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Standard-Form Contracting in the Electronic Age

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STANDARD-FORM CONTRACTING IN THE ELECTRONIC AGE

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The development of the Internet as a medium for consumer transactions creates a new question for contract law. In this Article, Professors Robert Hillman and Jeffrey Rachlinski address whether the risks imposed on consumers by Internet boilerplate requires a new lens through which courts should view these types of contracts. Their analysis of boilerplate in paper and Internet contracts examines the social, cognitive, and rational factors that affect consumers' comprehension of boilerplate and compares business strategies in presenting it. The authors conclude that the influence of these factors in Internet transactions is similar to that in paper transactions. Although the Internet may in fact allow companies a greater opportunity to exploit consumers, Professors Hillman and Rachlinski argue that this phenomenon does not implicate a need to create a new framework for deciding cases involving Internet transactions. The authors conclude that Professor Karl Llewellyn's theory of blanket assent, coupled with the unconscionability and reasonable-expectations doctrines that form the traditional framework used by courts to determine the validity of boilerplate terms in the paper world, should apply equally to the Internet world. Recognizing some of the specific concerns that arise in respect to boilerplate in Internet contracts, however, they address a number of issues to which courts should apply particular scrutiny and that may require the adoption of new approaches in the future.

The Internet is turning the process of contracting on its head. With increasing enthusiasm, businesses rely on the Internet to conduct their transactions.[1] More and more, ordinary people enter into con-

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[1] See Jonathan E. Stern, The Electronic Signatures in Global and National Commerce Act, 16 Berkeley Tech. L.J. 391, 391 (2001) ("Electronic commerce is rapidly redefining this nation's economy. This past year's revenues amounted to about $490 billion in United States online purchases. By 2004, the United States will transact online sales reaching an estimated $3.2 trillion." (citation omitted)); Morgan Stewart, Commercial Access Contracts and the Internet: Does the Uniform Computer Transactions Act Clear the Air with Regard to Liabilities When an On-Line Access System Fails?, 27 Pepp. L. Rev. 597, 597-600 (2000) (

> The Internet is developing at a rate never before seen by modern technology, drawing approximately 71,000 new users per day in 1997. . . . As a result, In-

tracts electronically, over the Internet, through electronic mail, and by installing software.[2] Contract law, with its quaint origins in cases involving the delivery of cotton by clipper ship or mill shafts by horse-drawn carriage, seems ill-equipped to respond to contracts made at the speed of light.[3] Can contract law adapt to this fundamental change in the way people make contracts, or is a new legal order required?

Lawmakers and theorists currently are debating the need for a new set of rules to support these innovative transactions.[4] Some assert that the general rules of contract law, which have adapted to numerous technological breakthroughs in the past, can also accommodate the new electronic modes of commerce (e-commerce).[5]

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ternet traffic in commerce, at the present rate of thirty billion web site hits per year, is expected to more than double in less than a year.

(citations omitted)); see also Margaret Jane Radin, Humans, Computers, and Binding Commitment, 75 Ind. L.J. 1125, 1125, 1151-52 (2000) (discussing growth of electronic commerce).

[2] See Radin, supra note 1, at 1128-33 (describing types of electronic contracts). Because people do not "sign" electronic contracts, Congress passed the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7031 (Supp. V 2000), which trumps state and federal law that require a writing and signature and validates electronic records; see also Robert A. Wittie & Jane K. Winn, Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA, 56 Bus. Law. 293, 298 (2000). For a discussion of the consumer-protection provisions regarding consumer consent, see id. at 303-11. The National Conference of Commissioners on Uniform State Laws also has drafted the Uniform Electronic Transactions Act (1999) (UETA), which has provisions comparable to the federal law. Unif. Elec. Transactions Act (1999), at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

[3] See Radin, supra note 1, at 1126-27 (arguing that traditional picture of contract law holds back innovation). Concern that commercial law is behind the times is certainly not new. See Grant Gilmore, On the Difficulties of Codifying Commercial Law, 57 Yale L.J. 1341, 1341 (1948) ("There is apparently wide agreement that the law of sales, in particular, is hopelessly behind the times. Horse law and haystack law are uneasily tolerated in the complex business of mass production and national distribution."). For a presentation of similar arguments concerning the application of conflict of laws rules to cyberspace, see Jack L. Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199, 1201 (1998), which argues that "traditional tools of jurisdiction and choice of law apply to cyberspace transactions."

[4] See Francesco G. Mazzotta, A Guide to E-Commerce: Some Legal Issues Posed by E-Commerce for American Businesses Engaged in Domestic and International Transactions, 24 Suffolk Transnat'l L. Rev. 249, 249-51 (2001) (noting that uniform, binding rules apply to international electronic transactions); Radin, supra note 1, at 1125 (posing issues regarding consent raised by growth of electronic contracting); Frederick E. Schuchman III, A Law for Contracting in the 21st Century, Mich. B.J., Sept. 2001, at 62 (arguing that practitioners would welcome certainty that Uniform Computer Information Transaction Act (UCITA) would provide if adopted); Jane K. Winn, What Does a Click Mean? Balancing Efficiency and Fairness Concerns in Internet Contracting (unpublished manuscript, on file with the *New York University Law Review*) (discussing need for new contract rules).

[5] See Shawn E. Tuma & Christopher R. Ward, Contracting over the Internet in Texas, 52 Baylor L. Rev. 381, 390 (2000) (asserting that "electronic contracts should be considered

Most commentators, however, believe that the existing law is inadequate, but disagree about what changes need to be made. For example, consumer advocates contend that consumers need greater protection in the electronic environment,[6] whereas businesses argue that they require new rules to facilitate the growth of e-commerce.[7]

No aspect of this controversy is more crucial than the issues that business-to-consumer standard-form contracts raise. Likely ninety-nine percent of paper contracts consist of standard forms,[8] and now, with increasing alacrity, people agree to terms by clicking away at electronic standard forms on web sites and while installing software ("clickwrap" contracts).[9] Businesses' websites also include hyperlinks to terms that they assume will be binding on Internet users who visit their sites ("browsewrap" contracts).[10] E-commerce has relied as heavily on standard-form contracts as the paper world.[11] The issues that the use of paper standard forms raise are now well rehearsed in the secondary literature, and the law has developed a set of rules and standards to govern these transactions.[12] But do these rules and standards translate to the electronic paradigm?

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valid and enforceable under the same principles as verbal agreements so long as there existed mutual assent, consent, or agreement").

6 See generally Jean Braucher, The Uniform Computer Information Transaction Act (UCITA): Objections from the Consumer Perspective (comments submitted to the Federal Trade Commission (FTC), High-Tech Warranty Project, Sept. 11, 2000) (summarizing these arguments), http://www.ftc.gov/bcp/workshops/warranty/comments/braucherjean.pdf.

7 See Holly K. Towle, Legal Developments in Electronic Contracting, in 2 Fourth Annual Internet Law Institute 93-94 (PLI Intellectual Prop. Course Handbook Series No. G-611, 2000) (arguing that enforcement of electronic contracts is vital to utilization of information infrastructure); Computer Software Indus. Ass'n, Re: High-Tech Warranty Project—Comment P991143 (comments submitted to the FTC, High-Tech Warranty Project, