement, and consumer bank loan contract. Her proposal could also impose tort liability upon the merchant employing legally approved techniques with attendant sizable damages in a class action proceeding.<sup>167</sup>

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<sup>161</sup> *Id.* at 977.

<sup>162</sup> *Id.* at 978.

<sup>163</sup> *Id.* at 977.

<sup>164</sup> *Id.*

<sup>165</sup> Radin cites the article in her book, RADIN, *supra* note 3, at 307 nn.26-27, but does not mention these qualifications.

<sup>166</sup> *Id.* at 212-16.

<sup>167</sup> Radin suggests statutory damages for all eligible persons in the mass market who were recipients of the offending boilerplate. *Id.* at 212-13. By necessary implication, Radin advocates class action relief for such persons but there is a caveat. Under FED. R. CIV P. 23(B)(3)(A), the law disfavors class certification where each class member has suffered

A suggestion for a pilot project to reform current contracting approaches would have been a much more prudent, incremental way to test her theories.

While she is correct that boilerplate (just as with any other contracting mechanism) where misused can cause unfairness, respected authorities have observed that boilerplate “abuses” can be “controlled without altering traditional doctrines, provided those doctrines are interpreted flexibly, realistically.”<sup>168</sup> Rather than implement the case law suggestion that the flexible, creative use of existing contract remedies is the soundest means to address possible boilerplate exploitation, Radin uses the much blunter, hasty, and overbroad approach of radically overhauling existing tort law.

Radin’s critique has missed an even larger legal trend. While she proposes as though it were an original proposition that the legal system should broadly regulate mass market boilerplate,<sup>169</sup> the law already employs wide-ranging boilerplate counter-measures. As a California case observes, the legal system has imposed “a proliferation of legal controls” on adhesion contracts.<sup>170</sup> In recent years, state and federal regulatory agencies have also been more active in imposing controls on contracts and contract making in particular situations.<sup>171</sup> In a similar vein, the *Restatement (Second) of Contracts* observes that “The obvious danger of overreaching has resulted in government regulation of insurance policies, bills of lading, retail installment sales, small loans, and other particular types of contracts. Regulation sometimes includes administrative review of standard terms, or even prescription of terms.”<sup>172</sup>

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sizeable damages or has an emotional stake in the litigation but the opposite is true where each class member suffered relatively modest damages. *See, e.g., In re N. Dist. of Cal., Dalkon Shield, Prods. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir. 1982), *abrogated on other grounds, Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996). Thus, the law takes a case-by-case approach to class certification whereas Radin seems to take an undifferentiated approach on the same issue.

<sup>168</sup> *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (Posner, J.).

<sup>169</sup> RADIN, *supra* note 3, at 217-21 (calling current efforts “piecemeal”).

<sup>170</sup> *H.S. Perlin Co. v. Morse Signal Devices*, 258 Cal. Rptr. 1, 9 n.10 (Dist. Ct. App. 1989).

<sup>171</sup> *Id.*; *see also F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 945-46 (N.D. Ill. 2008) (stating Federal Trade Commission’s general policy is to rely on consumer choice without regulatory intervention except where certain types of unfair sales techniques impair the consumer’s ability of free decision making). Pursuant to the Dodd Frank Act, the Consumer Financial Protection Bureau has broad power to regulate unfair and deceptive acts and practices as well as abusive consumer credit contracts. Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 *BROOK. J. CORP. FIN. & COM. L.*, 107, 107-09 (2012). *But see* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 *GA. L. REV.* 583, 620 (1990) (“It is axiomatic that government involvement in the marketplace is a second best solution. All governmental regulation of contracts imposes costs and risks of inefficiency and error and can only be justified when the gains from a regulation exceed its costs.”).

<sup>172</sup> *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt. c (1981). The following excerpt from Alabama law shows the close regulation of terms in insurance policies:

An insurer may not enter into or issue a policy of insurance under this chapter until its policy form has been submitted to and approved by the director of the division of insurance. The director of the division of insurance may not approve the policy form

In view of these well-known trends, along with the numerous pro-consumer case law doctrines cited in this Article, it remains a puzzlement why Radin believes new tort remedies are needed or why she insists that the legal system has mounted such an ineffectual response to the potential problems of mass market boilerplate contracting.

#### IV. THE PROPOSED TORT OF INTENTIONAL DEPRIVATION OF BASIC LEGAL RIGHTS

The prior section analyzed Radin's argument that tort is a better fit than contract to remedy improper boilerplate. Radin gets more specific as she contends that abusive boilerplate terms can serve as a proper basis for the tort of intentional deprivation of basic legal rights as a means for combating democratic degradation.<sup>173</sup>

In this section, after making some general criticisms of her proposed standard, I will analyze Radin's treatment of the following examples of such purported improper deprivations: (1) forum selection clauses that can require consumers at possible great expense and inconvenience to bring an action in a distant location; (2) contractual waivers of the right to a jury trial along with a substitute of mandatory arbitration;<sup>174</sup> (3) undue limitations of plaintiff remedies under U.C.C. § 2-719 that deprive consumers of the right to adequate redress;<sup>175</sup> and (4) denial of the consumer's right to adequate safety where infringed by overly broad exculpatory clauses that protect the merchant for its negligence against the consumer.<sup>176</sup>

##### A. General Criticisms of The Proposed Tort

Radin's proposal quickly runs into difficulty based on the mental state needed for the tort of intentional deprivation of basic legal rights. The required mental state

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of an insurance company until the company files with it the certificate of the director of the division of insurance showing that the company is authorized to transact the business of workers' compensation insurance in the state. The filing of a policy form by an insurance company with the division of workers' compensation for approval constitutes, on the part of the company, a conclusive and unqualified acceptance of the provisions of this chapter, and an agreement by it to be bound by them.

ALA. CODE 1975 § 27-14-10 (2009); *see also* ALASKA STAT. § 23.20.025 (2009).

Another example of governmental regulation of boilerplate is that new contract clauses in federal government contracting having a significant cost or administrative impact on contractors must go through the standard notice and comment procedures characteristic of the Administrative Procedure Act. *See* 48 C.F.R. subpart 1.5 (stating that such proposed regulatory clause "shall" be published in the *Federal Register* and that policy makers "will consider" the views of non-governmental parties or organizations). The cases frequently comment that the federal procurement regulatory clauses are "boilerplate." *E.g.*, *Jordan Pond Co., LLC v. U.S.*, 115 Fed. Cl. 623, 628 (2014); *Appeal of D.W. Clark, Inc.*, 1994 WL475837 (ASBCA, Aug. 26, 1994).

<sup>173</sup> Radin recognizes that naming the tort in this manner is not entirely logical because if the court finds the defendant liable and the court invalidates the boilerplate, the plaintiff is not deprived of any rights. RADIN, *supra* note 3, at 301 n.39; *see also id.* at Chapter Three (Radin's argument regarding democratic degradation).

<sup>174</sup> *Id.* at 16-17, 108, 131-32.

<sup>175</sup> *Id.* at 140, 141, 145.

<sup>176</sup> *Id.* at xiv, 138-40, 184-85.

creates the likelihood of the tort's having little impact because of proof problems. The reason is that "intentional" in the law of torts has an established meaning: "[a]n intentional tort is one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act."<sup>177</sup> In intentional tort cases, courts are sensitive to the "inherent" barriers to proving a tortfeasor's mindset and so resort must be had to the often-contestable nature of the surrounding circumstances of the defendant's conduct.<sup>178</sup>

Radin seems to argue that the mere act of issuing boilerplate contracts is sufficient evidence of the requisite bad intent, but this position would be incorrect. Radin says—with no supporting evidence—that "[t]hose who draw up and deploy boilerplate know exactly what they are doing and are fully aware of its effects *and indeed intend those effects.*"<sup>179</sup> Without some level of individualized evidence that the person intends to produce the harm, however, Radin's unqualified conclusion that every merchant who deploys abusive boilerplate does so intentionally is based only on supposition.

The next problem pertains to how Radin classifies deprivations of "basic legal rights." In addressing this point, Radin contends that boilerplate terms operate improperly when they deprive consumers of rights granted by the "polity."<sup>180</sup> Thus, courts should consider the extent of democratic degradation, she says, when the boilerplate creates a danger of erasing an entire legislative scheme for many persons.<sup>181</sup> Furthermore, she believes the most likely candidate for this tort is where mass market boilerplate cancels a basic right that should be fully, or at least partially, market inalienable.<sup>182</sup>

In Radin's lexicon, "market inalienable" means that the person cannot divest himself of the right by contract, even voluntarily. An example would be that a party

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<sup>177</sup> Moore v. Western Forge Corp., 192 P.3d 427, 432 (Colo. App. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 870 (1979); see also RESTATEMENT (SECOND) OF TORTS § 876 (1979) (describing three ways in which a person acting in concert may be deemed liable for another's tortious conduct).

<sup>178</sup> See *In re* Washington Pub. Power Supply Sys. Sec. Litig., 1988 WL 158948 (W.D. Wash. July 14, 1988). Cf. State v. Castagna, 905 A.2d 415, 420 (N.J. Super. Ct. App. Div. 2006) ("There is rarely direct proof of intent, and purpose may and often must be inferred from what is said and done and the surrounding circumstances, including "[p]rior conduct and statements [criminal harassment]." (citations omitted).

<sup>179</sup> RADIN, *supra* note 3, at 215. If the person issuing the abusive, standard form boilerplate to the customer is essentially ignorant of the terms, it cannot be said that this party acts in concert with the author of the document; see generally Casey v. U.S. Bank Nat'l Ass'n, 26 Cal. Rptr. 3d 401, 407 (Cal. Dist. Ct. App. 2005) ("A defendant can be held liable as a co-tortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort.").

<sup>180</sup> RADIN, *supra* note 3, at 212, 216.

<sup>181</sup> *Id.* at 211. Only one case was found supporting Radin's argument regarding democratic degradation in modern contracting. An Iowa decision not cited by Radin comments in dicta that the dominance of form contracts has placed personal rights in a constitutionally suspect manner in the hands of private lawmakers without the consent, express or implied, of the affected persons. See C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 174 (Iowa 1975).

<sup>182</sup> RADIN, *supra* note 3, at 211.



is barred from giving up a right where there is “severely problematic consent,” such as prohibiting a person from selling himself into slavery.<sup>183</sup> “Partially market inalienable” means that a trade of the right for money is permissible, but only upon the approval by a public institution, such as a court, that reviews or oversees the transaction.<sup>184</sup> An example of such a transaction would be a consumer’s waiver under the U.C.C. of the right to recover consequential damages.<sup>185</sup>

When the contract is fully or partially inalienable, as stated above, Radin contends that courts should declare these boilerplate contracts invalid in their entirety. She even claims that firms deploying boilerplate to erase the consumer legal rights that make contractual private ordering possible “[a]re using contract to destroy the underlying basis of contract [as well as making] an assault on the underlying structure of the polity.”<sup>186</sup> When a contract contains such improper terms, Radin’s solution is to substitute contracts governed by background legal default rules because she believes it is too difficult to sever only the offending clauses.<sup>187</sup> This group of arguments largely forms the basis for her contention that the deprivation of consumer rights stemming from boilerplate contracts has led to democratic degradation.

In Radin’s view, what are the specific circumstances forming the basis for “deprivation of basic legal rights”? In Chapter Nine, Radin analyzes the specific infractions that can trigger the new tort. Some examples are contractual denials of the rights of redress of grievances, the right to a jury trial, the right to free speech, and the right to privacy.<sup>188</sup> Yet, because of its vague contours, this broad new theory of tort liability is necessarily ambiguous because the quoted words—“basic legal rights”—lack a standard legal definition. While Radin, in giving examples, does attempt to cabin the tort to an extent, her novel restriction to “severe remedy deletions” of rights that are least “partially market inalienable” provides inadequate guidance for judges and the parties. Equally vague and subjective are her “parameters” consisting of: “(1) the nature of the divested right; (2) the quality of consent by recipients; and (3) the extent of social dissemination of a scheme that supersedes recipients’ background rights.”<sup>189</sup>

Because of the open-endedness of Radin’s typology, the judicial system could not apply her formulation fairly or consistently. A constant tug of war would exist between plaintiffs, who will contend that most or all legal rights are “basic,” and defendants, who will contend that only a narrow “basic rights” category is appropriate. As commentators have noted, the elements of a tort and the interests it

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<sup>183</sup> *Id.* at 159, 211-12, 286 n.4. “Sheer ignorance” is often associated with this theory, Radin contends, and it occurs when another party divests the first party’s entitlement but the person “[d]oes not know that is happening, or indeed that anything is happening.” *Id.* at 21.

<sup>184</sup> *Id.* at 157-61.

<sup>185</sup> *Id.* at 182.

<sup>186</sup> *Id.* at 36, 39, 173; Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate*, (G. Lestas, P. Saprai, & G. Klass eds., Oxford University Press 2014) (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2274790#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274790#).

<sup>187</sup> RADIN, *supra* note 3, at 213.

<sup>188</sup> *Id.* at 154-186.

<sup>189</sup> *Id.* at 181.

seeks to protect should be “adequately defined so as to allow consistent application.”<sup>190</sup> Another point she overlooks is that the polity in the form of the people’s legislature often limits or restricts the so-called inalienable rights through supervening statutes, such as congressional action through the Federal Arbitration Act, which is a federal law that is paramount over the contracting parties’ contrary intent.<sup>191</sup>

Radin further fails to address the high judicial importance placed on setting appropriate limits on damages. When parties ask courts to expand tort law duties, as per her suggestion, there is frequently “judicial resistance to the expansion of duty . . . out of practical concerns . . . about potentially limitless liability. . . .”<sup>192</sup> Her book contains little, if any, mention of the problems of imposing excessive monetary liability upon defendants and causing a chilling effect on defendants’ heretofore legitimate business dealings. Instead, Radin’s overriding objective is to maximize consumer rights—preferably through liberal use of class actions—with insufficient attention to other legitimate social and economic goals. In essence, after one goes through the examples she specifically calls out as possible bases in her Chapter Nine, and the vague criteria for defining the tort in the same chapter and elsewhere, the proposed tort of intentional deprivation of basic legal rights is subjective and undefinable.

The basic question remains: is tort generally better suited than contract to remedy abusive boilerplate? The former Chief Justice of the Alabama Supreme Court has described very well why the structure of contract is better suited than tort to remedy the problems sought to be addressed under, as proposed by Radin, a new residual tort:

Contractual duties are consensual, and even when implied they have the virtue of implication from the contract itself. There are well-established rules for determining a breach and its consequences. Contract is perhaps the most concrete and predictable body of legal doctrine, whose application is unlikely to defeat any valid expectation interests of the parties . . . Finally, judicial control of the excesses of passionate juries is less problematic in contracts than it is in the realm of torts. In contracts, the important issues are more often legal than factual, and any modification of damage rules would not require the availability of punitive damages.

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<sup>190</sup> Comment, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 113-14 (1979). Only one case was found explicitly approving the concept of “market inalienability,” and that was from the United States Court of Appeals for the Ninth Circuit dealing with brothels and prostitution in Nevada. *Coyote Publ’g, Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010). The court ruled that “[t]here are, in a civilized society, some things that money cannot buy” is a deeply rooted notion in our nation’s law and public policy. *Id.* at 603. The court gave as examples selling babies into adoption or selling human organs. The key point is that market inalienable means offending the norms of a civilized society and violating public policy. *Id.* Radin’s formulation does not contain or meet these criteria.

<sup>191</sup> See Bix, *supra* note 4, at 508 (noting this issue as a weakness in Radin’s book).

<sup>192</sup> *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001).

In contrast to the virtues of contract law in general . . . the creation of any new tort is fraught with disadvantages . . .

The duties recognized in tort are non-consensual, imposed from without, either because of a special relationship between the parties or because of perceived public policy implications. Such duties are of necessity amorphous, becoming in application little more than matters of degree, best suited to resolution by a jury. Tort duties are difficult to judicially define or confine; although most courts are content with the enunciation of standards, such as “reasonable care,” in defining tort duties, wherever courts enunciate particular concrete rules, the process becomes endless, with attempts to cover each fact situation specifically as it arises, ultimately causing more confusion than clarity as the specific rules inevitably conflict.<sup>193</sup>

The Alabama jurist’s general comments about the weaknesses of amorphous torts apply with equal force to Radin’s new residual tort of intentional deprivation of basic legal rights.

### *B. Specific Criticisms of The Proposed Tort*

Some of Radin’s specific areas of concern for the proposed tort are forum selection clauses, standard form jury trial waivers, limitations of monetary remedies under the U.C.C., and exculpatory clauses regarding seller negligence. Contrary to Radin’s doctrinal analysis, a more in-depth examination of the case law will show that, in various key ways, the law already has a definite pro-consumer slant and does not contribute to democratic degradation. My analysis will further demonstrate that the tort of intentional deprivation of basic legal rights in these respects is unnecessary and lacks a sound rationale.

#### 1. Forum Selection Clauses and the Level Playing Field

A “forum selection clause,” a common form of boilerplate, designates a particular state or court as the jurisdiction where the parties will litigate disputes.<sup>194</sup> Controversy involving these clauses usually occurs where the plaintiff files the action in his home state and the defendant moves to dismiss because the complaint was not filed in the contractually designated forum.

Radin maintains that these boilerplate clauses “can effectively deny a remedy to injured parties by limiting claimants to bringing suit in jurisdictions that are very far away.”<sup>195</sup> She also argues courts do not sufficiently apply traditional defenses against the enforcement of these clauses, such as the doctrine of unconscionability, to protect individual rights.<sup>196</sup> Thus, where these clauses generate what Radin believes is widespread injustice to consumers, she claims these provisions can

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<sup>193</sup> *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1079-80 (Ala. 1984) (Torbert, C.J., dissenting), *vacated*, 475 U.S. 813 (1986).

<sup>194</sup> 17A AM. JUR. 2D *Contracts* § 259 (2014).

<sup>195</sup> RADIN, *supra* note 3, at 6.

<sup>196</sup> *Id.* at 137-38.

support the new tort of intentional deprivation of basic legal rights.<sup>197</sup> Radin does recognize in a footnote, however, that courts have deemed forum selection clauses invalid if the place or manner in which litigation is to occur is unreasonable, such as being cost prohibitive, and where the clause effectively denies a party its “day in court.”<sup>198</sup>

Radin emphasizes that she is not advocating that all choice of forum clauses cause an intentional deprivation of a basic legal right for purposes of the new tort. She opposes only those clauses that (1) alter the legal infrastructure of redress for a large number of persons, (2) are part of a full blown rights deletion scheme that undermines the rule of law, and (3) are a form of partial market inalienability that causes democratic degradation.<sup>199</sup>

Radin’s critique and summary of the law of forum selection clauses is incomplete, inconsistent, and incorrect in various ways. She leaves out the salutary principles that consider fairness to both consumers and industry and she de-emphasizes some key consumer-friendly doctrines. The following summary of the case law will show these material omissions regarding current legal doctrine.

In earlier times, courts disfavored forum selection clauses as illegitimate attempts to oust courts of their jurisdiction or as otherwise violative of public policy.<sup>200</sup> Today, forum selection clauses are *prima facie* valid and will be enforceable absent the contesting party’s overcoming a “heavy burden of proof” that enforcement would be unreasonable or unjust.<sup>201</sup> A remote location to the plaintiff, without more, will be insufficient to deny enforcement of a choice of forum clause.<sup>202</sup>

In the federal courts, where these issues are usually (but not exclusively) litigated, three reasons typically can make enforcement of a forum selection clause unreasonable: (1) if the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; or (3) if enforcement would contravene a “strong public policy” of the forum (whether declared by statute or court decision) in which suit is brought.<sup>203</sup> The doctrinal rules

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<sup>197</sup> *Id.* at 137, 146, 183.

<sup>198</sup> *Id.* at 282 n.42. (citing decisions).

<sup>199</sup> *Id.* at 212, 231.

<sup>200</sup> *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6, 9, 12 (1972).

<sup>201</sup> *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294 (9th Cir. 1988) (quoting *Bremen*, 407 U.S. at 17); *see also* *Unique Shopping Network, LLC v. United Bank Card, Inc.*, 2011 WL 2181959 (E.D. Tenn. June 3, 2011) (providing a comprehensive analysis that a forum selection clause was enforceable against the asserted grounds that it was unreasonable, unfair, ambiguous, overreaching, unconscionable or part of a contract of adhesion).

<sup>202</sup> *Durdahl v. Nat’l Safety Assocs., Inc.*, 988 P.2d 525, 528 (Wyo.1999) (citing *Bremen*, 407 U.S. at 17).

<sup>203</sup> *Petersen v. Boeing Co.*, 715 F.3d 276, 280 (9th Cir. 2013); *Haynsworth v. The Corp.*, 121 F.3d 956, 963 (5th Cir. 1997) (similar four-part test). For an influential case discussing when a forum selection clause will be valid, see *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383-84 (2d Cir. 2007). Some state courts follow a similar standard. *E.g.*, *In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009); *see also* 6 C.J.S. *Arbitration* § 36 (2012) (clause not enforceable where it conflicts with an express provision of the Federal Arbitration Act). Fraud or overreaching “does not mean that any time a dispute arising out of a transaction

governing contracts in general will determine the validity of a forum selection clause.<sup>204</sup>

Radin's approach to forum selection clauses reveals her philosophical opposition to these clauses as opposed to a cogent legal theory for the objection. Radin uniformly maintains a strong preference for consumers and shows little, if any, sensitivity to the legitimate needs of industry. What she leaves out is the main public policy supporting enforcement of these clauses: *both parties' freedom of contract*<sup>205</sup> and the accompanying judicial respect for party autonomy.<sup>206</sup> As with all contract terms, "[t]he clear language must be interpreted and enforced as written even though it contains terms which may be considered harsh and unjust by a court."<sup>207</sup> Accordingly, a court when upholding the clause is not limiting the plaintiff's right to choose its forum, but is enforcing the forum that the plaintiff has already consensually selected.<sup>208</sup>

In effect, the parties entering a valid and reasonable clause agree that the selected forum is not so inconvenient that enforcing the clause would be an unfair imposition on either party.<sup>209</sup> Another way of making same point is that where a forum selection clause is valid, the contesting party by signing the contract has waived the right to a change of venue on the ground of inconvenience.<sup>210</sup> Similarly, the mere fact that the designated forum might have less favorable legal principles for a plaintiff is immaterial.<sup>211</sup> A "strong public policy" (as quoted above) as a basis for overriding a

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is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that . . . [a] forum-selection clause in a contract is not enforceable if *the inclusion of that clause in the contract was the product of fraud or coercion.*" *Haynsworth*, 121 F.3d at 963 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974)(emphasis added).

<sup>204</sup> 17A AM. JUR. 2D *Contracts* § 259 (2014). "The question of the scope of a forum selection clause is one of contract interpretation." *John Wyeth & Brother Ltd. V. Cigna Int'l Corp.*, 119 F.3d 1070, 1073 (3rd Cir. 1997). *Strafford Technology v. Camcar Div. of Textron*, 784 A.2d 1198, 1201 (N.H. 2001) ("It is the intent of the parties that [the forum selection clause statute] seeks to exalt . . ."); *see also Unique Shopping Network, LLC v. United Bank Card, Inc.*, 2011 WL 2181959 (E.D. Tenn. 2011) (comprehensive analysis that a forum selection clause was enforceable against the asserted grounds that it was unreasonable, unfair, ambiguous, overreaching, unconscionable or part of a contract of adhesion).

<sup>205</sup> *Hansen Family Trust v. FGH Indus., LLC*, 760 N.W.2d 526, 534 (Mich. Ct. App. 2008); *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990) ("The rationale most often used to support application of the modern rule is that it comports with traditional concepts of freedom of contract and recognizes the present nationwide and worldwide scope of business relations which generate potential multi-jurisdictional litigation.").

<sup>206</sup> *See Michael E. Solimine, Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 52 (1992) ("The rise of forum-selection clauses is a manifestation of the increasing deference to party autonomy in jurisdictional and related matters . . .").

<sup>207</sup> *Cf. Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 511 (Tenn. 2001) (stating general rule).

<sup>208</sup> 17A AM. JUR. 2D *Contracts* § 259 (2012).

<sup>209</sup> *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 234 (Tex. 2008).

<sup>210</sup> *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990).

<sup>211</sup> *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 831 (6th Cir. 2009). This doctrine answers Radin's contention, *see RADIN, supra* note 3, at 25, 145-46, 231, that choice of law clauses are

forum selection clause is one that outweighs the policy protecting freedom of contract.<sup>212</sup>

Accordingly, Radin leaves out that the courts carefully balance the interests of consumers and industry in the administration of these provisions. Forum selection clauses advance the “salutary” purposes of enhancing contractual predictability (especially with international transactions), reducing the costs of doing business, minimizing litigation over forum selection disputes, facilitating judicial economy and efficiency, and lowering consumer prices.<sup>213</sup> At its essence, a valid forum selection provision advances the basic function of contract law, which is “to promote commerce.”<sup>214</sup> The case law properly preserves fairness to defendants, especially where the company does business in many jurisdictions and will be unjustly required to defend what would likely be a constant stream of lawsuits in numerous locations versus in one place.<sup>215</sup>

An analogy shows the courts’ fair approach to the proper enforcement of forum selection clauses. The law’s interest in maintaining a balanced playing field for both parties therefore bears affinity with venue statutes, which: “(1) lay venue in a place that has a logical connection with the parties to the litigation; and (2) protect the defendant against the hardship of having to litigate in a distance place.”<sup>216</sup> Indeed, many corporations do business in all fifty states and in overseas locations, which means that they could be unduly burdened in litigating in “far flung fora.”<sup>217</sup> Thus, contrary to the impression left by Radin, it will be irrelevant for purposes of this issue that a large corporation has a major resource advantage as compared with the consumer.<sup>218</sup>

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prima facie or even per se improper merely because the drafting party can select a jurisdiction with legal standards markedly more favorable to its position than to the other party. *Cf. Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128,131-32 (7th Cir. 1996) (“Parties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress.”).

<sup>212</sup> *L’Arbalette, Inc. v. Zaczac*, 474 F. Supp. 2d 1314, 1321 (S.D. Fla. 2007).

<sup>213</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-15 (1972); *Martinez v. Bloomberg LP*, 740 F.3d 211, 219 (2d Cir. 2014); *Venard v. Jackson Hole Paragliding, LLC.*, 292 P.3d 165, 169 (Wyo. 2013); *see also Solimine*, *supra* note 206, at 52 (“These clauses have many virtues. They permit parties to select a desirable, perhaps neutral, forum in which to litigate disputes. Such planning permits orderliness and predictability in contractual relationships, obviating a potentially costly struggle at the outset of litigation over jurisdiction and venue.”).

<sup>214</sup> *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994).

<sup>215</sup> *See supra* note 201 and accompanying cases.

<sup>216</sup> *See Energy Res. Group, Inc. v. Energy Res. Corp.*, 297 F. Supp. 232, 234 (S.D. Tex. 1969).

<sup>217</sup> *D’Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708, 714-15 (D.R.I. 1983).

<sup>218</sup> *Mendoza v. Microsoft, Inc.*, 2014 WL 842929, at \*8 (W.D. Tex. Mar. 5, 2014) (“Plaintiffs also devote extensive briefing to the “Goliath”-like bargaining power of Microsoft, recounting Defendant’s “virtually limitless resources” and “thousands of attorneys at its disposal”—factors that are irrelevant for purposes of the enforcement of a forum-selection clause . . .”).

Consistent with their concern for balancing consumer and industry interests, courts have not hesitated to strike down a forum selection clause when it violates legal standards. A good example of such an unfair and unenforceable forum selection clause is one allowing suit in any jurisdiction of a particular party's choice.<sup>219</sup> Some courts also apply a stricter standard of reasonableness regarding enforceability.<sup>220</sup> A key point is the clause to be enforceable must contain language indicating the parties' intent to make venue exclusive, i.e., mandatory and not permissive.<sup>221</sup> When the clause is permissive, courts use traditional *forum non conveniens* analysis.<sup>222</sup> If the clause is oppressive and unconscionable, courts will accept this defense.<sup>223</sup> While she does briefly touch upon these issues in a footnote, Radin fails to give proper weight to these consumer-friendly legal doctrines.<sup>224</sup>

One other prominent consumer-friendly doctrine applies to these clauses. "Enforceability generally depends on whether the terms of the contracts are beyond the reasonable expectations of an ordinary person, or oppressive or

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<sup>219</sup> Central Ohio Graphics, Inc. v. Alco Capital Res., Inc., 472 S.E.2d 2 (Ga. Ct. App. 1996).

<sup>220</sup> See 7 RICHARD A. LORD, WILLISTON ON CONTRACTS §15:15 (4th ed. 2009) (so characterizing Hall v. Superior Court, 197 Cal. Rptr. 757 (Dist. Ct. App. 1983)).

<sup>221</sup> Caldas & Sons, Inc. v. Willingham, 17 F.3d 123, 127 (5th Cir. 1994); Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 755 (7th Cir. 1992); Fireman's Fund McMgee Marine v. M/V Caroline, 2004 WL 287663, at \*3 (S.D.N.Y. Feb. 11, 2004) ("a permissive forum selection clause indicates the contracting parties' consent to resolve their dispute in a given forum, but does not require the dispute to be resolved in that forum"); Bohl v. Hauke, 906 N.E.2d 450, 456 (Ohio Ct. App. 2009); Marjorie A. Shields, Annotation, *Permissive or Mandatory Nature of Forum Selection Clauses Under State Law*, 32 A.L.R.6th 419 (2008).

<sup>222</sup> See RELCO Locomotives, Inc. v. AllRail, Inc., 2014 WL 1047153 (S.D. Iowa Mar. 5, 2014). In a typical *forum non conveniens* case, where the contract has no agreed forum selection clause, the district court applies a three-step analysis whereby it (1) determines if an alternative forum exists; (2) considers the "relevant factors of private interest, weighing in the balance the relevant deference given the particular plaintiff's initial choice of forum;" and (3) weighs the relevant public interest, if the private interests are either nearly in balance or do not favor dismissal. Pride Int'l, Inc. v. Tesoro Corp. (US), 2014 WL 722129, at \*2 (S.D. Tex. Feb. 24, 2014) (citing cases).

<sup>223</sup> See, e.g., Bolter v. Superior Court, 104 Cal. Rptr.2d 888, 909 (Dist. Ct. App. 2001) (finding the forum selection provision "unduly oppressive" where small "Mom and Pop" franchisees located in California were required to travel to Utah to arbitrate their claims against an international carpet-cleaning franchisor); see also Nagrampa v. MailCoups, Inc., 469 F.3d 1257 (9th Cir. 2006) (finding Boston forum unconscionable because it was so prohibitively expensive that the individual plaintiff was essentially unable to litigate her claim). Radin acknowledges this line of authority, but weakly argues that the unconscionability doctrine applies in an "unpredictable" manner. RADIN, *supra* note 3, at 138.

<sup>224</sup> Radin leaves the impression that decisions disapproving these clauses are rare, RADIN, *supra* note 3, at 146. For a collection of a significant number of decisions denying enforcement of a particular choice of forum clause, see Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 § 4[c] (1984 & Supp.); 32A AM. JUR. 2D *Federal Courts* § 1148 (2013).

unconscionable.”<sup>225</sup> This principle advances the traditional skepticism and stricter standard of review that courts entertain with respect to adhesion contracts.<sup>226</sup> Along similar lines, some jurisdictions have ruled “[t]he legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff”<sup>227</sup> and a few states even follow a strong state public policy against the enforcement of contractual provisions that mandate resort to a foreign forum.<sup>228</sup> Again, Radin short-shrifts the protections enjoyed by consumers courts properly give weight to the valid concerns of both consumers and industry in the administration of forum selection clauses.

In a further examination of Radin’s questionable treatment of the case law, let us pose a hypothetical that the forum selection clause is valid as a matter of contract, but a party seeks a change of venue on grounds of hardship. A typical reason would be, as argued by Radin, that the plaintiff opposing the forum selection must incur undue expense to travel to a distant site, which also means more burden to the plaintiff’s witnesses.<sup>229</sup> To what extent may such a challenge succeed?

To answer this question, I note that after the publication of Radin’s book, the U.S. Supreme Court clarified the law of forum selection clauses in *Atlantic Marine Constr. Co., Inc. v. U.S. District Court for the Western District of Texas*.<sup>230</sup> In this case, the Supreme Court observed that in deciding whether a forum selection clause is enforceable, the Court must consider, first, whether the clause is valid and, second, whether public interest factors nevertheless weigh against its enforcement “in all but

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<sup>225</sup> *Jenkins v. Marvel*, 683 F. Supp. 2d 626, 636 (E.D. Tenn. 2010); *see also* *Unique Shopping Network, LLC v. United Bank Card, Inc.*, 2011 WL 2181959 (E.D. Tenn. June 3, 2011) (providing a comprehensive analysis that a forum selection clause was enforceable against the asserted grounds that it was unreasonable, unfair, ambiguous, overreaching, unconscionable or part of a contract of adhesion).

<sup>226</sup> *See D’Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708, 714 (D.R.I. 1983) (“[I]t is well settled that the existence of boilerplate contracts should give a reviewing court pause.”); *see generally* *York v. Dodgeland of Columbia, Inc.*, 749 S.E.2d 139, 149 (S.C. Ct. App. 2013) (stating judicial rule of skepticism).

<sup>227</sup> *Hodes v. S.N.C. Achille Lauro Altri-Gestione*, 858 F.2d 905, 910 (3rd Cir. 1988), *abrogated on other grounds*, *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989); *see also* *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995) (“[t]he legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff”).

<sup>228</sup> Some states deem all such clauses unenforceable. Iowa, Idaho, and Montana hold that “outbound” forum selection provisions are per se unenforceable, and the latter two states do so based upon interpretations of state statutes. *See* *Davenport Machine & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 435-36 (Iowa 1982); *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1146 (Idaho 1989); *State ex rel. Polaris Indus., Inc. v. District Court*, 695 P.2d 471 (Mont.1985); 7 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 15:15 (4th ed. 2009). *But see* *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600 (7th Cir. 1994) (recognizing that a state may refuse to enforce forum-selection clauses providing for out-of-state litigation, as a matter of state public policy, but in a diversity case, federal law would apply over a non-discretionary state policy).

<sup>229</sup> RADIN, *supra* note 3, at 16-17.

<sup>230</sup> 134 S. Ct. 568 (2013).



the most exceptional cases.”<sup>231</sup> When the parties have agreed to a valid forum selection clause, the Court said, but a party brings the case in a different (and unauthorized) jurisdiction, a district court should almost always transfer the case to the specified forum.<sup>232</sup>

The *Atlantic Marine* Court further ruled that the parties’ and witnesses’ private convenience or interests are not valid considerations on change of venue because in agreeing to the clause, the parties have waived their right to challenge the preselected forum and private interests are no longer part of the equation.<sup>233</sup> In particular, the moving party’s preference for a particular forum merits no weight.<sup>234</sup> Accordingly, it will be immaterial that the parties’ have private interests in “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of a view of premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”<sup>235</sup>

Instead, the only relevant issues for change of venue under *Atlantic Marine* are public interest factors, and the plaintiff must show on this basis why the transfer to the designated forum should not take place.<sup>236</sup> Relevant public interest factors can include: local interest in the lawsuit, the court’s familiarity with governing law, the burden on local courts and juries, court congestion in the court, and the costs of resolving a dispute unrelated to the forum.<sup>237</sup> (Note that in the above hypothetical, the opposing party has raised only insufficient private interests and not the requisite public ones.)

Consistent with the traditional public policies governing forum selection clauses, the *Atlantic Marine* Court emphasized party autonomy, the contractual nature of these clauses, and the need for justice as between the parties:

[W]hen a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its “venue privilege” before a dispute arises.

. . . .

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set

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<sup>231</sup> *Id.* at 581-82; *see also id.* at 583 (“the party acting in violation of the forum-selection clause . . . must bear the burden of showing that public-interest factors overwhelmingly disfavor transfer.”). For additional discussion of *Atlantic Marine*, see Matthew J. Sorenson, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 *FORDHAM L. REV.* 2521 (2014).

<sup>232</sup> *Atlantic Marine*, 134 S. Ct. at 577.

<sup>233</sup> *Id.* at 582.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 582 n.6.

<sup>236</sup> *Id.* at 582.

<sup>237</sup> *Id.* at 582 n.6.

monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, “the interest of justice” is served by holding parties to their bargain.<sup>238</sup>

This unanimous Supreme Court decision giving increased importance to the enforceability of consensually-selected forum selection clause makes it practically impossible that a lower court would have any interest in Radin’s legal critique of these provisions. As for Radin’s normative criticisms, the courts’ emphasis on personal autonomy and fairness to both sides is superior to Radin’s unvarnished preference for consumers over business defendants. For all these reasons, Radin’s argument is not well-taken that widely used, valid consumer forum selection clauses necessarily lead to democratic degradation.

## 2. Jury Trial Waivers and Freedom of Contract

In arguing for the new tort as she propounds her theory of democratic degradation, Radin relies upon the alleged dilution of the consumer’s constitutional right to a jury trial that stems from widely used pre-dispute contractual arbitration clauses.<sup>239</sup> Radin argues that “it is unclear” why American courts permit contractual arbitration clauses to waive this right.<sup>240</sup> Radin believes that the right to a jury trial is market inalienable (non-waivable) where it is to be supplanted by contractual arbitration.<sup>241</sup> She also contends American courts “lack argument” to explain why a contract can so readily “trump the Constitution,” by which she means the Seventh Amendment right to a jury trial.<sup>242</sup>

The first flaw in Radin’s critique is that she misreads the Seventh Amendment—the Constitution does *not* absolutely guarantee a right to a jury trial. Instead, courts have stated, “[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court.”<sup>243</sup> Therefore, if the parties have an enforceable arbitration

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<sup>238</sup> *Id.* at 582-83.

<sup>239</sup> RADIN, *supra* note 3, at 16, 17, 85, 108, 131 (stating that arbitration clauses “deprive” consumers of “their right to a jury trial”); *see also id.* at Chapter Three (Radin’s view of democratic degradation).

<sup>240</sup> *Id.* at 160, 286 n.8. As one commentator points out, the term “waiver” in this context should be deleted in favor of “exchange.” The reason is that the consumer receives consideration from the merchant in return for giving up the right to a trial by jury. *See* Stephen J. Ware, *Arbitration Clauses, Jury Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167, 169 (2004). Because courts also use the phrase “waiver” in this context, I will do the same.

<sup>241</sup> RADIN, *supra* note 3, at 160, 286-87 n.8.

<sup>242</sup> *Id.* at 286-87 n.8. For commentary similarly critical of the current judicial approach in this area, *see generally* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997). For a commentary making the counter-argument, including a specific rebuttal of Sternlight’s thesis, *see* Ware, *Arbitration Clauses*, *supra* note 240, at 181, 188.

<sup>243</sup> *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (quoting *Cremin v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.* 957 F. Supp. 1460, 1471 (N.D. Ill. 1997)).

agreement and a duly authorized arbitrator hears the matter, the consumer has voluntarily ceded the choice of permitting a jury to consider his complaint.<sup>244</sup> Where the Seventh Amendment waiver meets legal standards, the legal and policy basis for enforcement is the consumer's right to freedom of contract and the need to conserve judicial resources in an already over-burdened system.<sup>245</sup> Given the well-settled rationale for the current doctrine, her statement is misplaced that courts "lack argument" to explain why a party may contractually waive a constitutional guarantee.

In her next criticism of pre-dispute jury trial waivers, Radin argues that when the law improperly allows the "expedient of required arbitration [to] depriv[e] a wide swath of the public of any viable remedy from the legal system [this practice] undermines the rule of law."<sup>246</sup> This argument has overtones of paternalism as Radin wishes to decide for all citizens whether they are barred from waiving certain rights.<sup>247</sup> Again, courts frequently have explained that parties exercising their freedom of contract may waive personal constitutional rights and that Seventh Amendment waivers do not offend public policy.<sup>248</sup> Many decisions have upheld pre-dispute jury trial waivers and an express or implied election to allow arbitration.<sup>249</sup> Radin also nowhere mentions that under Fed. R. Civ. P. 38(d), a party may be deemed to have waived the right to a jury trial if the party made an untimely

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<sup>244</sup> *Id.*; see also *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771, 781 (Tenn. Ct. App. 2010) (further noting that such pre-dispute waivers can be proper with or without an enforceable arbitration agreement).

<sup>245</sup> See *Lowe Enters. v. District Court*, 40 P.3d 405, 409 (Nev. 2002); see *In re Key Equip. Fin. Inc.*, 371 S.W.3d 296, 301 (Tex. App. 2012) (noting "strong" public policy concerns favoring freedom of contract) (jury trial waiver case).

<sup>246</sup> RADIN, *supra* note 3, at 137; see also *id.* at 174 (similar comment).

<sup>247</sup> See *infra* Part VI (describing the pro-consumer aspects of arbitration). *Cf.* *Blaylock Grading Co. v. Smith*, 658 S.E.2d 680, 682 (N.C. Ct. App. 2008) (quoting *Gas House, Inc. v. Southern Bell Tel. & Tel. Co.* 221 S.E.2d 449, 504 (N.C. 1976)) (Parties "should be entitled to contract on their own terms without the indulgence of paternalism by the courts . . ."). The argument also erroneously implies that arbitration is generally ineffectual for consumers.

<sup>248</sup> *E.g.*, *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) ("The seventh amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract."); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) ("Although the right of trial by jury in civil actions is protected by the Seventh Amendment to the Constitution, that right, like other constitutional rights, may be waived by prior written agreement of the parties."); *In re Key Equip. Fin. Inc.*, 371 S.W.3d at 301 (public policy allows such waivers). See generally Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 (1989); Wayne Klomp, Note, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545 (2005-2006).

<sup>249</sup> See 3 THOMAS A. OEHMKE, *COMMERCIAL ARBITRATION* § 50:4 (2014) (citing decisions); see *Ware, Arbitration Clauses, supra* note 240, at 171-172 (same). The "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984).

request;<sup>250</sup> therefore, no legal basis exists to conclude as an absolute principle that a party may not waive the choice to select a jury trial.

Even with the well-established individual right to dispense with a jury trial, many courts remain cognizant of the Seventh Amendment as they take a hard look at these waivers. Most jurisdictions allowing pre-dispute waivers of this kind protect the consumer's choice to elect a jury trial "[w]ith a number of safeguards not typical of commercial law."<sup>251</sup> These courts deem this choice as being so important that it must be "'zealously guarded' in the face of a claimed waiver."<sup>252</sup> Decisions have emphasized, "[i]t is elementary that the Seventh Amendment right to a jury is fundamental . . . ."<sup>253</sup> Therefore, many courts strictly construe a contractual pre-dispute jury trial waiver so that it must be knowing and voluntary.<sup>254</sup> This judicial task calls for a "fact based inquiry" which considers the "totality of the circumstances."<sup>255</sup> Contrary to Radin's implications, many courts do not take lightly the contracting party's abandonment of the guarantee to a jury trial, but indulge "every reasonable presumption" against the waiver of this alternative.<sup>256</sup>

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<sup>250</sup> *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 818 F. Supp. 2d 1193, 1205 (E.D. Cal. 2011).

<sup>251</sup> *Treo @ Kettner Homeowners Ass'n v. Superior Court*, 83 Cal. Rptr. 3d 318, 324 (Dist. Ct. App. 2008).

<sup>252</sup> *Id.* While some of the cases in this section do not specifically deal with arbitration as an alternative to pre-dispute jury trial waivers, courts have said that similar policy considerations apply to any such waiver in a civil case. *Id.* at 323.

<sup>253</sup> *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (also stating that a "presumption exists against its waiver."); *Duhn Oil Tool, Inc.*, 818 F. Supp. 2d at 1205 ("a strong presumption" exists against waiver of the right to a jury trial).

<sup>254</sup> "Contractual jury waivers do not violate public policy and are enforceable as long as the waiver is voluntary, knowing, and intelligent, and with full awareness of the legal consequences." *In re Key Equip. Fin., Inc.*, 371 S.W.3d 296, 301 (Tex. App. 2012); *see also* *Lehman Bros. Holdings Inc. v. Bethany Holdings Grp., LLC*, 801 F. Supp. 2d 224, 229 (S.D.N.Y. 2011) (quoting *Morgan Guar. Trust Co. of N.Y. v. Crane*, 36 F. Supp. 2d 602, 603-04 (S.D.N.Y. 1999)); *see also* *Neuro-Rehab Assocs., Inc. v. AMRESKO Commercial*, 2006 WL 1704258, at \*6 (D. Mass. June 19, 2006) (citing *Med. Air Tech. Corp. v. Marwan Inv.*, 303 F.3d 11, 18-19 (1st Cir. 2002)); *see generally* Landis, *supra* note 248; Klomp, *supra* note 248.

<sup>255</sup> *Neuro-Rehab Associates, Inc.*, 2006 WL 1704258, at \*6 (quoting *Med. Air Tech. Corp.*, 303 F.3d at 19).

<sup>256</sup> *Travelers Cas. & Sur. Co. of Am. v. Highland P'ship*, 2013 WL 878754, at \*2 (S.D. Cal. Mar. 8, 2013); *see* *Century 21 Real Estate LLC v. All Prof'l Realty, Inc.*, 2012 WL 2682761, at \*3 (E.D. Cal. July 6, 2012); *see* *Woodruff v. Bretz, Inc.*, 218 P.3d 486, 491 (Mont. 2009); *see also* Jay M. Zitter, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5th 53 §2[a] (1996) ("[M]any cases [state] that since the right to a jury trial is highly favored, independent contractual waivers of jury trials, entered into independent of specific litigation, will be strictly construed and will not be lightly inferred or extended."); *see also* Landis, *supra* note 248, at §2[a] (same). *But see* *In re Key Equip. Fin. Inc.*, 371 S.W.3d at 301 (noting that Texas does not apply a presumption against contractual jury waivers). Radin appears unaware of the cases applying strict scrutiny because she proposes as a new rule that courts should subject to "stricter scrutiny" waiver of the right to a jury trial. RADIN, *supra* note 3, at 246.

In further promoting consumer rights, most courts adjudicating disputes on jury trial waivers employ a complex multi-factor test. They focus on the conspicuousness of the provision, the parties' relative bargaining power, the sophistication of the party challenging the waiver, whether the waiving party's counsel had the opportunity to review the agreement, and whether the terms of the contract were negotiable.<sup>257</sup> No single factor is conclusive and the court is not bound by the number of factors that have been satisfied. Rather, the court asks whether, in light of all the circumstances, is the waiver unconscionable, contrary to public policy, or simply unfair.<sup>258</sup> In at least one jurisdiction, Montana, before a party may effectively waive the fundamental right to trial by jury, the person must personally consent to the waiver in a deliberate and understanding manner after being advised of the consequences.<sup>259</sup> Another pro-consumer policy is that most federal circuits place the burden of non-persuasion upon the party seeking to enforce the waiver to prove its validity.<sup>260</sup>

Based on the above guidelines, the majority of courts are not so unduly disposed toward approving contractual jury waivers as Radin contends in her book.<sup>261</sup> In sum, this area of the law lends no support to Radin's argument regarding democratic degradation.

### 3. U.C.C. § 2-719 and Limitations of Remedies

Radin correctly asserts that U.C.C. § 2-719 allows the parties to modify or limit Code remedies by agreement.<sup>262</sup> The parties may not limit consequential damages, however, when the limitation or exclusion is unconscionable, as stated in U.C.C. § 2-719(3). Thus, it will be *prima facie* unconscionable under the latter U.C.C. section where the parties limit these damages for personal injury arising from consumer goods (but the same will not be so for limitations on damages for commercial losses).<sup>263</sup> Another important point is that under U.C.C. § 2-719(2), where the circumstances cause an exclusive or limited remedy "to fail of its essential

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<sup>257</sup> *Martorella v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 1136444, at \*2 (S.D. Fla. Mar. 18, 2013) (citing decisions); *Dunkin' Donuts Franchising LLC v. Sai Food & Hoispitality, LLC*, 2013 WL 1092866, at \*1 (E.D. Mo. Mar. 15, 2013); *Travelers Cas. & Sur. Co. of Am.*, 2013 WL 878754, at \*2 (S.D. Cal. Mar. 8, 2013); *Key Equip. Fin., Inc. v. Poag & McEwen Lifestyle Ctrs., LLC*, 2010 WL 2696195, at \*3 (W.D. Tenn. July 6, 2010) (quoting *In re S. Indust. Mech. Corp.* 266 B.R. 827, 830-31 (W.D. Tenn. 2001)); *Woodruff v. Bretz, Inc.*, 218 P.3d 486, 491 (Mont. 2009).

<sup>258</sup> *Martorella*, 2013 WL 1136444, at \*2 (citing cases).

<sup>259</sup> *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 699 (Mont. 2009) (quoting *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, ¶ 65 (Mont. 2002)) (exhaustive list of factors).

<sup>260</sup> *See Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."). *But see Med. Air Tech. Corp.*, 303 F.3d at (noting circuit split on which party bears the burden on this issue).

<sup>261</sup> RADIN, *supra* note 3, at pp. xiv, 131.

<sup>262</sup> *Id.* at 141.

<sup>263</sup> *Id.*

purpose”<sup>264</sup> (explained below), a remedy may be had under chapters 1 to 9 of the U.C.C. Radin takes no issues with these propositions.

As explained more fully below, her analysis become more questionable as she describes the effect of U.C.C. § 2-719. According to Radin, U.C.C. § 2-719(1)(a) allows merchants to “severely limit” the buyer’s remedies “without providing that such limitations need be communicated especially carefully or that separate consent must be obtained.”<sup>265</sup> Radin also states that it is “unlikely” that courts applying U.C.C. § 2-719 would declare it is unconscionable for a merchant to impose a severe curtailment of remedies without any particular warnings to the recipient. She further calls these provisions the U.C.C.’s “invitation to shrink remedies” that merchants “very widely use.”<sup>266</sup> One such merchant maneuver is a boilerplate attempt to cancel the consumer’s ability to assert the doctrine of failure of essential purpose.<sup>267</sup>

Radin proposes several reforms for the use of U.C.C. § 2-719(2). Her principal suggestion is for courts to “make more use of” and to “review more carefully” the consumer’s right to invoke any U.C.C. remedy where the contractual remedies under the circumstances fail of their essential purpose.<sup>268</sup> Another proposed reform is that state courts should declare per se unenforceable those clauses “that shrink remedies beyond what seems necessary to provide realistic opportunities for redress.”<sup>269</sup> Radin believes that the U.C.C. and the courts have enabled firms to take unfair advantage of consumers with such “remedy slashing.”<sup>270</sup> Remarkably, Radin in her critique of U.C.C. § 2-719 fails to cite the Official Comments thereto or to any case law. Nevertheless, is her analysis correct that U.C.C. § 2-719 is defective or that courts wrongly have interpreted the U.C.C. consumer protections? Relying on the text of U.C.C. § 2-719, the Official Comments, and the decisions, this Article will test Radin’s criticisms that merchants have greater rights than consumers under U.C.C. § 2-719 and that courts need to put “some teeth” into the U.C.C. concept of “failure of essential purpose.”<sup>271</sup>

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> RADIN, *supra* note 3, at 141, 145. Radin claims that U.C.C. § 2-719 “also provides that remedies can be very severely limited by contract,” *id.* at 184, and that the U.C.C. “has a permissive stance toward minimizing economic remedies” for aggrieved buyers, *id.* at 224.

<sup>268</sup> *Id.* at 145-46. Radin states that merchants are giving consumers only a “minimalist remedy,” *id.* at 184, and that legislation is needed to clarify U.C.C. § 2-719 on what constitutes “fails of its essential purpose,” *id.* at 224. *See also id.* at 302-03 n.44 (asserting that courts have inadequately enforced U.C.C. § 2-719(2) in light of the underlying principles of U.C.C. §1-103 and that courts can do more to enhance consumer rights regarding the scope of failure of essential purpose).

<sup>269</sup> *Id.* at 147.

<sup>270</sup> RADIN, *supra* note 3, at 184.

<sup>271</sup> *Id.*

The Official Comments to U.C.C. § 2-719, which merit substantial weight as very persuasive authority,<sup>272</sup> negates Radin's contention that U.C.C. § 2-719 deprives consumers of fair redress or that it unduly favors merchants. Thus, according to the Official Comments, the first policy of U.C.C. § 2-719 is to respect the parties' freedom of contract.<sup>273</sup> This section gives them the leeway "[t]o shape their remedies to their particular requirements."<sup>274</sup> Accordingly, if the parties reach "reasonable agreements limiting or modifying remedies," courts should give effect to such agreements.<sup>275</sup> This language shows that the Code seeks to achieve consensus and mutual accommodations by *both* parties subject to *reasonable* restraints.<sup>276</sup> By contrast, Radin continually emphasizes consumer rights in her book with little, if any, mention of the valid need to support legitimate merchant rights and remedies.<sup>277</sup>

Employing a policy protective of both merchants and consumers, Official Comment 1 to U.C.C. § 2-719 provides "[i]t is of the very essence of a sales contract that at least minimum adequate remedies be available."<sup>278</sup> In another balanced policy, the parties under the same Comment must accept "[a]t least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."<sup>279</sup> Similarly, the Official Comments state that under U.C.C. § 2-719(2), if "[a]n apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article."<sup>280</sup> Numerous decisions rely on these passages from the Official Comments.<sup>281</sup>

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<sup>272</sup> See *In re U.S. Ins. Grp., LLC v. Cohutta Banking Co.*, 429 B.R. 903, 915 (E.D. Tenn. 2010); *First State Bank at Gallup v. Clark*, 570 P.2d 1144, 1146 (N.M. 1977) (making similar observations about Official Comments on other U.C.C. sections).

<sup>273</sup> U.C.C. § 2-719 cmt. 1 (2014) ("parties are left free to shape their remedies"); see also U.C.C. § 1-102 cmt. 2 (2003) ("[F]reedom of contract is a principle of the [Uniform Commercial] Code."); see also Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment*, 78 ST. JOHN'S L. REV. 663, 691 (2004) ("Freedom of contract provides the fundamental component of Article 2's structure.") (footnote omitted).

<sup>274</sup> U.C.C. § 2-719 cmt. 1 (2014).

<sup>275</sup> *Id.*

<sup>276</sup> See, e.g., *AES Tech. Sys., Inc. v. Coherent Radiation*, 583 F.2d 933, 941 (7th Cir. 1978) (stating that "Section 2-719 was intended to encourage and facilitate *consensual* allocations of risks associated with the sale of goods") (emphasis added).

<sup>277</sup> Radin consistently questions the ethics and integrity of merchants who use what Radin believes to be boilerplate rights reduction schemes. For example, Radin accuses them of using contract "to destroy the ideal of private ordering" which practice "undermines the rule of law" and "contributes to democratic degradation." RADIN, *supra* note 3, at 39. See also *id.* at 36 (accusing merchants of using purported contracts to erase consumer legal rights and "to destroy the underlying basis of contract"). Radin does not seem to entertain the possibility of merchant good faith in the use of boilerplate. See also *supra* note 60 and accompanying text (use of boilerplate is not morally inoffensive).

<sup>278</sup> U.C.C. § 2-719 cmt. 1 (2014).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*; see also U.C.C. § 2-719(2) (2014) ("Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.");

The primary difficulty in this area is how courts should balance the interests of buyers and sellers in considering a limited or exclusive remedy. The U.C.C. is definitely protective of both parties. While U.C.C. § 2-719 permits the parties to limit the remedies available for the buyer, “[l]imitations of remedy are not favored . . . and are strictly construed against the seller on the basis of public policy.”<sup>282</sup> The seller also has the burden of proof to establish the validity of such a limitation.<sup>283</sup> A further expression of the courts’ solicitude for consumers is that most jurisdictions have ruled that “in order for a limitation of remedy to be effective, it must also be conspicuous and a buyer must be afforded a reasonable opportunity to read it.”<sup>284</sup> Interestingly, the courts have added this last requirement to U.C.C. § 2-719 even though the Code has no actual “conspicuousness” provision.<sup>285</sup>

A representative Michigan case nicely illustrates how courts amply safeguard buyer prerogatives under the Michigan version of U.C.C. § 2-719.<sup>286</sup> Here, the plaintiff took over a Mobil Oil dealership without the company’s making him aware that the contract excluded the recovery of consequential damages. In holding the contract unenforceable on this issue, the decision evidences the law’s protection of buyers faced with a severe deletion of rights by a powerful corporation:

[B]efore a contracting party with the immense bargaining power of the Mobil Oil Corporation may limit its liability vis-à-vis an uncounseled

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*id.* at cmt. 1 (“[W]here an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.”); *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977) (“[T]he fundamental intent of section 2-719(2) reflects that a remedial limitation’s failure of essential purpose makes available all contractual remedies, including consequential damages authorized pursuant to sections 2-714 and 2-715.”) (citing numerous decisions); *Kearney & Trecker Corp. v. Master Engraving Co.*, 527 A.2d 429, 433-34 (N.J. 1987) (noting the twin objectives of U.C.C. § 2-719 that each party be treated fairly).

<sup>281</sup> *E.g.*, *Ragen Corp. v. Kearney & Trecker Corp.*, 912 F.2d 619, 625 (3d Cir. 1990) (citing the Official Comments for the statement that “the underlying philosophy of the Uniform Commercial Code [is] that there be at least a fair quantum of remedy for breach of obligations.”); *Baptist Mem’l Hosp. v. Argo Const. Corp.*, 308 S.W.3d 337, 345 (Tenn. Ct. App. 2009); *Master Engraving Co.*, 527 A.2d at 434 (lengthy quote from cmt. 1).

<sup>282</sup> *Cimino v. Fleetwood Enters.*, 542 F. Supp. 2d 869, 887 (N.D. Ind. 2008) (quoting *Perry v. Gulf Stream Coach, Inc.*, 814 N.E.2d 634, 643 (Ind. Ct. App. 2004)); *accord Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 250 (N.D. Ill. 1974), *aff’d*, 522 F.2d 469 (7th Cir. 1975) (“Uniform Commercial Code disfavors limitations [on remedies] and specifically provides for their deletion if they would act to deprive a contracting party of reasonable protection against breach.”).

<sup>283</sup> *See Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116, 1120 (Okla. 1978).

<sup>284</sup> *See Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577, 588-89 (Neb. Ct. App. 1992) (citing decisions); *see also* 14 RICHARD A. LORD, WILLISTON ON CONTRACTS § 40:40 (4th ed. 2000) (“most courts that have considered the question have declared that a limitation of remedies clause must also be conspicuous, despite the absence of a specific statutory requirement to that effect”).

<sup>285</sup> *See* U.C.C. § 2-719 & Official Comment.

<sup>286</sup> *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 266 (E.D. Mich. 1976).



layman, as it seeks to do in this case, to ‘difference money damages,’ it has an affirmative duty to obtain the voluntary, knowing assent of the other party. This could easily have been done in this case by explaining to plaintiff in laymen’s terms the meaning and possible consequences of the disputed clause. Such a requirement does not detract from the freedom to contract, unless that phrase denotes the freedom to impose the onerous terms of one’s carefully-drawn printed document on an unsuspecting contractual partner. Rather, freedom to contract is enhanced by a requirement that both parties be aware of the burdens they are assuming<sup>287</sup>

This decision contradicts Radin’s unsupported comment that courts approve limitations on remedies “without providing that such limitations be communicated especially carefully or that separate consent must be obtained.”<sup>288</sup> Simply put, when merchant/consumer interests clash regarding application of U.C.C. § 2-719, the need to ensure an informed purchaser and to maintain an adequate remedy for the consumer outweighs the merchant’s ability to prescribe the terms of sale.

A related issue in the application of U.C.C. § 2-719 to the point just discussed is that U.C.C. § 2-719(3) allows a seller to limit or exclude consequential damages unless to do so would be unconscionable. Radin vigorously attacks restrictions on award of consequential damages.<sup>289</sup> The point of contention is whether the policy against a limited remedy failing of its essential purpose defeats a disclaimer of consequential damages. One would not know from Radin’s critique that courts have devised three approaches (described below) on the availability of consequential damages under U.C.C. § 2-719.

First, a strong line of decisions holds that where the buyer’s exclusive or limited remedy fails of its essential purpose, most commonly where the seller fails to comply with its “repair or replace” warranty work for non-conforming goods,<sup>290</sup> the buyer may recover proven consequential damages, even with a contract term excluding them.<sup>291</sup> This approach is known as the “dependent approach” because the

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<sup>287</sup> *Id.* at 269; *see also* Am. Nursery Prods., Inc. v. Indian Wells Orchards, 797 P.2d 477, 481 (Wash. 1990) (“[T]o uphold an exclusionary clause in the consumer sales context, the clause must be ‘explicitly negotiated between buyer and seller’, and the remedies being excluded must be ‘set forth with particularity.’”) (internal citations omitted).

<sup>288</sup> RADIN, *supra* note 3, at 141.

<sup>289</sup> *Id.* (calling this practice one of the UCC’s “invitation to shrink remedies”).

<sup>290</sup> Baptist Mem’l Hosp. v. Argo Const. Corp., 308 S.W.3d 337, 346 (Tenn. Ct. App. 2009) (quoting 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-10 (5th ed.)) (noting this circumstance is the most frequent scenario). With a repair or replace warranty, courts generally have had little difficulty conceptualizing “failure of essential purpose.” *See, e.g.,* McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1073 (5th Cir. 1992) (repair or replacement remedies went beyond a commercially reasonable time); Liberty Truck Sales, Inc. v. Kimbrel, 548 So. 2d 1379, 1384 (Ala. 1989) (remedy will be available where seller fails to make repairs within a reasonable time or refuses to make repairs pursuant to the warranty).

<sup>291</sup> *See, e.g.,* Ragen Corp. v. Kearney & Trecker Corp., 912 F.2d 619, 625 (3d Cir. 1990); Murray v. Holiday Rambler, 265 N.W.2d 513, 526 (Wis. 1978); *see also* R.W. Murray, Co. v. Shatterproof Glass, 758 F.2d 266, 271-72 (8th Cir. 1985) (limited remedy’s failure of essential purpose voided the contract’s disclaimer for consequential damages).

exclusion of the consequential damages exclusion of U.C.C. § 2-719 depends on the survival of the limitation of remedy.<sup>292</sup>

Second, a majority of jurisdictions follow the “independent” approach.<sup>293</sup> The independence factor comes into play because this doctrine holds that courts will assess a limitation of consequential damages on the merits and enforce it unless unconscionable and independent of whether the contract also contains a limitation of remedy which has failed of its essential purpose.<sup>294</sup> Here, the failure of the limitation of remedy and the exclusion of damages are not mutually exclusive.<sup>295</sup>

Third, a few courts apply the “case by case” approach.<sup>296</sup> Under this variation, “[a]n analysis to determine whether consequential damages are warranted must carefully examine the individual factual situation including the type of goods involved, the parties and the precise nature and purpose of the contract.”<sup>297</sup> This theory has minimal appeal because it has no support from the U.C.C. or its official comments.<sup>298</sup>

The dependent approach is the superior alternative because it is the most faithful to the terms of U.C.C. § 2-719 and the Official Comments to this section.<sup>299</sup> A leading case also opines that it preserves fairness to the parties, especially the consumer:

[a] Court would be in an untenable position if it allowed the [seller] to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the [seller] is attempting to avoid.<sup>300</sup>

As U.C.C. remedies must be “liberally administered,” per U.C.C. § 1-106(1), so that the aggrieved party is put in as good a position as if the defaulting party had fully performed,<sup>301</sup> the dependent approach properly ensures that the seller bears the risk the limited remedy could fail.<sup>302</sup>

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<sup>292</sup> See *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 616 (Ill. 2006); *Kearney & Trecker Corp. v. Master Engraving Co.*, 527 A.2d 429, 436 (N.J. 1987); Daniel Hagen, Note, *Sections 2-719(2) & 2-719(3) of the Uniform Commercial Code: The Limited Warranty Package & Consequential Damages*, 31 VAL. U. L. REV. 111, 116-17, 128-29 (1996).

<sup>293</sup> See *Razor*, 854 N.E.2d at 616-17.

<sup>294</sup> See *id.*; *Kearney & Trecker Corp.*, 527 A.2d at 436; Hagen, *supra* note 292, at 117, 129-31.

<sup>295</sup> See *Razor*, 854 N.E.2d at 617.

<sup>296</sup> See Hagen, *supra* note 292, at 131.

<sup>297</sup> *AES Tech. Sys., Inc. v. Coherent Radiation*, 583 F.2d 933, 941 (7th Cir. 1978); see Hagen, *supra* note 292, at 117, 131-34.

<sup>298</sup> See *Razor*, 854 N.E.2d at 617-18.

<sup>299</sup> See *R.W. Murray v. Shatterproof Glass*, 758 F.2d 266, 272-73 n.7 (8th Cir. 1985).

<sup>300</sup> *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1370 (8th Cir. 1977) (quoting *Jones & McKnight v. Birdsboro Corp.*, 320 F. Supp. 39, 43-44 (N.D. Ill. 1970)).

<sup>301</sup> See, e.g., *S & R Metals, Inc. v. C. Itoh & Co. (Am.)*, 859 F.2d 814, 818 (9th Cir. 1988) (quoting CAL. COM. CODE § 1106(1) (West 1964)); *Allapattah Servs., Inc. v. Exxon Corp.*, 61

In the final issue regarding § 2-719, Radin flippantly says “whatever that means” about the definition of the failure of essential purpose doctrine.<sup>303</sup> The cases, however, are legion in explaining this concept in careful detail.<sup>304</sup> Courts say that under U.C.C. § 2-719, “[a] limited remedy fails of its essential purpose when an unexpected circumstance arises and neither party accepted the risk that such circumstance would occur.”<sup>305</sup> The basis for whether a limited remedy has failed of its essential purpose involves a two-step process. First, the court must decide the essential purpose of the limited remedy.<sup>306</sup> Second, the court must determine whether the remedy has not succeeded in meeting that purpose.<sup>307</sup> Numerous similar formulations exist for this U.C.C. § 2-719 concept.<sup>308</sup>

Under U.C.C. § 2-719(2), courts have said, the concept of “failure of essential purpose” has the following additional components. First, “a remedy’s essential purpose ‘is to give to a buyer what the seller promised him.’”<sup>309</sup> This provision helps ensure that each side receives the “benefit of its bargain,” and further reflects that “it is of the very essence of a sales contract that at least minimum adequate remedies be available.”<sup>310</sup> Therefore, the analytical focus “is not whether the remedy compensates for all damage that occurred, but that the buyer is provided with the

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F. Supp. 2d 1326, 1330 (S.D. Fla. 1999) (quoting U.C.C. § 1-106(1)); *see also* U.C.C. § 1-103(a) (the Code shall “be liberally construed to promote its underlying purposes and policies”).

