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# Can We Dicker Online or is Traditional Contract Formation Really Dying - Rethinking Traditional Contract Formation for the World Wide Web

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# NOTE

# CAN WE DICKER ONLINE OR IS TRADITIONAL CONTRACT FORMATION REALLY DYING? RETHINKING TRADITIONAL CONTRACT FORMATION FOR THE WORLD WIDE WEB

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## I. INTRODUCTION

When most people imagine the process of contract formation, they picture two people sitting down and negotiating, arguing about particular contract provisions and particular contract terminology, and maybe even

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involving attorneys to draft an "official" version of the contract. Regardless of the specific details people imagine, traditional contract formation generally involves some form of negotiation between two parties where they choose one set of terms over another. In modern society, however, such negotiation happens very rarely.[1] People enter into many contracts on a daily basis, for example, when they purchase goods or services online.[2] Online purchases are governed by computers, which do not allow for dickering. That is, it is simply not possible to negotiate with a computer, as computers can only respond with pre-programmed terms. Despite this limitation, traditional contracting is not dying—it simply has to be rethought to accommodate this digital architecture.

## II. Moving Traditional Dickering to the Internet

### A. *The Traditional Sales Process*

The traditional consumer sales process generally involves two parties: a person who wants to purchase goods or services ("consumer") and a person who wants to provide these goods or services ("seller"). Both consumer and seller know they want to get to some end—making the purchase or achieving the sale. To complete the sale, the parties negotiate particular sales terms. The process of negotiation necessarily entails flexibility, with give and take by each party. Flexibility inherently means that there *are* options when it comes to terms and at least one party knows in advance about these options. The seller, for example, generally knows about the different types of warranties available (e.g., three-year warranty with either at-home repair or ship-out repair) and can educate the consumer. Since, in this transaction, the seller knows about these options in advance, there is no reason why the range of options cannot be provided to consumers purchasing items online. In fact, warranty options are already being provided to users making purchases online.[3] So, while traditional contracting, where two people sit down and discuss terminol-

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1.    *See* James J. White, *Default Rules in Sales and the Myth of Contracting Out*, 48 Loy. L. Rev. 53, 53–55 (2002).

2.    In 2006, online sales in the United States were over $100 billion and expected to be over $108 billion for 2007. *See* Editorial, *'Net's Benefit*, Investor's Bus. Daily, Oct. 11, 2007, at A12.

3.    Sears.com, for example, offers a "PurchaseProtect Plan" or a "Maintenance Agreement" which is basically an extended warranty that offers replacement coverage for a number of years. Thus, a customer purchasing an Altect Lansing Surround Sound Theater System may also purchase the Sears PurchaseProtect Plan for an additional $30. This plan offers two years replacement coverage for the Altec brand name but 3 years replacement coverage for the Craftsmen and Kenmore brands. *See* Sears, Protection Agreements, http://www.sears.com/shc/s/nb_10153_12605_NB_ProtectionAgreements (last visited Jan. 25, 2009).

ogy, cannot be recreated online, technology is available which would allow businesses to provide the major component of negotiated contracts: options.

## B. *The Online Sales Process*

Just like the traditional sales process, online sales also involve consumers and sellers. In the online context, however, there is an intermediary facilitating the sale: the computer. Sellers must create a website on the Internet that consumers can visit. To sell items, sophisticated sellers, such as Wal-Mart or Dell, have technically complicated shopping carts that are integrated with merchant processing companies (e.g., AuthorizeNet), the United States Postal Service, and often a host of other companies. In addition, they generally have large database servers[4] processing information in milliseconds. Integrating all of these components requires much skill from computer programmers and systems engineers, and a significant investment on the part of companies.

### 1. Clickwrap and Browsewrap Agreements

For consumers, however, the purchasing process appears quite simple. Consumers neither see nor are aware of the sophisticated technology used to support a seller's website. When a consumer visits a retailer's website, the consumer generally picks out an item, checks a couple of "I Agree" boxes (without reading the agreement), enters the necessary credit card information and is finished.

When visiting or purchasing from a website, consumers accept a predetermined set of terms, commonly referred to as boilerplate "clickwrap"[5] or "browsewrap" agreements.[6] Clickwrap agreements generally require consumers to click on an "I Agree" button, while browsewrap

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4.    *See* Morwenna Marshall, *Teradata Shows Its Muscle*, 11 DATABASE PROGRAMMING & DESIGN S40(3) (1998) (In 1998, Wal-Mart had the "[l]argest known centralized decision-support database based on number-of-rows metric: 50 billion rows." At that time, their "warehouse contain[ed] 65 weeks of inventory and sales data collected nightly from the cash register scanners in some 3,000 stores. This data, representing 50,000 to 80,000 items, is grouped at each store by item, number sold, store location, price, and date before being sent by satellite to the Arkansas-based centralized warehouse. It is then housed in a 700GB table containing more than five billion rows.").

5.    RADIN ET AL., INTERNET COMMERCE: THE EMERGING LEGAL FRAMEWORK 793–94 (2d ed. 2005) (defining "clickwrap" agreements as those "in which the terms of the agreement are displayed on the computer screen and the computer user is requested to click an on-screen button to indicate assent to the displayed terms").

6.    *Id.* at 794 (explaining "browsewrap" agreements: "Some websites disclose the existence of terms governing use of the site with nothing more than a link on the home page labeled 'Terms of Use.'" The website owner intends that this notice will indicate to the user, "[b]y continuing to use this site you agree to a set of terms which you will only see if you choose to click on this link.").

agreements do not even require that much effort. In fact, consumers have to make an affirmative effort to seek out the terms of a browsewrap agreement. Thus, even if the consumers making these online purchases wanted to negotiate the clickwrap or browsewrap terms, current website architecture prohibits a negotiation process from taking place.

## 2. Selecting Options During the Purchasing Process

While consumers cannot currently select contract terms, they are making other choices during their purchasing process. When consumers visit, for example, a computer retailer's website (e.g., Dell.com or CDW.com), they see a range of products and a range of options available for those particular products. Consumers can then choose different types of computers (e.g., notebook or desktop), choose from a range of colors (e.g., tuxedo black or crimson), and choose particular specifications (e.g., 3 gigabytes or 4 gigabytes of SDRAM).[7] Dell.com, for example, already provides consumers with some options. That is, the website displays component options with corresponding prices for each option.[8] As consumers add components, Dell's website recalculates and updates the price to reflect the particular options selected. Thus, consumers know the approximate amount they will pay as they proceed through the computer customization process.[9] Given that companies already give consumers the ability to customize orders through option selection, companies can extend option-based purchasing to the formation of customized contracts.[10]

## 3. Critique of the Current Process and Benefits of Digital Dickering

Currently, many websites have boilerplate agreements that may be difficult to find, and which are long and complicated. These boilerplate agreements allow consumers no opportunity to negotiate or reject their terms. That is, the boilerplate terms are part of the product and if consumers want the product (e.g., a new computer), then they must accept the boilerplate agreement.[11] Dell, for example, provides a link (in small

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7.    *See, e.g.*, The Dell Online Store: Build Your System, http://configure.us.dell.com/dellstore/config.aspx?c=us&cs=19&l=en&oc=DYDWHR2&s=dhs (last visited Jan. 25, 2009).

8.    *Id.*

9.    The amount is approximate because consumers generally have to pay shipping costs as well. Those costs are not calculated until consumers enter their shipping information at the end of the order process.

10.    Dell could add another tab to their list or purchasing tabs that consumers could click on and select the particular contract terminology. Making this process easy for the consumer, however, would entail complicated programming by the corporations' programmers. That is, it takes a lot of hard work to make the shopping process simple.

11.    If the agreement is part of the product and the consumer does not have an opportunity to read the agreement before purchasing the product, then the consumer could

font) at the bottom of every screen to a boilerplate browsewrap "Terms of Sale" agreement.[12] When consumers click on the "Terms of Sale" link, they are directed to Dell's Online Policies section.[13] From there, they must figure out which of the several agreements listed applies to their particular transaction. The notice at the top of the page reads: "Purchases of Dell products and services are governed by one of the following terms and conditions. Please review carefully."[14] Basically, unless consumers look for the agreement, they would never even notice that it was on the website. Once they find a link to the agreement webpage, they must determine which agreement actually applies to their purchase. If sellers used digital dickering, they could give their customers the opportunity to select terms out of a range of pre-provided options, much like how they select a color when they purchase a computer. Thus, consumers would not need to search the sellers' website to find the terms, as the terms would be integrated into the purchasing process. Having such integration would alleviate confusion and reduce the likelihood that consumers will not read the agreements at all.

Sellers may be willing to negotiate on some terms, but not others. Companies may, for example, demand arbitration but be flexible as to which organization they use for arbitration proceedings (e.g., National Arbitration Forum or the American Arbitration Association). Some companies may be flexible with Governing Law provisions.[15] Companies could, for example, break down their Governing Law provisions by issue (e.g., contract or warranty dispute). Some states may have comparable laws for particular types of issues and thus companies could allow consumers to pick among those states for that particular issue.[16]

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hypothetically return the product. According to ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), software is returnable if the consumer does not agree with the terms of the click-wrap agreement. The fact that the contract had a statement telling consumers that software was returnable was one of the main reasons why Judge Easterbrook upheld the agreement.

    12.    Dell, http://www.dell.com (last visited Jan. 25, 2009).

    13.    Dell's Online Policies, http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~section=012 (last visited Jan. 25, 2009).

    14.    *Id.*

    15.    *Cf. id.* ("Governing Law. THE PARTIES AGREE THAT THIS AGREEMENT, ANY SALES THERE UNDER, OR ANY CLAIM, DISPUTE OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, AND EQUITABLE CLAIMS) BETWEEN CUSTOMER AND DELL arising from or relating to this agreement, its interpretation, or the breach, termination or validity thereof, the relationships which result from this agreement, Dell's advertising, or any related purchase SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CONFLICTS OF LAWS.").

    16.    Governing Law provisions in contract agreements generally either list the state of the consumer (e.g., Florida) or the state of the company location (e.g., Virginia). However, by contract, parties can agree to litigate a dispute anywhere. Subject to public policy grounds,

The goal of digital dickering is to reduce litigation for companies while allowing consumers to make their own choices regarding contract terms. Accordingly, an important component of digital dickering is to give consumers a meaningful choice. That is, the range of acceptable alternatives should truly be agreed upon by both parties. However, if sellers insist on giving consumers only oppressive terms from which to choose, then giving a digital dickering option would be meaningless, as consumers will instead resort to litigation, rather than ultimately abiding by the oppressive terms. In fact, courts may well refuse to uphold truly oppressive terms.[17]

## III. THE DIGITAL DICKERING FRAMEWORK

People cannot negotiate with a computer. Thus, dickering, as traditionally viewed, where two parties haggle over terms, cannot work in the online context because computers can only respond with pre-programmed options. If dickering were to occur, programmers would need to add capabilities to sellers' websites to allow consumers to select from among the different terms while shopping on the seller's website. Thus, digital dickering would require that sellers pre-select and pre-price a range of acceptable terms.

Pricing out terms may be complicated; however, it is not impossible. Actuaries specialize in calculating this type of risk exposure.[18] Similarly, many other industries are equally competent to manage such risks; for example, the reinsurance and automotive insurance industries make these types of contract term decisions on a daily basis.

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courts will generally uphold such explicit contract choices. Thus, companies could allow consumers to pick any state to litigate a dispute. *See* CORBIN ON CONTRACTS § 79.7 (2008).

17.     In this context, boilerplate agreements are coming under closer scrutiny. Thus, while consumers may still insist on litigating the terms they themselves have selected, companies would have a greater chance of having those terms upheld. *See, e.g.,* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (Discussion Draft 2007) § 1.09 (highlighting that courts should closely examine particular provisions when presented in a boilerplate agreement). *See also* Doe 1 v. AOL LLC, 2009 U.S. App. LEXIS 875 *6 (9th Cir. 2009) (holding that the forum selection clause in the boilerplate member agreement prescribing litigation in Virginia, which does not allow consumer class actions, was unenforceable as to California plaintiffs because "California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.").

18.     About Casualty Actuarial Society, http://www.casact.org/about/ (last visited Jan. 25, 2009).

## A. *The Reinsurance Industry*

Reinsurance is insurance for insurance companies.[19] In the reinsurance industry, there are three parties: the primary insured (e.g., business owner), the insurance company (generally called the "cedent"[20]), and the reinsurance company (generally called the "reinsurer"[21]). For example, the primary insured might purchase hurricane insurance from an insurance company, such as MetLife, Inc., who would then purchase insurance from a reinsurance company, such as Berkshire Hathaway, Inc. Cedents generally purchase reinsurance as a hedge against catastrophic losses, such as those incurred as a result of hurricanes, earthquakes, or terrorist attacks. The reinsurer assumes a portion or all of the cedent's risk in return for a portion of the premium the cedent collects from the primary insured.[22]

As discussed in Appleman on Insurance, reinsurance serves four primary functions:

> First, reinsurance enables the reinsured to limit its liability on specific risks. Second, the use of reinsurance can stabilize the loss experience of the reinsured. Third, reinsurance provides protection against potentially catastrophic losses. Fourth, the use of reinsurance allows the reinsured to write more coverage than it would be able to in the absence of reinsurance.[23]

These four functions weigh differently in importance for each cedent. Because cedents will have different risk management needs based on the policies written for primary insureds, contracts between cedents and reinsurers are highly flexible.[24] That is, parties to a reinsurance contract can negotiate almost any term in a reinsurance agreement. Given such contractual flexibility, reinsurance companies must have a way to estimate the financial risk associated with a particular contractual term.

When business owners purchase insurance, they do so based on the amount of coverage they believe they will require should something happen to their business. Owners could purchase, for example, $1 million worth of flood insurance or $500,000 worth of fire insurance. Cedents know that if the business should burn down, they will have to

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19.     14 JOHN ALAN APPLEMAN, APPLEMAN ON INSURANCE § 102.1 (Eric Mills Holmes ed., LexisNexis 2d ed. 1996).

20.     *Id.*

21.     *Id.*

22.     *Id.*

23.     *Id.* § 102.2.

24.     DAVID R. CLARK, CAS. ACTUARIAL SOC'Y, CAS EXAM STUDY NOTE: BASICS OF REINSURANCE PRICING 1 (1996), *available at* http://www.casact.org/library/studynotes/clark6.pdf.

pay out $500,000 to the primary insured. Cedents, however, do not want to keep $500,000 in the bank just in case the business burns down; rather, they prefer to invest those funds to generate more capital for themselves. Additionally, cedents want to provide policies for as many business owners as possible but without keeping $500,000 in the bank for each policy holder. Basically, cedents are overselling insurance policies. But they acknowledge that this type of overselling is risky because a natural disaster could occur in a particular area, which would force them to pay out on all the policies for that area. Accordingly, cedents purchase policies from reinsurance companies to cover this risk. In turn, reinsurance companies look at the amount of the primary policy, the premium that the primary insured pays to the cedent and the amount of reinsurance the cedent wants to purchase. Then, the cedent and the reinsurance company negotiate a fee splitting agreement. In negotiating this reinsurance contract, there is a struggle between the cedent and the reinsurer. Both parties want to maximize their profit while at the same time minimizing their risk. Thus, the two parties must negotiate to choose the best contract terms among achievable alternatives.[25] That is, there is some point below which both parties will not go—the unachievable. But, everything in between is up for negotiation.

There are many different ways to structure reinsurance policies: reinsurance companies could share the risk equally or take on more risk and receive a higher percentage of the premium. There are also many different ways to calculate rates: surplus share, quota share, etc.[26] In assessing risk, actuaries take into account a wide variety of information and make many assumptions. The most basic information used to calculate rates are the bottom line numbers. That is, actuaries know the amount of the policy payout should the accident actually occur and they know the premium the primary insured is paying to the cedent. Additionally, actuaries take into account the likelihood of the accident occurring.

There are a multitude of organizations that track events of all types. The National Fire Protection Association (NFPA), for example, tracks the number of fires that occur each year.[27] Actuaries use this basic data in mathematical models to estimate the likelihood of a fire in a particular

25.    *See* James N. Stanard & Russell T. John, *Evaluating the Effect of Reinsurance Contract Terms*, LXXVII Proc. of the Cas. Actuarial Soc'y 1, 2 (1990), *available at* http://www.casact.org/pubs/proceed/proceed90/90001.pdf.

26.    *Id.* at 1–5 (noting that there are standard ratemaking procedures).

27.    *See* National Fire Protection Association Fire Reports, http://www.nfpa.org/ (follow "Research & Reports" hyperlink; then follow "Fire Statistics" hyperlink); *See also* Stephen G. Badger, *Large-Loss Fires for 2003*, NFPA J., Nov.–Dec. 2004 ("In 2003, fire departments in the United States responded to 1,584,500 fires"), *available at* http://findarticles.com/p/articles/mi_qa3737/is_200411/ai_n9470906.

area. Knowing the probability of the accident means that the reinsurance company knows the probability that they will actually need to pay out on the policy. If the probability is high, they can take more of the premium to compensate for assuming the higher risk. If the probability is low, then the cedent may not want to purchase reinsurance at all.

To determine the effect of particular contract terms, actuaries must also take into account more complicated numbers. This information includes the present value of pre-tax cash flows; the effect of cash receipts and payouts on the income statement and balance sheets; and the tax impact of the particular cash flows.[28] Using the bottom line numbers and other numbers as input, actuaries develop sophisticated mathematical models to allow reinsurance companies to price the risk assumed with particular contractual terms. That is, by knowing the likelihood of a particular occurrence (e.g., a fire burning down a business) and the financial impacts of particular terms (e.g., increases in tax payments because of increases in cash flows), reinsurance companies know how much of the premium they need to take on to compensate for this assumption of risk.[29]

## B. *Automotive Insurance*

In the automotive industry, there are two parties: the person (or business) purchasing auto insurance ("buyer") and the company providing auto insurance ("seller"). Similar to the reinsurance industry, automotive industry contracts are flexible because buyers have different insurance needs (e.g., number of drivers in the family) and states have different insurance requirements (e.g., mandatory personal injury protection). Thus, automotive insurance companies, like reinsurance companies, must have a way to estimate the financial risk associated with particular contractual terms.

Actuaries serving the automotive industry have a great amount of numerical input available to them. In an effort to track vehicle accidents, the US Department of Transportation (DOT) and the National Highway Traffic Safety Administration (NHTSA) created the Fatality Analysis Reporting System (FARS) in 1975.[30] Additionally, the National Center

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28. Stanard & John, *supra* note 25, at 4–5.

29. This is a very brief overview of the reinsurance industry and the types of information that actuaries consider. The mathematical calculations of actuaries are very complicated. For a simplistic overview of actuarial mathematical techniques used in the reinsurance industry, *see* CLARK *supra* note 24; for mathematical calculations of particular reinsurance contract terms, *see* Stanard & John, *supra* note 25 (the authors only considered economic impact in their calculations).

30. *See* FARS Encyclopedia, http://www-fars.nhtsa.dot.gov/Main/index.aspx (last visited Jan. 25, 2009) (statistics from 1994 through 2007). *See also* National Highway Traffic

for Statistics and Analysis (NCSA) provides car accident breakdowns by state, county, and even zip code.[31] Actuaries can, for example, ascertain the number of alcohol-related car accidents in a particular zip code that occurred on New Years Day.[32] Thus, because they have such specific statistics, actuaries can estimate the probability of a car accident in a particular area and automotive insurers can price their policies based on where the buyer lives. Car insurance in Florida, for example, may be less expensive than car insurance in Michigan because there is no snow in Florida. Car insurance in Jacksonville, Florida may be cheaper still than car insurance in Miami, Florida because the population in Jacksonville is smaller than that of Miami and a smaller population means less congestion and less potential for a car accident.

In addition to general environment statistical data, actuaries in the automotive industry also consider characteristics specific to the person.[33] Insurance providers will ask, for example, a buyer's age, driving history, number of family members in the household, number of miles driven per week and school attendance.[34] Insurance providers also require the release of credit reports which they use in assessing the profitability (i.e., recklessness) of particular individuals.[35] The rationale is that people who have a lot of debt may have a lot of stress in their lives and therefore will not drive as carefully because of these distractions. Actuaries have even

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Safety Administration, FARS Overview, http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.
9fef9613e59b4dd24ec86e10dba046a0/ (last visited Jan. 9, 2009).

31.    *See, e.g.,* Nat'l Ctr. for Statistics & Analysis, Traffic Safety Facts 2007: A Compilation of Motor Vehicle Crash Data from the Fatality Analysis Reporting System and the General Estimates System (Early Edition) 45 tbl.24 (2008), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/TSF2007EE.PDF (reporting number of crashes by time of day, day of the week, and crash severity).

32.    *See* Gregory L. Hayward, *Mining Insurance Data to Promote Traffic Safety and Better Match Rates to Risk,* Cas. Actuarial Soc'y F. 31 (2002), *available at* http://www.casact.org/pubs/forum/02wforum/02wf031.pdf (discussing the use of data marts and data mining technology to find the most significant risk characteristics and to adjust rate-making).

33.    *See* Cheng-Sheng Peter Wu & James C. Guszcza, State of Mo. Dep't of Ins., Does Credit Score Really Explain Insurance Losses? Multivariate Analysis from a Data Mining Point of View (2004) (criticizing the use of credit scores in both automobile and housing insurance). *Cf.* Brent Kabler, State of Mo. Dep't of Ins., Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri (2004) (criticizing the use of credit scores in both automobile and housing insurance).

34.    *See* Wu & Guszcza, *supra* note 33, at 116 ("Today, a typical personal auto rating plan contains hundreds, if not thousands of classes involving . . . territorial characteristics . . . vehicle use . . . driver characteristics . . . driving record . . . [and] vehicle characteristics.").

35.    *See id.* at 119 ("[T]oday more than 90% of insurance companies use credit scores or credit information in one way or another.").

suggested using personality tests to determine the accident proneness of particular individuals.[36]

Similar to the reinsurance industry, actuaries in the automotive industry process all the numerical inputs and assess the risk of particular individuals. In using this information, insurance companies can determine the amount they should charge to compensate for the risk they assume in providing a particular class of individuals with insurance. That is, male drivers below the age of twenty-four may be more likely to get into a car accident than female drivers below the age of twenty-four. Thus, male drivers below the age of twenty-four likely pay a higher premium than do female drivers below the age of twenty-four.[37]

The automotive insurance industry has been able to perfect their ratemaking procedures to a point where they can give real-time insurance quotes online. The quote procedure is similar to the procedure employed by Dell.com when customizing a computer—the difference is that the focus of the questions is on the person seeking automotive insurance rather than computer specifications. If consumers go to Progressive.com, for example, they are asked to provide: their name, address, marital status, gender, date of birth, whether they own their primary residence, vehicle type, whether they own or lease their vehicle, primary vehicle use, whether the vehicle has a security system and airbags, and whether they have any driver's license violations.[38]

Additionally, the Progressive.com website requests consumers' social security numbers to allow them to run their credit report immediately. Once the website retrieves the credit score, it processes all the input, and returns an insurance quote. Thus, *unlike* the Dell.com website, consumers *do not have a real-time* approximation of the cost of their insurance as they progress through the selection process. Rather, the quote is given at the final step in the process.

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36.    Ernest T. Berkeley, *Accident Proneness Discussion Summary*, XLVIII Proc. Cas. Actuarial Soc'y, 207–08 (1961) (summarizing Dr. Leon Brody's comments noting that much effort has be put into developing a personality test to assess accident proneness, as no reliable test exists).

37.    *See, e.g.*, *Are Men Better Drivers than Women?*, Insurance.com, Jan. 9, 2009, http://www.insurance.com/article.aspx/Are_Men_Better_Drivers_Than_Women/artid/259 ("Males aged 20 to 24 were more likely to die in an accident, while females aged 16–19 were slightly more likely to be killed than females 20–24. Many auto insurance industry experts would agree with the theory that males, especially young men, tend to drive more aggressively than women and display their aggression in a direct manner, rather than indirectly."). *See also* Sex Differences in Driving and Insurance Risk: An Analysis of the Social and Psychological Differences Between Men and Women That Are Relevant to Their Driving Behaviour, Soc. Issues Research Ctr. (2004), http://www.sirc.org/publik/driving.pdf.

38.    *See* Progressive, http://www.progressive.com (last visited Jan. 31, 2009).

On the back end, Progressive has rates pre-determined for particular classes of individuals.[39] That is, a twenty-four-year-old male driver who owns a 2000 Ford Escort 4-Door Sedan, rents an apartment in Detroit, Michigan, and has a credit score of 650, may get a rate of $350 per month. A forty-year-old female driver who owns her house in Detroit, Michigan, drives a 2006 Toyota Camry 4-Door Sedan, and has a credit score of 750, may get a rate of $150 per month. While the process is real-time in the sense that consumers do get a quote at the end, the insurance purchase is not final. Progressive reserves the right to double-check all of the information entered by consumers and add in miscellaneous surcharges or discounts.[40] These discounts or surcharges reflect policy characteristics or advances in vehicle technology.[41] Common discounts include a safe driver discount, homeowner discount, anti-theft discount, and student driver discount (or surplus depending on the age and record).[42] Thus, while consumers have an estimate, automotive insurers leave themselves room for further risk assessment and policy pricing changes before giving a final price.

## IV. CRITIQUES OF DIGITAL DICKERING

Given the examples provided above, it is apparent that estimating the cost of particular contract terms is possible in certain situations. A few industries have adapted the risk assessment results they receive from actuaries to the online context. Thus, through combining the contract term analysis tools used in the reinsurance industry with the online experiences of automotive insurance companies, it is possible that online digital dickering is a feasible alternative to clickwrap and browsewrap style agreements.

### A. *Efficiency and Cost*

There are, however, several problems with implementing a digital dickering system. One of these problems is overcoming the inherent economic efficiency of boilerplate agreements. Another problem is obtaining the numerical inputs necessary to create a digital dickering system.

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39.     *See* WU & GUSZCZA, *supra* note 33, at 116–17.
40.     *Id.* at 117.
41.     *Id.*
42.     *Id.*

## 1. Efficiency of Boilerplate Agreements

Ideally, digital dickering would replace boilerplate agreements which are used, in one form or another, by almost every website on the Internet. Boilerplate agreements have become quite popular in part because they are economically efficient.[43] That is, there is no negotiation involved and companies do not need to explain the terms of the agreement to potential consumers. Consumers can read the agreement at their leisure and if they do not agree, return the product. Smaller companies also find these agreements to be economically efficient because they can free ride—they simply look to the bigger companies and copy their terms.[44]

Replacing all the boilerplate agreements would be a time intensive and expensive task because a digital dickering system would require a great deal of back-end work. That is, companies would need a lot of input data, actuaries to process the data, and then programmers to implement the digital dickering systems on their websites. Additionally, companies would need attorneys to read through and analyze contract terminology and compare the benefits and burdens of the laws of multiple states. Larger corporations, such as Microsoft, can afford these costs but smaller corporations may not be able to bear the development costs of a digital dickering system.

Furthermore, smaller companies would not be able to look to larger competitors and free ride on their digital dickering systems because the actuarial data and price rates may be company-specific. Microsoft, for example, may be able to price their software products lower than Adobe because Microsoft has a broader consumer base. On the other hand, Microsoft may be more prone to being sued because they are the largest company in their industry and thus outsell their competitors. In considering these factors, actuaries at Microsoft would determine one pricing rate while actuaries at Adobe would determine a different pricing rate.

Nonetheless, small companies may still be able to work around this situation and continue to free ride off larger companies by following the miscellaneous surcharges and discounts model used by the automotive industry. If competitors' sales are 20 percent less than Microsoft's, for example, then actuaries may add in a premium into their calculations to account for possible rate differences.

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43.    *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (discussing benefits of shrinkwrap agreements).

44.    This free riding phenomenon, where smaller companies copy terms from market leaders, can be seen in states copying regulations from market leaders. Many states, for example, copy corporate regulations passed by Delaware which is often seen as the market leader for corporate law. *See, e.g.*, Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998).

## 2. Pricing and Input Problems

Another implementation problem with a digital dickering system is that it may be difficult to obtain the necessary numerical inputs. Actuaries in both the automotive industry and the reinsurance industry have substantial numerical data readily available, which they can use as inputs in risk assessment calculations. In both industries, there are numerous organizational bodies (e.g., NFPA and DOT) gathering information, processing it, and feeding it back to the actuaries for further processing.[45] Additionally, many of these organizations have been gathering data for years, allowing actuaries to make better assumptions because they can see patterns more easily than they could without historically-reliable data.

There is no "Association for Online Businesses" upon which companies could rely on for specific data. Perhaps, though, this lack of online-specific numerical data is not as problematic as it initially seems. Generally, companies that have online businesses also have a brick-and-mortar counterpart. That is, Progressive.com is an insurance company in the insurance industry. Microsoft.com is a software company in the software industry. Thus, each company can rely on its presence in the underlying industry for the necessary data.

Companies may find it more problematic, however, to actually price specific contract terms. While it is true that actuaries make many assumptions in risk assessment calculations, both the automotive and the reinsurance industries have at least some baseline upon which actuaries can build: both industries know the amount of their exposure at the outset. If an automotive insurer writes a $500,000 policy, for example, it knows that, at most, it may be responsible for paying out $500,000. Pricing contract terms for digital dickering, however, is not necessarily this simple because companies generally do not have a base amount upon which they can build. While companies may attempt to limit their exposure to the price of the product, not all states will allow such limitations and, even if they do, such limitations may be overcome through litigation.[46]

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45.     *See supra* notes 27, 30 and accompanying text.

46.     *See, e.g.*, Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 401 F.3d 901, 910–13 (8th Cir. 2005) (finding contract term in boilerplate limiting damages to price paid for goods to be unenforceable under Minnesota law because the limitation constituted an unreasonable surprise to the plaintiff); Fontana Prods., Inc. v. Spartech Plastics Corp., 6 Fed. Appx. 591, 595 (9th Cir. 2001) (finding a damages waiver in a contract could not not limit defendant's liability for fraud); Winchester v. Lester's of Minnesota, Inc., 983 F.2d 992, 996 (10th Cir. 1993) (reversing the district court and holding that, in a consumer transaction, a contract term limiting damages to the price of the product is a "contractual exclusion of the implied warranties of merchantability and fitness for a particular purpose [and is thus] void under Kansas law.").

In developing a digital dickering contract, companies would therefore need to consider what number(s) they would use as their baseline. Companies could, for example, look to the amount they have spent on lawsuits litigating particular contract terms. Companies such as Netscape,[47] Microsoft,[48] and Dell[49] have been sued on either the content or enforcement of their End User License Agreements (EULAs). Given that companies are concerned about costs, they already track their legal expenses.[50] Thus, these companies have internal data regarding expenses incurred in handling particular lawsuits. Companies also have information regarding the issues of each lawsuit. Therefore, they would know whether a consumer was suing for a violation of a privacy clause or whether the company was attempting to enforce an arbitration clause. Actuaries could then be brought in to take a closer look at the data available and use them as input in calculating the risk of particular terms. While this may be a difficult process for actuaries, as they will likely have to make many assumptions, actuaries make similar assumptions when calculating risk in any industry.

## B. *Consumer Demand and the Collective Action Problem*

In both the reinsurance industry and the automotive industry, providers give choices because customers demand them. Customers are demanding choices online as well. Internet consumers have access to a wide variety of information about oppressive EULAs, specifically at consumer-education websites.[51] The Small Print Project, for example, has gone so far as to draft an Anti-EULA:

> READ CAREFULLY. By [accepting this materialaccepting this paymentaccepting this business-cardviewing this t-shirtreading this sticker] you agree, on behalf of your employer, to release me

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47.    *See, e.g.,* Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (Netscape sought to enforce an arbitration agreement included in a click-wrap license).

48.    *See, e.g.,* Johnson v. Microsoft Corp., 2007 U.S. Dist. LEXIS 86148 (W.D. Wash. 2007) (Johnson alleged that Microsoft violated the Windows XP EULA by "surreptitious installation" of software).

49.    *See, e.g.,* Rogers v. Dell Computer Corp., 138 P.3d 826 (Okla. 2005) (Dell sought to enforce an arbitration provision included with the invoice and acknowledgement sent with the purchased computer); Complaint at ¶¶ 15–17, Intel Corp. v. American Guarantee & Liability Insurance Co., 2009 WL 229670 (N.D. Cal. Jan. 28, 2009) (No. C09-00299 PVT) (disclosing that Intel has exhausted $66 million from two insurers in contesting antitrust litigation).

50.    *See* John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits,* METROPOLITAN CORP. COUNS., Feb. 2008, at 28, *available at* http://www.metrocorpcounsel.com/pdf/2008/February/28.pdf (estimating the total cost of litigation to be $210 billion, which is "equivalent to one-third of the after tax profits of the Fortune 500").

51.    *See, e.g.,* The Small Print Project, http://smallprint.netzoo.net/reag/ (last visited Jan. 9, 2009).

> from all obligations and waivers arising from any and all NON-
> NEGOTIATED agreements, licenses, terms-of-service, shrink-
> wrap, clickwrap, browsewrap, confidentiality, non-disclosure, non-
> compete and acceptable use policies ("BOGUS AGREEMENTS")
> that I have entered into with your employer, its partners, licensors,
> agents and assigns, in perpetuity, without prejudice to my ongoing
> rights and privileges. You further represent that you have the au-
> thority to release me from any BOGUS AGREEMENTS on behalf
> of your employer.[52]

As consumers educate themselves about products and contracts, they
will shop around for the best deals and the most favorable terms.
Additionally, consumers will demand understandable contracts rather
than contracts full of complex and difficult to comprehend boilerplate
language. Once a critical mass of companies make efforts to provide
contract terms which are understandable to the public, consumers will
demand the same from other companies and will no longer settle for
boilerplate agreements. By allowing customers to select their terms and
making those terms understandable to the general public, companies will
simply be getting ahead of the curve.

Nonetheless, a collective action problem stands in the way. Many
people use the internet and it may be difficult to gather enough interested
people to demand that companies provide better terms. Moreover, people
may not be inclined to demand more favorable contract terms because
they are not aware of the oppressive contract terms (because they never
read the agreement), they have not had a problem with their purchase
and thus have no reason to be upset, or they simply believe that someone
else will address the issue. The extent of this problem, however, may be
exaggerated. Those interested in this issue can use social networking
websites, such as Facebook.com and MySpace.com, to reach out and
organize with others who may also be interested in this issue.[53]

## C. *Demand for Reform*

By allowing consumers to select the terms of their contracts, compa-
nies will increase the likelihood that their contracts will be upheld in
court. Courts have become more sophisticated about the Internet and

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52.    *Id.*
53.    *See e.g.*, David Canton, *U.S. Race Reflects Facebook's Arrival as Political Force—*
SOCIAL *Networking: Activism has Found an Effective Medium*, LONDON FREE PRESS (On-
tario), Jan. 12, 2009, at BM4 (discussing Obama's fundraising success through using
Facebook.com).

software agreements, and although many courts have followed[54] Judge Easterbrook's ProCD[55] decision relating to shrinkwrap agreements, recent courts have started to take a closer look at adhesive boilerplate contracts. Recently, the California Court of Appeals struck down a provision in a cellular phone company's EULA requiring consumers to go through arbitration to challenge termination fees.[56] The Court held that both the arbitration terms and the way that customers entered into the EULA were unconscionable and, accordingly, the arbitration provision was unenforceable. Interestingly, the Court dismissed T-Mobile's argument regarding market alternatives. T-Mobile argued that "there was no oppression in the formation of the agreements because plaintiffs had the option of obtaining mobile phone service from one of two other providers whose agreements did not contain class action waivers."[57] In dismissing the argument, the court noted "that the evidence of the availability of market alternatives is exceedingly slim. More fundamentally, we reject the contention that the existence of market choice altogether negates the oppression aspect"[58] of the contract. The Court's decision highlights that it is not enough just to have market alternatives but that the individual companies must give consumers legitimate choices.

Other organizations are also expressing concern over boilerplate agreements limiting consumer rights. The American Law Institute (ALI), for example, started a project in 2004 to "draft legal principles to guide courts in deciding disputes involving transactions in software and to guide the drafting of software contracts."[59] In its preliminary draft, the ALI notes that software contracts containing any of the following provisions may be problematic: "(1) preclude the transferee generally from making fair uses of the work; (2) ban or limit reverse engineering; (3) restrict copying or dissemination of factual information; and (4) forbid transfer of the software."[60]

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54.     As of February 8, 2009, a *LexisNexis Shepard's* report reflects that forty courts have followed the decision.

55.     ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (software is returnable if the consumer does not agree with the terms of the clickwrap agreement).

56.     Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571 (Cal. Ct. App. 2007). *Cf.* Feldman v. Google, Inc., 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007) (holding that where the user had to "click" the "Yes, I agree to the above terms and conditions" button in order to proceed with the online transaction, there was reasonable notice of the terms and mutual assent to the contract).

57.     *Gatton*, 152 Cal. App. 4th at 583.

58.     *Id.*

59.     American Law Institute, Current Projects, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=9 (last visited Jan. 9, 2009).

60.     AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.09 cmt.c (2008).

Meanwhile, efforts to create a uniform standard for shrinkwrap and browsewrap agreements have been rebuffed. The Uniform Computer Information Transactions Act (UCITA) is a proposed standard that would create a uniform set of rules governing EULA's and online transactions.[61] The UCITA has been opposed by a number of consumer groups and attorneys general of several states because the Act is said to significantly decrease consumer's rights and show overwhelming favoritism to companies.[62] To date, only Virginia and Maryland have passed the Act.[63]

If customers have the opportunity to select their terms, then it will be much more difficult for them to later repudiate the contract. That is, consumers will not be able to later claim that they did not read the terms because the terms were hidden from them. Additionally, consumers will be less likely to want to repudiate the contract because they will make selections that best serve their needs. Companies may be concerned that consumers will simply select the cheapest option. If that is a legitimate concern, companies could follow the progressive.com model and simply give a total price at the end rather than using the dell.com model and pricing the terms as people select them.

Giving consumers the option to select terms assumes, of course, that companies are giving customers a meaningful choice in the terms and not just allowing them to select the least oppressive out of a set of oppressive terms. It would be in a company's best interest to be fair when drafting term choices because individual consumers, consumer-protection groups, and attorney generals will litigate over oppressive terms and courts will refuse to uphold them.[64] Additionally, having favorable terms helps the companies' reputations. Large corporations such as Microsoft are already media targets, and there is heavy scrutiny when they engage in practices that disfavor consumers.[65] If large corporations use the digital

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61.    *See* Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461 (2001) (discussing the history and politics of UCITA). *See also* Pratik A. Shah, Note, *The Uniform Computer Information Transactions Act*, 15 BERKELEY TECH. L.J. 85 (2000) (discussing the interaction of UCITA with state and federal intellectual property laws).

62.    *See* McDonald, *supra* note 61, at 466.

63.    *See id.*

64.    *See, e.g.*, Phila. Indem. Ins. Co. v. Barerra, 21 P.3d 395, 403 (Ariz. 2001) (holding that the "exclusion [was] unenforceable here 'because of its technical wording and inconspicuous location within the policy boilerplate' "); Brower v. Gateway 2000, Inc., 246 A.D.2d 246 (N.Y. App. Div. 1998) (consumer challenging arbitration clause in boilerplate agreement). *But see* Kuehn v. Stanley, 91 P.3d 346, 354 (Ariz. Ct. App. 2004) (holding that the trial court did not err in rejecting the Kuehns' claim that the disclaimer was unenforceable because the disclaimer was not unconscionable, bizarre or oppressive).

65.    In February 2007, for example, there were several reports in newspapers and blogs regarding Microsoft campaigning to have a Russian school teacher imprisoned for using allegedly pirated Windows software. *See, e.g.*, Tom Zeller Jr., *Gorbachev to Bill Gates: Show Mercy for Accused 'Pirate'*, N.Y. TIMES, Feb. 5, 2007, http://thelede.blogs.nytimes.com/

dickering process to oppress consumers, they will have negative publicity and their sales will likely suffer.[66]

## V. CONCLUSION

In summary, the digital dickering and price contracting processes are possible and are already being used online in other contexts. Companies must recognize this situation and give consumers more options when contracting online because if they do not, consumers will simply stop doing business with those entities which fail to offer an online dickering model that provides real options. Consumers are already expressing more concern about the inflexibility and alleged unfairness of boilerplate terms. Finally, if companies do not begin to give consumers more options, courts and regulators will likely intervene to provide the necessary consumer protections.

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2007/02/05/gorbachev-to-bill-gates-show-mercy-for-accused-pirate/; Thomas Crampton, *Microsoft Spurns Appeal to Intervene in Russian Piracy Case*, N.Y. TIMES, Feb. 6, 2007, at C8; *Teacher Spurns Microsoft's Offer to Settle Out of Court*, MOSCOW TIMES, Feb. 13, 2007, at 3.

    66.    *See, e.g.*, Ripoff Report: Don't Let Them Get Away with It . . . Let the Truth Be Known!, http://www.ripoffreport.com (last visited Jan. 25, 2009) ("Many law firms and law enforcement agencies utilize Ripoff Report to aid in their investigations of business practices."); Hell: The Web's #1 Dell Complaint, http://ihatedell.net (last visited Jan. 25, 2009); Paul, *Why Dell Sucks Today*, WIZBANG, May 10, 2006, http://wizbangblog.com/content/2006/05/10/why-dell-sucks-today.php. *See also* Laurie J. Flynn, *Dell's Profit Drop Surprises Investors*, N.Y. TIMES, Aug. 28, 2008, at C4.