<sup>302</sup> *See* *Soo Line R.R. Co.*, 547 F.2d at 1370.

<sup>303</sup> RADIN, *supra* note 3, at 141; *see also id.* at 224 (doctrine is “vague”).

<sup>304</sup> *See infra* note 308.

<sup>305</sup> 67A AM. JUR. 2D *Sales* § 848 (2013).

<sup>306</sup> 4B ANDERSON ON THE UNIFORM COMMERCIAL CODE U.C.C. § 2-719:128 (3d ed.).

<sup>307</sup> *Id.*

<sup>308</sup> *E.g.*, *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 431 (6th Cir. 1983) (circumstances that cause exclusive or limited remedy to fail of its essential purpose refer to where it is “exceedingly impractical” to carry out essence of agreed-upon remedy); *Hadar v. Concordia Yacht Builders, Inc.*, 886 F. Supp. 1082, 1099-1100 (S.D.N.Y. 1995) (failure of essential purpose may occur as result of an inherent quality defect, for example, where the defect cannot be cured, where it is impossible to discover which of many parts had created the defect, or where the defect has completely destroyed entire product); *J. A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 549 (Del. Super. Ct. 1977), *appeal dismissed*, 377 A.2d 1 (Del. 1977) (factors to be considered in determining whether contractual limitation on liability fails of its essential purpose are: facts and circumstances surrounding the contract; nature of basic allegations of the party, nature of goods involved; uniqueness of experimental nature of the items; general availability of the items; and the good faith and reasonableness of the provision); *Midwest Hatchery & Poultry Farms, Inc. v. Doorenbos Poultry, Inc.*, 783 N.W.2d 56, 63 (Iowa Ct. App. 2010) (where repair or replacement remedy is not sufficient a court may find the remedy failed of its essential purpose). Another alternative for when a remedy will fail of its essential purpose is when “defects in the goods are latent and not discoverable on reasonable inspection.” *See Marr Enters. Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 955 (9th Cir. 1977).

<sup>309</sup> *Midwest Hatchery*, 783 N.W.2d at 62-63.

<sup>310</sup> *Potomac Constructors, LLC v. EFCO Corp.*, 530 F. Supp. 2d 731, 736 (D. Md. 2008).

product as the seller promised.”<sup>311</sup> Put another way, “[f]ailure of essential purpose . . . is concerned with the essential purpose of the remedy chosen by the parties, not with the essential purpose of the code or of contract law, or of justice and/or equity.”<sup>312</sup> Thus, if the event in question defeats a primary contractual objective, and the possible occurrence of that event would have been outside the contemplation of the parties at contract formation, this circumstance can qualify as a “failure of an essential purpose” of the contract. Compare the above in-depth case law treatment of “failure of essential purpose” with Radin’s dismissive comment about the quoted U.C.C. language. The conclusion must be that Radin’s criticism is not well-taken.<sup>313</sup>

For Radin, the take-away is that U.C.C. § 2-719 “provides that remedies may be severely limited” and that it invites merchants to “shrink remedies,”<sup>314</sup> but the fact is consumers enjoy robust rights under this provision. After fully assessing the authorities, another commentator observes about U.C.C. § 2-719, “[c]ourts have generally favored the unsophisticated consumer, and have left the wealthy, well-advised industrial giants to fend for themselves.”<sup>315</sup> More importantly, the leading commentators on the U.C.C., professors White, Summers and Hillman, correctly indicate that U.C.C. § 2-719 reflects a pro-consumer perspective when they state in their treatise that “it is hard to find any [other] provision in Article 2 that has been more successfully used by aggrieved buyers in the last [25] years than Section 2-719(2).”<sup>316</sup> Accordingly, this area of the law in no manner supports Radin’s argument pertaining to democratic degradation.

#### 4. Exculpatory Clauses for Seller Negligence

As another basis for a proposed tort of intentional deprivation of basic legal rights, Radin contends that broad exculpatory clauses for seller negligence as against the buyer for injuries stemming from furnished goods or services should be proscribed unless consumers have the choice to trade off rights for a lower price.<sup>317</sup> She also says that exculpatory clauses have become so favorable to merchants that, absent “exceptional circumstances,” “many people injured through the fault of a business they deal with are precluded by the company’s paperwork from holding the company legally accountable.”<sup>318</sup>

Radin cites no statistics or case law for the above empirical questions. In her brief legal analysis, Radin also fails to mention that under case law, the public policy of freedom of contract generally permits both parties to freely and knowingly enter

<sup>311</sup> *Midwest Hatchery*, 783 N.W.2d at 62-63.

<sup>312</sup> *Baptist Mem’l Hosp. v. Argo Const. Corp.*, 308 S.W.3d 337, 346 (Tenn. Ct. App. 2009).

<sup>313</sup> RADIN, *supra* note 3, at 141; *see also id.* at 145-46 (arguing incorrectly that courts do not make sufficient use of this doctrine).

<sup>314</sup> *Id.* at 141.

<sup>315</sup> Karl S. Yohe, *The Inherent Ambiguity Of Uniform Commercial Code Section 2-719: ‘Failure Of Essential Purpose’ v. ‘Unconscionability,’* 1987 U. ILL. L. REV. 523, 524 (1987).

<sup>316</sup> 1 JAMES J. WHITE, ROBERT E. SUMMERS & ROBERT A. HILLMAN, *UNIFORM COMMERCIAL CODE* § 13:19 (6th ed. 2012).

<sup>317</sup> RADIN, *supra* note 3, at 184-85.

<sup>318</sup> *Id.* at 7.

contracts exonerating a merchant of goods or services from his acts of future negligence as against the purchaser.<sup>319</sup> For this reason, Radin's proposed near-total ban on such contracts would offend public policy. At the same time, notwithstanding freedom of contract principles, she does not capture that there are other doctrines making such exculpatory provisions "not favored" and "strictly construed" against the benefiting party;<sup>320</sup>

The importance of this principle in its practical results cannot be overestimated. Though only a rule of construction, it effectively changes the outcome in the majority of cases in which the defense is made that liability for negligence was excluded by a contractual provision.<sup>321</sup>

Additionally, to protect the buyer, the courts say that clear, unambiguous, unmistakable, and conspicuous language is required to release a seller from his or her future negligence.<sup>322</sup> There must be "no doubt" that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving.<sup>323</sup> Indeed, in some jurisdictions, the word "negligence" must be clearly stated in a release of future negligence.<sup>324</sup> Another principle is that no matter what the level of bargaining that exists between the parties, many jurisdictions will not enforce exculpatory agreements to protect a promisor's future recklessness, gross or willful negligence, or a future intentional tort or crime.<sup>325</sup> The decisions also hold

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<sup>319</sup> *E.g.*, Hussein v. L.A. Fitness Int'l, L.L.C., 987 N.E.2d 460, 465 (Ill. Ct. App. 2013); Miller v. A & R Joint Venture, 636 P.2d 277, 278 (Nev. 1981).

<sup>320</sup> Hussein, 987 N.E.2d at 465; Topp Copy Prods., Inc. v. Singletary, 626 A.2d 98, 99 (Pa. 1993); *see also* Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734, 742 (Conn. 2005) (striking down clause based on the guiding principles of the tort system).

<sup>321</sup> K.A. Drechsler, Annotation, *Validity of Contractual Provision by One Other than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8, 92 (1948).

<sup>322</sup> *See, e.g.*, Hanks, 885 A.2d at 739; Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 337 (Mo. 1996); Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) (applying the doctrine that "a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract").

<sup>323</sup> Alack, 923 S.W.2d at 337-38; Wright v. Loon Mountain Recreation Corp., 663 A.2d 1340, 1342 (N.H. 1995) (determining "whether the plaintiff understood the import of the agreement, and if not, whether a reasonable person in [her] position would have known of the exculpatory provision") (internal quotation marks omitted); Nissley v. Candytown Motorcycle Club, Inc., 913 A.2d 887, 891 (Pa. Super. Ct. 2006) (upholding an exculpatory clause that "a reasonable person would have understood, from the very beginning, [to be a waiver of] all rights to bring a claim, without qualification").

<sup>324</sup> *E.g.*, Hussein, 987 N.E.2d at 465; Guthrie v. Hidden Valley Golf and Ski, Inc., 407 S.W.3d 642, 647 (Mo. Ct. App. 2013); *see also* Agric. Aviation Eng'g Co. v. Bd. of Clark Cnty. Comm'rs, 794 P.2d 710, 712-13 (Nev. 1990) (good summary of numerous interpretive principles requiring strict construction).

<sup>325</sup> Hanks, 885 A.2d at 747-48 (citing cases); Werdehoff v. Gen. Star Indem. Co., 600 N.W.2d 214, 222 (Wis. Ct. App. 1999) ("[A]n exculpatory contract exempting a party from tort liability for harm caused intentionally or recklessly is void as against public policy.")

that before an exculpatory clause will be construed against the party seeking to avoid liability, such a clause to be valid must “spell out the intention of the parties with great particularity.”<sup>326</sup> These last mentioned doctrines confirm that “[i]t is generally held that exculpatory provisions must meet high standards for clarity.”<sup>327</sup> Radin does not mention these critical points in her discussion of this topic.

Other nuances exist in this area showing close (pro-plaintiff) judicial attention—i.e., “strict scrutiny”—to clauses limiting the liability of a party.<sup>328</sup> To be enforceable against the consumer, the clause must not be too broad, i.e.: (1) consistent with the seller’s need for protection in legitimate business activity; (2) neither unduly harsh nor oppressive to the consumer; and (3) not harmful to the public.<sup>329</sup> Thus, courts construing a seller’s exculpatory clause will include the public interest as a factor regarding enforceability. This public interest element helps ensure fair treatment for the consumer.

Citing an influential 1963 California Supreme Court decision<sup>330</sup> the Tennessee Supreme Court in *Olson v. Molzen*<sup>331</sup> followed the majority rule in adopting the following criteria for deciding when an exculpatory provision impairs the public interest:

- (1) It concerns a business of a type generally thought suitable for public regulation.
- (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a practical necessity for some members of the public.

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(internal quotation marks omitted); *Brooten v. Hickok Rehab. Servs., LLC*, 831 N.W.2d 445, 448 (Wis. Ct. App. 2013); *Inv. Ltd. P’ship v. Columbia Twp.*, 60 A.3d 1, 24 (Md. 2013).

<sup>326</sup> *Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20, 26 (Tex. App. 1982).

<sup>327</sup> 8 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 19:22 (4th ed. 2010); *see also Brooten*, 831 N.W.2d at 449 (“[T]he form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed.”).

<sup>328</sup> *See Lyndon Prop. Ins. Co. v. Duke Levy & Assocs., LLC*, 475 F.3d 268, 272 (5th Cir. 2007).

<sup>329</sup> *Jesse v. Lindsley*, 233 P.3d 1, 8 (Idaho 2008).

<sup>330</sup> *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963). Radin states, “A few courts may still adhere to the older view that such clauses are generally unenforceable [as] delineated in a California case from the early 1960s [*Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963)].” RADIN, *supra* note 3, at 139, 282 n.46. To the contrary, contemporary decisions frequently refer to *Tunkl* as “[t]he leading case on determining whether an exculpatory clause within a contract violates public policy.” *H.K. Supermarket, Inc. v. Magteec Inv. Co.*, 2005 WL 534233, at \*3 (Cal. Ct. App. Mar. 8, 2005); *accord Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 798 (Vt. 1995) (“Numerous courts have adopted and applied the *Tunkl* factors.”) (citing decisions); *Berlangieri v. Running Elk Corp.*, 48 P.3d 70, 84 (N.M. Ct. App. 2002) (referring to *Tunkl* as the “widely followed if not leading decision” in this area).

<sup>331</sup> *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977).

(3) The party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards.

(4) As a result of the essential nature of the services, in the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services.

(5) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

(6) As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or its agents.<sup>332</sup>

This doctrine of an agreement “being affected with the public interest” differs from whether the clause violates public policy.<sup>333</sup> “Simply stated, and in its most basic form, the public policy exception provides that exculpatory provisions which violate public policy are at the very least unenforceable, and may be void in their entirety and therefore a legal nullity.”<sup>334</sup>

The *Olson* case mentioned above emphasized that not all six factors need be present for a court to invalidate the exculpatory clause, although such a provision that has at least some of these characteristics generally would be unacceptable.<sup>335</sup> In the application of this policy, no one factor is dispositive because each case depends upon “the totality of the circumstances of any given case against the backdrop of current societal expectations.”<sup>336</sup> The *Olson* criteria also go beyond the contract type construed in that decision, which was for professional services.<sup>337</sup> Under the decisions, even legitimate business motivations or a pecuniary exchange, while relevant, will not necessarily validate the exculpatory clause.<sup>338</sup> These well-known policies strike a proper consumer/merchant balance of power even though Radin does not mention these case law doctrines in any depth.

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<sup>332</sup> *Id.* at 431.

<sup>333</sup> 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:22 (4th ed. 2010).

<sup>334</sup> *Id.*

<sup>335</sup> *Russell v. Bray*, 116 S.W.3d 1, 5-6 (Tenn. Ct. App. 2003) (citing *Olson*, 558 S.W.2d at 431) (striking down clause where four of the six criteria were present).

<sup>336</sup> *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 744 (Conn. 2005) (also citing variations on the *Tunkl* doctrine); *100 Inv. Ltd. P’ship v. Columbia Twp.*, 60 A.3d 1, 24 (Md. 2013).

<sup>337</sup> *E.g.*, *Crawford v. Buckner*, 839 S.W.2d 754, 758-59 (Tenn. 1992) (landlord-tenant case).

<sup>338</sup> *See Childress By & Through Childress v. Madison Cnty.*, 777 S.W.2d 1, 4 (Tenn. Ct. App. 1989).

In fact, some states go further than their sister jurisdictions and hold that *all* exculpatory agreements purporting to release tortfeasors from future liability for personal injuries yet to occur are unenforceable.<sup>339</sup> The same result of unenforceability exists for exculpatory terms in favor of a business affected with the public interest, such as a common carrier, where the transaction occurs when the business has acted under its public duties.<sup>340</sup> Another important consideration in some jurisdictions is that “[e]ach party must be a free bargaining agent to the agreement so that the contract is not one of adhesion.”<sup>341</sup> Indeed, some courts are so skeptical about the validity of these clauses that these terms may be close to being *de facto* illegal in these jurisdictions. Thus, in 2005, the Wisconsin Supreme Court mentioned, “[i]ndeed, each exculpatory contract that this court has looked at in the past 25 years has been held unenforceable.”<sup>342</sup> A 2013 Wisconsin Court of Appeals decision observed along the same lines, “[s]uch clauses have been, are, and will continue to be, looked upon with disfavor.”<sup>343</sup>

As can be seen, the actual state of the law on exculpatory clauses is substantially pro-consumer. It differs materially from the law Radin depicts on the supposed inadequate judicial oversight.<sup>344</sup> It also negates her contentions about the presence of democratic degradation.

### C. The Severability of Improper Boilerplate

Radin overstates the difficulty of excising any offending clauses from mass market boilerplate. She observes,

My preliminary suggestion is that a purported contract containing offending boilerplate should be declared invalid in toto, and recipients should be governed by the background legal default rules. I am proposing invalidation in toto and recurrence to existing default rules, because it is much harder for courts to sever and excise only certain clauses . . . .<sup>345</sup>

Radin argues that this difficulty of severing offending boilerplate supports her new tort of intentional deprivation of basic legal rights.<sup>346</sup> As explained below, no such difficulty exists and so her normative critique continues to lack the essential predicate of a need to revise the law.

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<sup>339</sup> *E.g.*, *Nashua Gummed & Coated Paper Co. v. Noyes Buick Co.*, 41 A.2d 920, 922 (N.H. 1945); *Hiett v. Lake Barcroft Cmty. Ass’n*, 418 S.E.2d 894, 895-96 (Va. 1992).

<sup>340</sup> *Childress*, 777 S.W.2d at 4. Radin appears unaware of these decisions. *See* RADIN, *supra* note 3, at 145 (proposing as if an original suggestion that exculpatory clauses be “severely limited”).

<sup>341</sup> *Topp Copy Prods., Inc. v. Singletary*, 626 A.2d 98, 99 (Pa. 1993).

<sup>342</sup> *Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ’g, Inc.*, 706 N.W.2d 95, 105 (Wis. 2005).

<sup>343</sup> *Brooten v. Hickok Rehab. Servs., LLC*, 831 N.W.2d 445, 448 (Wis. Ct. App. 2013).

<sup>344</sup> RADIN, *supra* note 3, at 184 (criticizing courts for “immunizing” sellers from having to answer for their culpable injuries to other persons).

<sup>345</sup> *Id.* at 213.

<sup>346</sup> *Id.* (observing that the difficulty in judicial severing of clauses justifies invalidation of such contracts in their entirety).



The legal standard is well-settled. Where a contract clause is void as against public policy or otherwise is unenforceable, a court may sever just that clause and enforce the remainder of the contract.<sup>347</sup> A contract clause can be severed and a contract may survive if a court can delete an illegal clause without defeating the primary purpose of the bargain<sup>348</sup> or where the parties intended that the contract may stand despite an offending term.<sup>349</sup> Courts regularly accomplish these excisions but Radin leaves an inaccurate impression on this point.

Another important aspect of this issue is where the problem at hand is a clause that goes to the plaintiff's available remedy.<sup>350</sup> Modern courts generally view remedial provisions, when they are unenforceable, as "easily separable" from the contract such that the surviving terms remain fully in effect.<sup>351</sup> Provided that no indication exists the parties have intended otherwise, such an offending remedial term can be severable.<sup>352</sup> Courts following this view properly reason that if they rejected the request of a party that belongs to the protected class to excise the prohibited provision, the law would penalize the protected party by including a suspect clause and reward the targeted party by retaining the improper term.<sup>353</sup> Therefore, Radin's argument is not well-taken that courts should necessarily deem the entire contract "invalid in toto" just because it has some offending boilerplate.<sup>354</sup>

Lastly, Radin leaves unmentioned a related non-waiver doctrine that enhances the rights of both the consumer and of the public. A strong public policy protects individual rights where a statute confers a particular right on a private party and that statute affects both the individual's interests and the public interest. An example would be where a contract contradicts the Fair Labor Standards Act (FLSA).<sup>355</sup> This statutory program, 29 U.S.C. §§ 201 et seq., prescribes standards for the basic minimum wage and overtime pay affecting most private and public employment.<sup>356</sup>

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<sup>347</sup> *Dawson v. Goldammer*, 722 N.W.2d 106, 111–12 (Wis. Ct. App. 2006); RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 184 (1981).

<sup>348</sup> *Dawson*, 722 N.W.2d at 111-12; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 184 (1981) (stating the rule of partial enforcement with the omission of an offending but not essential provision).

<sup>349</sup> *See Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 236 (9th Cir. 1995); *see also* *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 275 (1st Cir. 2006) (court may sever or modify overbroad exculpatory clause).

<sup>350</sup> *Ind. Dep't of Transp. v. Shelly & Sands, Inc.*, 756 N.E.2d 1063, 1071 (Ind. Ct. App. 2001) (noting that the particular exculpatory clause "limits the remedy"); *see also* *Aetna Workers' Comp Access, LLC v. Coliseum Med. Ctr.*, 746 S.E.2d 148, 154 (Ga. Ct. App. 2013) (exculpatory clauses "restrict remedies").

<sup>351</sup> *Dawson*, 722 N.W.2d at 111–12 (citing GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 89.10 at 659 (Joseph M. Perillo ed., 2003)).

<sup>352</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); *Hill v. NHC HealthCare/Nashville, LLC*, 2008 WL 1901198, at \*7 n.8 (Tenn. Ct. App. Apr. 30, 2008).

<sup>353</sup> *Dawson*, 722 N.W.2d at 112.

<sup>354</sup> RADIN, *supra* note 3, at 213.

<sup>355</sup> FAIR LABOR STANDARDS ACT OF 1938, 29 U.S.C. § 201 *et seq.* (2012).

<sup>356</sup> *Jenkins v. Sara Lee Corp.*, 2008 WL 731265, at \*3 (E.D. Tenn. Mar. 17, 2008).

In this circumstance, the employee may not waive or release his rights to FLSA compensation where the waiver or release would undermine the statutory objective in protecting the individual employee and the public.<sup>357</sup>

Radin could have—but did not—rely on this last-mentioned general principle to argue that all rights granted by the polity, such as the Seventh Amendment right to a jury trial, enjoy similar protection because they protect both the individual party and the public interest in effective judicial processes. No cases were found considering either way this potentially valid argument for the topics analyzed in this section. What can be said is that the law in this area seeks to counteract, not condone, democratic degradation.

#### V. BOILERPLATE AND PRODUCTS LIABILITY

Radin argues “we should take seriously” that unfair boilerplate contracts qualify as a defective product under the law of products liability.<sup>358</sup> Radin observes that “onerous or oppressive ‘legal-ware’ poses product safety issues instead of issues of contractual consent under a system of private ordering.”<sup>359</sup>

Radin’s suggestion is not well taken. In the law of products liability, a “product” is generally “tangible personal property distributed commercially for use or consumption.”<sup>360</sup> Therefore, Radin overlooks that the written contract itself—which are merely pieces of paper—does not meet this definition. The contract memorializes an intangible item, which is the actual agreement of the parties.<sup>361</sup> Although a document delivers the information, the plaintiff’s grievance in such a case is with the content of the document, not with the tangible medium itself.<sup>362</sup> Therefore, it becomes apparent that boilerplate may not serve as the predicate for a cause of action sounding in tort.

Even if a contract with unfair boilerplate were a “product” for the above purposes, it is not “defective” as a basis for tort liability. “A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.”<sup>363</sup> Abusive contract boilerplate is not defective under the *Restatement*

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<sup>357</sup> *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945); *Pereira v. State Bd. of Educ.*, 37 A.3d 625, 654-55 (Conn. 2012).

<sup>358</sup> RADIN, *supra* note 3, at 101, 198.

<sup>359</sup> *Id.* at 101.

<sup>360</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a) & cmt. b. (1998). For a collection of state statutes and case law, see *id.* at reporters’ cmt. a.; AMERICAN LAW OF PRODUCTS LIABILITY 3d §§ 16:61-62 (Richard E. Kaye ed., 2013); David W. Lannetti, *Toward a Revised Definition of “Product” Under the Restatement (Third) of Torts: Products Liability*, 55 BUS. LAW. 799 (2000).

<sup>361</sup> John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1342 (1975) (calling this principle “[o]ne of the unassailable rudiments of contract law”).

<sup>362</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a) cmt. d. (1998).

<sup>363</sup> *Id.* at § 2.

definition because it is at most merely a defective idea.<sup>364</sup> Radin apparently agrees with this observation because she concedes that the “harms” inflicted by boilerplate “are not harms to the (composite) product” because the boilerplate “still functions.”<sup>365</sup> Thus, she makes the strained argument that the composite product (boilerplate) is still “defective” because “it should be unenforceable under the circumstances.”<sup>366</sup>

Compare Radin’s approach on “harm” to how most products liability statutes address this point. For example, under Ohio law, “harm” means “death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question [and also excludes ‘economic loss’].”<sup>367</sup> Contract law does not give rise to the type of tort damages contemplated by products liability law.<sup>368</sup>

Lastly, Radin’s attempted reliance on products liability law for defective boilerplate departs from the doctrine’s established policies. “Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty.”<sup>369</sup> As stated by the *Restatement (Second) of Torts*, Section 402A,

[T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.<sup>370</sup>

The gist of a remedy for deficient boilerplate is to address the consumer’s expectation interest in the parties’ contract for the provision of goods or services. In

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<sup>364</sup> See *Birmingham v. Fodor’s Travel Publ’ns, Inc.*, 833 P.2d 70, 76, 78-79 (Haw. 1992) (no cause of action in products liability for defective ideas).

<sup>365</sup> RADIN, *supra* note 3, at 214.

<sup>366</sup> *Id.*

<sup>367</sup> OHIO REV. CODE ANN. § 2307.71(A)(7) (West 2007); *accord* *Ford Motor Credit Co., LLC v. Mendola*, 48 A.3d 366, 374 (N.J. Super. Ct. App. Div. 2012) (“[A] ‘products liability’ cause of action is available only for claims arising from personal injury or damage to property other than the defective product itself.”) (construing N.J. STAT. ANN. § 2A:58C-1(b)(2)).

<sup>368</sup> Radin accepts that her proposal targets injury to the consumer’s rights even though “[p]roducts liability has been primarily aimed at physical injury to persons or property.” RADIN, *supra* note 3, at 215. Her short response is that her proposal “should be distinguished to some extent from previous applications of defective product liability.” *Id.*

<sup>369</sup> *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 866 (1986).

<sup>370</sup> RESTATEMENT (SECOND) OF TORTS § 402(a) cmt. c. (1965).

other words, the plaintiff in an abusive boilerplate case suffers only economic loss.<sup>371</sup> By comparison, products liability statutes typically *exclude* economic loss.<sup>372</sup> Accordingly a claim unsupported by proof of physical harm to persons or property (besides the product itself) does not invoke the policies supported by products liability.<sup>373</sup>

Because Radin's new tort cannot meet these important pre-requisites of products liability law —“product,” “defect” and “harm”— her proposal for a new tort must be found wanting. Indeed, Radin herself concedes that “[p]erhaps the contract-as-product amalgam breaks down here”<sup>374</sup> and that the intentional tort theory “[w]ould be of better service than products liability.”<sup>375</sup> Nevertheless, Radin does not unambiguously renounce this proposed new theory<sup>376</sup> and so it must be emphasized that Radin overlooks that the economic loss rule precludes relief in tort actions for consequential losses that are merely economic.<sup>377</sup>

#### VI. CONTRACTUAL ARBITRATION: ENGINE OF CONSUMER OPPRESSION OR LEGITIMATE DISPUTE RESOLUTION MECHANISM?

Arbitration is “the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them.”<sup>378</sup> Radin is intensely critical of contractual arbitration as what she views is a vehicle for mass market consumer rights deletion schemes.<sup>379</sup> She proposes that mass market mandatory consumer arbitration be “disallowed” where it is an improper form of “full-blown democratic degradation.”<sup>380</sup> Accordingly, this next section of the Article will examine Radin's contention that contractual arbitration undermines the civil justice system.

##### *A. Radin's Objections to Contractual Arbitration*

Radin repeatedly indicates that contractual arbitration is a blight on the U.S. economy and is the primary reason for democratic degradation. Her objections are

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<sup>371</sup> Cf. OHIO REV. CODE ANN. § 2307.71(A)(2) (West 2007) (“‘Economic loss’ means direct, incidental, or consequential pecuniary loss.”).

<sup>372</sup> See *supra* note 367 and accompanying citations.

<sup>373</sup> See *Carter v. Brighton Ford, Inc.*, 251 P.3d 1179, 1183 (Colo. App. 2010).

<sup>374</sup> RADIN, *supra* note 3, at 214-16.

<sup>375</sup> *Id.* at 215.

<sup>376</sup> *Id.* at 101 (calling her proposed concept of products liability “a serious idea”); *id.* at 198 (stating that the proposal includes the notion that boilerplate qualifies as a basis for products liability).

<sup>377</sup> *Id.* at 214-16. “[I]n the absence of an accident, there can be no action in negligence to recover the loss of the economic value of a defective product, unless there is some personal injury or damage to other property.” *Vulcan Materials Co., Inc. v. Driltech, Inc.*, 306 S.E.2d 253, 254 (Ga. 1983).

<sup>378</sup> *Gold Coast Mall, Inc. v. Larmar Corp.*, 468 A.2d 91, 95 (Md. 1983).

<sup>379</sup> E.g., RADIN, *supra* note 3, at 183 (stating that mandatory arbitration clauses improperly “erase the right” to a jury trial and frequently to class action relief).

<sup>380</sup> *Id.*

that pre-dispute contractual arbitration (1) bypasses the consumer's right to collective remedies, such as class actions and class arbitration,<sup>381</sup> (2) results in decisions rendered in secret without precedential value and rarely subject to appellate review,<sup>382</sup> (3) uses arbitrators that are usually business persons who are more sympathetic to merchants than consumers,<sup>383</sup> and (4) is inefficient because it is secret, ad hoc and nonprecedential.<sup>384</sup> Indeed, her antipathy goes so deep that she accuses the U.S. Supreme Court in its interpretation of the federal arbitration statutes of condoning "invidious" racial or sexual discrimination and of "underwriting democratic degradation" by "making redress impossible, in practice if not in theory, for large numbers of people."<sup>385</sup> Thus, for Radin, the current arbitration system is inconsistent with the "rule of law."<sup>386</sup>

Although Radin says that a mandatory arbitration clause must be disallowed when it creates a mass-market rights deletion scheme,<sup>387</sup> legislatures and courts do not share Radin's implacable (and overheated) opposition to contractually designated arbitration.<sup>388</sup> She also overlooks that the polity as the voice of the people in the form of the national legislature is the same body that has enacted the broad sweep of federal arbitration.<sup>389</sup>

As a reflection that federal and state court hostility to arbitration "is a thing of the past,"<sup>390</sup> the Federal Arbitration Act (FAA) has been in effect since 1925.<sup>391</sup> By law, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>392</sup> Courts will

<sup>381</sup> RADIN, *supra* note 3, at 132-33.

<sup>382</sup> *Id.* at 134.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 183.

<sup>386</sup> *Id.* at 135.

<sup>387</sup> *Id.* at 183. In 123 references, Radin in a negative connotation repeatedly couples "mass market boiler plate" with the word "scheme." *See, e.g., id.* at 35, 38, 39, 174. The dictionary definition of "scheme" when used negatively is "an underhanded plot." *See* DICTIONARY.COM, <http://dictionary.reference.com/browse/scheme?s=t> (last visited Aug. 26, 2014). Radin never refers to mass market boilerplate in a positive light.

<sup>388</sup> *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 152 (4th Cir. 1993) (citing cases).

<sup>389</sup> *See Polity Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/POLITY?s=t> (last visited Nov. 6, 2014).

<sup>390</sup> The main reason for this hostility was that "[p]arties were considered incapable of ousting the courts of their jurisdiction by contract." *Sverdrup*, 989 F.2d at 152 (explaining former judicial policy against arbitration).

<sup>391</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200-01 (2d Cir. 1998).

<sup>392</sup> 9 U.S.C. § 2 (2012); *see also* *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("congressional purpose was to make arbitration agreements as enforceable as other contracts, but not more so").

uphold contractual arbitration provisions if they “[a]re sufficiently clear, unambiguously worded, satisfactorily distinguished from the other Agreement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate all possible claims arising under the contract.”<sup>393</sup>

Despite the impression left by Radin, this form of commercial arbitration is never “mandatory,” as she uses this term repeatedly,<sup>394</sup> but is designed to be a matter of the open and fair contractual consent of both parties.<sup>395</sup> Properly understood, “mandatory arbitration” requires arbitration pursuant to a contract clause if either of the parties elects to pursue it; “permissive” arbitration pursuant to a contract clause requires arbitration only with consent of both parties. “In other words, a party cannot be compelled to arbitrate a dispute he has not [contractually] agreed to submit.”<sup>396</sup> Accordingly, when each party to an arbitration agreement “fully and clearly comprehends” that disputes are subject to this procedure, it will be enforceable.<sup>397</sup>

Courts further state “[t]here is nothing inherently unfair or oppressive about arbitration clauses”<sup>398</sup> and that arbitration agreements are not necessarily adhesive or unconscionable.<sup>399</sup> Far from being inherently oppressive and unfair to plaintiffs, the law in the interpretation of contractual arbitration employs a solicitous standard of consent that liberally favors the consumer. Thus, in the United States Court of Appeals for the Second Circuit, the requirement for the consumer’s knowing consent

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<sup>393</sup> Curtis v. Cellco P’ship, 992 A.2d 795, 799 (N.J. Super. Ct. App. Div. 2010).

<sup>394</sup> RADIN, *supra* note 3, at 280, 284, 289. Radin inappropriately mixes notions of “compulsory arbitration” with “mandatory arbitration.” The latter is contractual and consensual; the former is prescribed by statute and does not require the party’s consent. See BLACK’S LAW DICTIONARY (9th ed. 2009). A good example in the former situation is in the labor relations context. See *In re Bd. of Educ. of Watertown City School Dist.* 710 N.E.2d 1064, 1067 (N.Y. 1999).

<sup>395</sup> Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 41-43 (2003).

<sup>396</sup> Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775 (Ct. App. 1976); see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (arbitration “is a matter of consent, not coercion.”). The Federal Arbitration Act, 9 U.S.C. § 1 et seq., places arbitration agreements “upon the same footing as other contracts.” Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state law principles that govern the formation of contracts.”).

<sup>397</sup> Specht v. Netscape Commc’ns. Corp., 306 F.3d 17, 29-32 (2d Cir. 2002).

<sup>398</sup> Coleman v. Prudential Bache Sec., Inc., 802 F.2d 1350, 1352 (11th Cir. 1986), and decisions cited therein.

<sup>399</sup> *Id.* at 1352; *Ex parte McNaughton*, 728 So.2d 592, 597-98 (Ala. 1998); see also Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 301 n.5 (5th Cir. 2004) (“there is nothing per se unconscionable about arbitration agreements”); Greenpoint Credit, L.L.C. v. Reynolds, 151 S.W.3d 868, 874-75 (Mo. Ct. App. 2004) (despite disparate bargaining power between the parties, pre-printed form contracts are enforceable as long as an “average member of the public who accepts [such a contract] would reasonably expect disputes involving whether either party was in default under its terms to be subject to arbitration rather than litigation.”).

applies with “particular force” to arbitration agreements whereby such terms must demonstrate “clarity and conspicuousness.”<sup>400</sup>

Of course, as with any other area of contract law, there will always be those individuals that attempt to take advantage of their contracting partners. On those occasions where a merchant uses or drafts an arbitration clause improperly, the consumer’s potential defenses include laches, estoppel, waiver, fraud, duress, reasonable expectations, public policy and unconscionability.<sup>401</sup> Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may invalidate arbitration agreements without contravening the Federal Arbitration Act, provided that the local state law or practice does not single out arbitration contracts for suspect treatment.<sup>402</sup> The reasonable expectations defense, mentioned above, is especially friendly to consumers. It provides that “[d]espite disparate bargaining power, pre-printed form contracts are enforceable as long as an “average member of the public who accepts [such a contract] would reasonably expect disputes involving whether either party was in default under its terms to be subject to arbitration rather than litigation.”<sup>403</sup> Therefore, even with an adhesion contract, a court will not enforce an arbitration provision against a weaker party if (1) arbitration is not within the party’s reasonable expectations or (2) arbitration is within the party’s expectations but it is unduly oppressive, unconscionable, or against public policy.<sup>404</sup>

Additionally, some jurisdictions follow the pro-consumer doctrine that an arbitration clause will be unenforceable if it contains a “substantial waiver of a parties’ rights.”<sup>405</sup> A similar interpretive doctrine favoring consumers and disfavoring merchants, the rule of *contra proferentum* (ambiguities construed most strongly against the drafter), applies to arbitration clauses just as with other contractual terms.<sup>406</sup> Based on the case law, contract law is a proper and potent vehicle for protecting consumer interests given the numerous potential defenses available against the enforcement of unfair arbitration agreements.

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<sup>400</sup> *Specht*, 306 F.3d at 30.

<sup>401</sup> *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237, 242 (Mont. 2005); *Spann v. Am., Express Travel Related Servs. Co.*, 224 S.W.3d 698, 711 (Tenn. Ct. App. 2006). In a recent Executive Order, President Obama has prohibited companies with federal contracts of \$1 million or more from requiring their employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when valid contracts already exist). *Fair Pay and Safe Workplaces*, 79 Fed. Reg. 150, 45314 (July 31, 2014).

<sup>402</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (2000) (also stating “[c]ourts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions”).

<sup>403</sup> *Greenpoint Credit*, 151 S.W.3d at 874-75.

<sup>404</sup> *Iwen v. U.S. West Direct*, 977 P.2d 989, 994-95 (Mont. 1999) (calling such a provision “void”). If the form contains a material, risk-shifting clause, the court may excise the clause as being unconscionable where the signer would not reasonably expect to encounter it in such a transaction. *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 146 (Pa. Super. Ct. 1985).

<sup>405</sup> *Valued Servs of Ky., LLC v. Watkins*, 309 S.W.3d 256, 263 (Ky. Ct. App. 2009).

<sup>406</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1997); *Perez v. Qwest Corp.*, 883 F. Supp. 2d 1095, 1118 (D.N.M. 2012); *Karnette v. Wolpoff & Abramson, L.L.P.*, 444 F. Supp. 2d 640, 647 (E.D. Va. 2006).

Nevertheless, Radin firmly rejects the proposition that arbitration proceedings are usually fair to both sides as she is quite dubious of the impartiality of the proceedings.<sup>407</sup> In an important case, however, the U.S. Supreme Court has expressly rejected the “outmoded presumption” and “suspicion of arbitration as a method of weakening the protections afforded in the substantive law.”<sup>408</sup> The Court also has refused to “indulge in the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.”<sup>409</sup> As stated in another influential Court decision, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”<sup>410</sup> Indeed, “[t]here is reason to believe that arbitration clauses lower the contract price of the goods, services, or money, or provide weaker parties with more advantageous terms, because arbitration reduces the parties’ joint costs of contracting.”<sup>411</sup>

Given the realities of arbitration, which Radin never meaningfully addresses, this alternative dispute resolution technique is “[n]ot inherently pro-business or anti-consumer.”<sup>412</sup> The incidence of arbitration also is not as widespread as Radin has argued. One recent study concludes,

The vast majority of credit card issuers do not utilize arbitration clauses, and by the end of 2010, the majority of credit card debt was not subject to such an agreement. Likewise, while the use of class waivers is widespread

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<sup>407</sup> RADIN, *supra* note 3, at 130-35.

<sup>408</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

<sup>409</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 21 (1991). While arbitration dispenses with many of the formalities of a trial, it still requires a fair procedure. *See* *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir. 2007); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *Rembert v. Ryan’s Family Steak Houses, Inc.*, 596 N.W.2d 208, 211 (Mich. Ct. App. 1999); *see also* *Sampson v. Judicial Arbitration & Mediation Servs., Inc.*, 2008 WL 1892686, at \*4 (Cal. Dist. Ct. App. Apr. 30, 2008) (“We are unaware of any instance where the fair procedures doctrine has been employed to remove an arbitrator in a private arbitration, and we shall not so employ it in this case.”).

<sup>410</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985); *see also* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1366 (2012) (“Reputable organizations like the American Arbitration Association have incentives to provide reasonably fair arbitration procedures in order to preserve a reputation for evenhandedness.”).

<sup>411</sup> Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 480 (2012); *see also* Sarah Rudolph Cole, *Of Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 472 (2011) (“in the vast majority of consumer arbitrations, consumers pay fewer fees than they would in court, obtain results faster than they would in court, and win greater relief than they would likely win in court”).

<sup>412</sup> *Jones v. General Motors Corp.*, 640 F. Supp. 2d 1124, 1138-39 (D. Ariz. 2009).



in arbitration clauses, most clauses lack the sort of unfair procedural terms for which arbitration is often criticized.<sup>413</sup>

After carefully canvassing the literature, the same study concluded that much of the commentary hostile to arbitration is “decidedly not empirical.”<sup>414</sup> Therefore, Radin has overstated any systemic problems associated with arbitration.

### *B. The Benefits of Contractual Arbitration*

In examining Radin’s anti-arbitration bias, the preceding section also touched upon some of the benefits of contractual arbitration. This section will build upon that analysis.

A “strong” public policy favors arbitration over litigation because arbitration is expeditious, avoids litigation delays, relieves court congestion, results in lower expense and does not violate the constitutional or statutory right to trial by jury.<sup>415</sup> In the words of the California Supreme Court,

The speed and economy of arbitration, in contrast to the expense and delay of jury trial, could prove helpful to all parties; the simplified procedures and relaxed rules of evidence in arbitration may aid an injured plaintiff in presenting his case. Plaintiffs with less serious injuries, who cannot afford the high litigation expenses of court or jury trial, disproportionate to the amount of their claim, will benefit especially from the simplicity and economy of arbitration; that procedure could facilitate the adjudication of minor . . . claims which cannot economically be resolved in a judicial forum.<sup>416</sup>

Regarding Radin’s comment that arbitration is inefficient because it is secret, ad hoc and non-precedential, she is actually arguing that arbitration should be more like formal litigation. If two parties can settle a dispute in private, without the aid of arbitration, it will be equally secret, ad hoc and non-precedential. Such settlements occur every day but no court or commentator finds that process particularly

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<sup>413</sup> Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 1 (2013).

<sup>414</sup> *Id.* at 10 n.30 (collecting articles). For a comprehensive analysis of the criticisms of unfair arbitration clauses, see Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695 (2001).

<sup>415</sup> *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1186-87 (Cal. 1976); *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 782-83 (Dist. Ct. App. 1976); *Hartford Steam Boiler Inspection & Ins. Co. v. Underwriters at Lloyd’s & Cos. Collective*, 857 A.2d 893, 905 (Conn. 2004) (lengthy discussion of the benefits of arbitration); *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 449 (Tenn. 1996); *Maguire v. King*, 917 So.2d 263, 266 (Fla. Dist. Ct. App. 2005) (public policy generally favors arbitration, and all doubts regarding the scope of an arbitration clause should be resolved in favor of arbitration, when practicable).

<sup>416</sup> *Madden*, 552 P.2d at 1186. Similarly, the U.S. Supreme Court has noted that arbitration (1) is “cheaper and faster than litigation,” (2) has “simpler procedural and evidentiary rules,” (3) “minimizes hostility and is less disruptive of ongoing and future business dealings among the parties,” and (4) is “more flexible in regard to scheduling of times and places of hearings and discovery devices.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. REP. NO. 97-542, at 13 (1982)).

objectionable. The only difference between private settlements and contractual arbitration is that the private settlements typically have the adversaries bargaining on the issues, frequently with “*sturm und drang*” (stress and turmoil), whereas contractual arbitration allows selection of a neutral third party expert(s) whom the parties expect will resolve the matter based on the law and the facts in a rational, even-handed way.

In essence, Radin’s comment that arbitration is inefficient because it is secret, ad hoc and nonprecedential<sup>417</sup> reveals a misconception of the nature and purposes of this alternative dispute resolution technique. Arbitration “[i]s a private system of justice offering the benefits of reduced delay and expense.”<sup>418</sup> As the United States Court of Appeals for the Seventh Circuit has remarked, “[a]rbitration is an alternative to the judicial resolution of disputes, and an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative.”<sup>419</sup> Another decision has cogently observed:

Maximum deference is owed to the arbitrators because the parties have contracted to use binding arbitration rather than litigation as a means to resolve their disputes. . . . By agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>420</sup>

As just indicated, an additional benefit of arbitration is the avoidance of most follow-on judicial proceedings by either side with the attendant prospect of extra delay and cost. The parties therefore can rely more upon the finality of the arbitrator’s determination than a trial court’s judgment because they will have the assurance with a later challenge that the arbitrator’s decision will stand absent exceptional circumstances.<sup>421</sup> While an arbitration proceeding must comply with

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<sup>417</sup> See *supra* note 384 and accompanying text.

<sup>418</sup> *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994).

<sup>419</sup> *Local 879, Allied Indus. Workers of Am., AFL-CIO v. Chrysler Marine Corp.*, 819 F.2d 786, 788 (7th Cir. 1987).

<sup>420</sup> *Hosier v. Citigroup Global Markets, Inc.*, 835 F. Supp. 2d 1098, 1101 (D. Colo. 2011) (citations omitted); see also *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985) (“Such limited review is necessary if arbitration is to serve as a quick, inexpensive and informal means of private dispute resolution.”). For these reasons imposing a requirement upon the arbitrator to explain his decision (absent the parties’ agreement otherwise) “[w]ould serve only to perpetuate the delay and expense which arbitration is meant to combat.” *Eljer*, 14 F.3d at 1254.

<sup>421</sup> *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146–47 (10th Cir. 1982) (“Once an arbitration award is entered, the finality of arbitration weighs heavily in favor of supporting the arbitrator’s decision and cannot be upset except under exceptional circumstances”).

Radin also objects that arbitrators as a class are inherently biased because they are business persons necessarily more sympathetic to merchants than consumers. See *supra* note 383 and accompanying text. To the contrary, the arbitrator’s expertise and knowledge of the subject matter is a plus for the process and not an automatic indicator of bias see *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) (“parties agree to arbitrate precisely because they prefer a tribunal with expertise

statutory law,<sup>422</sup> the standard of review under the Federal Arbitration Act is “extremely narrow and exceedingly deferential.”<sup>423</sup> Here, the court “[m]ust sustain an arbitration award even if [a court] disagree[s] with the arbitrator’s interpretation of the underlying contract as long as the arbitrator’s decision ‘draws its essence’ from the contract.”<sup>424</sup>

As a result, arbitration has greater potential for achieving more durable outcomes than conventional litigation because reviewing courts give wider deference to the judgment of arbitrators. These advantages can be even more pronounced in the 21<sup>st</sup> century with the increasing globalization of consumer trade where arbitration might be the only practicable method for deciding disputes between parties in far-off locations.

No doubt exists that some commentators strongly disagree with the current judicial interpretation of the Federal Arbitration Act. The main source of this dissatisfaction is that the U.S. Supreme Court has adopted what one commentator calls “the contractual approach to arbitration law,” which means that “[c]ourts must enforce agreements to arbitrate unless contract law provides a ground for denying enforcement.”<sup>425</sup> These Supreme Court decisions, especially, have generated unusually bitter (and even disrespectful) criticisms in the literature. One writer, for

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regarding the particular subject matter of their dispute”); *see also* *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)

As arbitrators are usually knowledgeable individuals in a given field, often they have interests and relationships that overlap with the matter they are considering as arbitrators. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator . . . . To set aside an award for arbitration partiality, “[t]he interest or bias . . . must be direct, definite and capable of demonstration rather than remote, uncertain or speculative.

*Id.*

<sup>422</sup> *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1468-69 (D.C. Cir. 1997).

<sup>423</sup> *Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.), Inc.*, 695 F.3d 181, 186 (1st Cir. 2012). Actually, the scope of review is indeed limited but broader than what the cases sometimes discuss. The federal statute provides the following grounds to vacate an award: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a) (2006). Some courts also recognize a common law ground for vacating arbitration awards that are in “manifest disregard of the law,” *Bangor*, 695 F.3d at 187 (noting split of authority); *see generally* Kenneth R. Davis, *The End of an Error: Replacing “Manifest Disregard” with a New Framework for Reviewing Arbitration Awards*, 60 CLEV. ST. L. REV. 87 (2012). Radin mentions none of these exceptions to the enforcement of these awards.

<sup>424</sup> *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797, 802 (5th Cir. 2012).

<sup>425</sup> Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With a Contractualist Reply to Carrington & Hagen)*, 29 MCGEORGE L. REV. 195, 195 (1998) (citing views of various commentators).

example, has stated that the Supreme Court's interpretation of the Act shows its bias "for the comparatively richer and more powerful litigant" and that "the Court's pronounced, but intellectually inconsistent, preferences for arbitration reflects a reckless, impure, or tainted love."<sup>426</sup> In a second example, a different commentator has argued that "[i]n sum, if the Supreme Court will not change its course, Congress must act quickly to prevent companies from using arbitration as a tool of oppression, rather than to achieve justice."<sup>427</sup> In a third commentary, one set of authors call the issuers of mandatory arbitration agreements "birds of prey" who "sup on workers, consumers, shippers, passengers, and franchisees" and concludes that these agreements are "sometimes a method for stripping people of their rights."<sup>428</sup> Interestingly, all these authors focus almost entirely on pre-dispute arbitration but voice little concern with the fairness of post-dispute arbitration agreements, i.e., where the parties agree to arbitrate an existing dispute.

The more dispassionate commentators correctly observe the Supreme Court "[h]as faithfully applied the Federal Arbitration Act, which itself explicitly enacted the contractual approach to arbitration law."<sup>429</sup> These scholars also point out that the pro-consumer nature of arbitration has been "generally overlooked."<sup>430</sup> Further, these authors have shown that, based on the established economics principle of "rate-of-return equalization," the existence of competition forces businesses to pass on the cost-savings (that often results from the contract arbitration) to consumers.<sup>431</sup> More generally, the facts are that "[g]eneral enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties."<sup>432</sup> Contrary to the beliefs in some academic circles, courts exposed on a daily basis to the work-a-day

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<sup>426</sup> Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 795 (2012); see also Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1383 (1996) ("arbitration zealots . . . including most of the Supreme Court . . . ride roughshod over individual rights and basic notions of fairness in the heat of pursuing a popular current goal.").

<sup>427</sup> Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 712 (1996).

<sup>428</sup> Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996).

<sup>429</sup> Ware, *supra* note 426, at 195.

<sup>430</sup> Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Good Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001).

<sup>431</sup> *Id.* at 89; Stephen J. Ware, *The Case For Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 277-78 (2006) (also noting how judicial regulation of arbitration agreements increases the dispute-resolution costs of the businesses and the costs for both businesses and consumers). Radin rejects this economic principle without adequate explanation. RADIN, *supra* note 3, at 31.

<sup>432</sup> Ware, *The Case For Enforcing Adhesive Arbitration Agreements*, *supra* note 432, at 264.

business world properly hold that the mere existence of an arbitration clause in a contract does *not* favor either party.<sup>433</sup>

Giving no weight to the courts' experience with arbitration, Radin aligns herself with the commentators opposing the Supreme Court's arbitration jurisprudence. As with these other critics, Radin in using some intemperate language does not adequately explain why the contractual approach is incorrect.<sup>434</sup> She also makes no attempt to give her readers a balanced presentation of the arbitration process or to explain why state and federal courts at every level uniformly endorse arbitration as a fair and proper procedure.<sup>435</sup>

Despite Radin's unyielding (and over the top) opposition to contractual arbitration, such as her inexcusable comment accusing the U.S. Supreme Court of condoning widespread racial and sexual discrimination in America,<sup>436</sup> the available evidence suggests that arbitrators "decide cases much as judges do" and "with less cognitive distortion than juries."<sup>437</sup> Arbitration can also be an inherently more fair and accurate method of case resolution than conventional litigation because the parties are not bogged down by "[p]retrial substantive motions, discovery wars, antiquated rules of evidence or juries that allowing clever [or fumbling] advocates to skew the results."<sup>438</sup> For all the above reasons, some jurisdictions state that arbitration is a "favorite of the law."<sup>439</sup>

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<sup>433</sup> *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90–91 (Tex.1996); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (stating that by avoiding the delay and expense of litigation, arbitration will appeal to big business and little business alike as well as to corporations and individuals).

<sup>434</sup> *See RADIN*, *supra* note 3, at 183 (stating that the Court has allowed discrimination against "large numbers of people," and has failed to construe the Act consistent with the "original intent").

<sup>435</sup> *See Public Policy Favoring Arbitration*, 6 C.J.S. *Arbitration* § 3, 1 (2013) ("Arbitration agreements to resolve disputes between parties have received near universal approval"). Indeed, state courts in the interpretation of state arbitration statutes have adopted the federal policy. *E.g.*, *Walther v. Sovereign Bank*, 872 A.2d 735, 742 (Md. 2005) ("The same policy favoring enforcement of arbitration agreements is present in both our own and the federal acts.").

<sup>436</sup> *RADIN*, *supra* note 3, at 183 (stating the Court has "underwritten democratic degradation" on these grounds).

<sup>437</sup> *Burton*, *supra* note 412, at 480.

<sup>438</sup> *Id.* at 480–81; *see also Ware*, *The Case For Enforcing Adhesive Arbitration Agreements*, *supra* note 432, at 259 (making similar comparison); *see also David Sherwyn et al., Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *STAN. L. REV.* 1557, 1578 (2005) ("[T]here is no evidence that plaintiffs fare significantly better in litigation.").

<sup>439</sup> *Valley Const. Co., Inc. v. Perry Host Mgmt. Co., Inc.*, 796 S.W.2d 365, 366 (Ky. Ct. App. 1990); *see also Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 915 (Cal. 1997) (noting the presumption in favor of arbitrability). *But see Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) ("Congress simply requires us to put arbitration clauses on the same footing as other contracts, not make them the special favorites of the law.").

C. AT&T Mobility LLC v. Concepcion: *The “Final Nail in the Coffin of Aggregate Federal Remedies?”*

Radin’s main criticism of the U.S. Supreme Court’s case law on federal arbitration policy, which she says deprives plaintiffs of the right to employ mass remedies, is the 2011 decision in *AT&T Mobility LLC v. Concepcion*.<sup>440</sup> In *Concepcion*, the Court applied the Federal Arbitration Act (FAA) and held that it pre-empted a California law stating that class action arbitration waivers in a contract are unconscionable.<sup>441</sup> Radin accuses the Court majority of being biased in favor of corporate defendants, both in hobbling states trying to protect their consumers and increasing “[t]he risks to plaintiffs, who could be deprived of all remedy against a firm free to gouge them out of small amounts . . . .”<sup>442</sup>

Radin’s analysis of the Supreme Court’s *Concepcion* case has various shortcomings. Primarily, Radin’s statement is readily rebutted that the Court in *Concepcion* “drove the final nail into the coffin of aggregate legal remedies for consumers.”<sup>443</sup> What Radin leaves out of her discussion is the *Concepcion* Court’s observation, “[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.”<sup>444</sup> These words are hardly the statement of a Supreme Court bent on obliterating consumer aggregate legal remedies. Instead, the Court’s comments show that as long as states do not single out arbitration contracts for disparate treatment as compared with other contracts, such aggregate remedies are permissible.<sup>445</sup> The “nail” that Radin references is not in sight and there is no body in the coffin.

Even more dubious is her statement that “[b]y deploying an arbitration clause, a firm also deletes recipients’ right to bring a class action suit.”<sup>446</sup> This statement misapprehends the law because of the rule that “there is *no right* to litigate a claim as a class action.”<sup>447</sup> Given the green light the *Concepcion* Court has given the states to

<sup>440</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>441</sup> *Id.* at 1753.

<sup>442</sup> RADIN, *supra* note 3, at 133

<sup>443</sup> *Id.* at 133. Other commentators use similar hyperbole about the perceived effect of *Concepcion*. See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (noting that *Concepcion* “[w]ill provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued”); *id.* at 726 (arguing that if lower court interpretations of *Concepcion* stand, “[w]e are providing companies with licenses to cheat and harm almost at will.”).

<sup>444</sup> *Concepcion*, 131 S. Ct. at 1750 n.6.

<sup>445</sup> *Id.* at 1747–53.

<sup>446</sup> RADIN, *supra* note 3, at 17; see also *id.* at 101 (arguing against contract clauses that involve relinquishing one’s “right to bring a class action in court”); *id.* at 173 (mass market contracts that exclude class actions use private tools to dispose of a public “right” of redress).

<sup>447</sup> *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (enforcing arbitration clause which prohibited class-action claims, stating that “there is no entitlement to proceed as a class action”); see also *supra* note 68 (making same point).

“address the concerns that attend contracts of adhesion,”<sup>448</sup> Radin also incorrectly suggests that a state under *Concepcion* may not mandate that “arbitration clauses be foregrounded rather than buried in fine print.”<sup>449</sup>

Furthermore, Radin fails to make a persuasive argument that *Concepcion* was wrong on the pre-emptive power of the Federal Arbitration Act (FAA) over contrary state law. Instead, the Court did its homework in patiently explaining why California’s law striking class action waivers impaired federal statutory policy on arbitration. Class-wide arbitration is at odds with federal policy, the Court said, and impedes the national policy effectiveness of the FAA in the following ways: (1) it “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment;” (2) it “requires procedural formality” because of due process concerns, i.e., “for a class action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class;” and (3) it “greatly increases risks to defendants” and “is poorly suited to the higher stakes of class litigation” because of the lack of judicial review that will take place regarding huge awards, thus rendering arbitration unattractive.<sup>450</sup> Radin makes no effort to analyze these positions, preferring instead to condemn arbitration in general because she believes it creates a system of ad hoc, unreviewable, unreported and biased pro-business decisions.<sup>451</sup>

Even given these weighty reasons justifying the *Concepcion*’s majority’s position, plaintiffs can use some creative techniques to avoid *Concepcion*’s preclusive effect upon the enforceability of class action waivers. As one commentator observes, “*Concepcion* is not necessarily the death knell for class-wide arbitration.”<sup>452</sup>

The following avenues for collective action remain viable after *Concepcion*. For example, after the decision in *Concepcion*, another Supreme Court case, *American Express Co. v. Italian Colors Restaurant*, left open the possibility that an arbitration agreement or class action waiver would be invalid where the high cost of arbitration or other factors would make the vindication of statutory rights impossible or extremely impracticable.<sup>453</sup> In a second exception, *Concepcion* does not automatically preclude a contract formation defense based upon

<sup>448</sup> *Concepcion*, 131 S. Ct. at 1750 n.6.

<sup>449</sup> See RADIN, *supra* note 3, at 294 n.44; see also *id.* at 131 (arguing that a state consumer protection agency “probably cannot require that an arbitration clause be printed in bold type”).

<sup>450</sup> *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 198 (Cal. 2013) (summarizing *Concepcion*).

<sup>451</sup> RADIN, *supra* note 3, at 133-34.

<sup>452</sup> Don Zupanec, *Class Arbitration—Federal Arbitration Act—Title VII Claim*, 26 No. 10 FED. LITIGATOR 9 (2011).

<sup>453</sup> *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310-11 (2013). Under the “statutory rights” doctrine, the merchant and consumer may agree to decide the consumer’s statutory rights by way of arbitration instead of by litigation, but only “so long as the prospective litigant effectively may vindicate the statutory cause of action in the arbitral forum.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

unconscionability.<sup>454</sup> In a third qualification, a defendant can be held to have waived a *Concepcion* defense.<sup>455</sup> Then again, in *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*,<sup>456</sup> the New Mexico Court of Appeals distinguished *Concepcion*, reasoning “[b]ecause our invalidation of the ban on class relief rests on the doctrine of unconscionability, a doctrine that exists for the revocation of any contract, the FAA does not preempt our holding.”<sup>457</sup>

Radin herself acknowledges that some courts are “[f]ind[ing] a way around *Concepcion*.”<sup>458</sup> Indeed, prominent commentators have stated that “*Concepcion* leaves open and unresolved the viability of a state law challenge to a bilateral arbitration clause which is shown, in a particular case, to impose a forfeiture of the claimant’s ability to vindicate his state law rights.”<sup>459</sup> Also, several commentators have concluded that class wide arbitration remains a viable remedy within the confines of the FAA.<sup>460</sup> Given these viable alternatives remaining extant, Radin’s

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<sup>454</sup> *Coneff v. AT & T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012) (procedural unconscionability); *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr.3d 19, 28-29 (Dist. Ct. App. 2011).

<sup>455</sup> *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277–80 (11th Cir. 2012) (defendant waived right to arbitrate by twice denying that it sought arbitration but where it changed its mind and requested arbitration after the Supreme Court decided *Concepcion*).

<sup>456</sup> *Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480 (N.M. Ct. App. 2012).

<sup>457</sup> *Id.* at 485. *But see* *THI of N. M. at Hobbs Center, LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (rejecting *Figueroa* as conflicting with federal arbitration policies). In New York, because of the strong public policy favoring arbitration and the absence of a similar policy supporting the right to bring a class action lawsuit, a contractual prohibition against a class action is neither unconscionable nor violative of public policy. *Ranieri v. Bell Atlantic Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003)

<sup>458</sup> RADIN, *supra* note 3, at 279 n.21. Even as they castigate the Supreme Court for its decision, other critics of the decision also grudgingly concede that viable theories for challenging arbitral class waivers have survived *Concepcion*. *See, e.g.*, Sternlight, *Tsunami*, *supra* note 444, at 713-16(citing state and federal decisions).

<sup>459</sup> Myriam Gilles, *Killing Them With Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 826 (2012).

<sup>460</sup> *E.g.*, Brian J. Murray, *I Can’t Get No Arbitration: The Death of Class Actions That Isn’t, At Least So Far*, 62 FED. LAW. 62, 62 (2013) (“Class actions have proven resilient, however, marching onward with the assistance of courts and agencies working to winnow *Concepcion*’s [sic] scope”); Jerett Yan, *The Lunatic’s Guide To Suing For \$30: Class Action Arbitration, The Federal Arbitration Act After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 553 (2011) (“Far from the cataclysm predicted by critics, the impact of *Concepcion* in the lower courts has been modest. Most courts interpreting *Concepcion* simply read the decision as having pruned one of the most far reaching forms of unconscionability doctrine, leaving the bulk of the unconscionability jurisprudence intact.”). Ted Frank, *Class Actions, Arbitration And Consumer Rights: Why Concepcion Is a Pro-Consumer Decision*, 16 LEGAL POLICY REPORT, MANHATTAN INSTITUTE FOR POLICY RESEARCH (Feb. 2013), [http://www.manhattan-institute.org/html/lpr\\_16.htm#VGu7cMlNci4](http://www.manhattan-institute.org/html/lpr_16.htm#VGu7cMlNci4) (“Overall, the Supreme Court’s decision in *Concepcion* has not led, and should not be expected to lead, to a broad erosion of consumer rights, as some alarmists have predicted.”). Another court has deemed *Concepcion* inapplicable where the class action waiver and other arbitration clauses were so



statement is puzzling that the Supreme Court in *Concepcion* has driven “the *final nail* into the coffin of aggregate legal remedies for consumers.”<sup>461</sup>

#### VII. CONCLUSION

Radin makes a spirited, but ultimately flawed, argument that courts should create one or more new torts to combat the perceived evils of boilerplate. As indicated throughout this Article, the creation of a new cause of action in tort must accord with the need and reason for tort liability in general and the legal system’s need to adjust to changing social conditions. This Article further has shown in great detail that Radin’s new torts are not necessary or beneficial because the law in numerous respects adopts a pro-consumer perspective on the enforceability of boilerplate contracts that amply protects legitimate consumer interests.

While no thoughtful proposed major shift in contract doctrine should be rejected out of hand, any credible new policy must be steeped in at least the fundamental doctrines of contract law to have any chance of adoption. Because a valid normative argument about the contracting system must proceed from an accurate statement of the key doctrinal principles, no such possibility exists with Radin’s radical overhaul of the guiding principles of both contract and tort.

Even assuming that the law’s response to the problems of mass market standard form contracts has been insufficient, Radin’s proposal to transform abusive mass market boilerplate contracts into a fount of tort liability in favor of the consumer is counterproductive. Her proposal would very likely create unintended adverse consequences for the same individuals that Radin strives so mightily to protect. The main problem would be that the expanded liability of sellers arising from Radin’s suggested reforms would necessarily cause sellers to impose price increases to account for this added seller legal exposure. In *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*,<sup>462</sup> the United States Court of Appeals for the Seventh Circuit observed:

[t]he idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because [the other side] will demand compensation for bearing onerous terms.

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confusing and inconsistent that the arbitration terms were unenforceable. NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777, 794 (N.J. Super. App. Div. 2011).

<sup>461</sup> RADIN, *supra* note 3, at 279 n.22 (emphasis added). Other commentators properly caution against an overly critical interpretation of the supposed adverse effects of this decision. See, e.g., Rutledge & Drahozal, *supra* note 69, at 961 (“only a handful of franchisors have switched to arbitration clauses since *Concepcion*”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T v. Concepcion*, 79 U. CHI. L. REV. 623, 628 (2012) ([A] too-broad reading of *Concepcion* may collide with Supreme Court jurisprudence that provides agreements to arbitrate federal statutory claims are fully enforceable, but only “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”).

<sup>462</sup> *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282 (7th Cir. 1992).

Balanced with commonsense levels of statutory and regulatory oversight, and fair rules of competition, the more the contracting rules support the free market system, the more both consumers and merchants will benefit. As stated by the United States Court of Appeals for the Seventh Circuit in *ProCD, Inc. v. Zeidenberg*, “[c]ompetition among vendors . . . is how consumers are protected in a market economy.”<sup>463</sup> Radin, however, places no faith in the free market and advocates intrusive regulation on all consumers regardless of their means or abilities.<sup>464</sup> For the above reasons, I respectfully contend that Radin fails to prove her case that the expansion of merchant tort liability to resolve any issues with boilerplate contracts is necessary to remedy any subjectively-perceived democratic degradation.<sup>465</sup>

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<sup>463</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996).

<sup>464</sup> As this Article was going to press, as revealed by Westlaw, no court opinion has cited Radin’s book and just two parties have cited Radin’s book in their briefs. *See* Westlaw, “Allcases” and “All-briefs.” Thus, it appears that her book has had little, if any, impact on courts and practitioners.

<sup>465</sup> Radin confines her analysis to mass market consumer standard form contracts but devotes almost no attention to the many business-to-business boilerplate contracts that constitute a significant portion of the American contracting system. Many small business owners could be functionally indistinct from ordinary consumers. The closest she comes to this comparison is a footnote in Chapter One commenting that contracts between business entities “are more likely to instantiate freedom of contract than those involving consumers.” RADIN, *supra* note 3, at 251 n.6. Radin’s book would have benefited from a comparison of boilerplate consumer contracts with boilerplate business contracts. Does she also contend that these boilerplate business contracts cause democratic degradation? While Radin is entitled to establish the scope of her analysis, covering this point would have broadened the value of her book.

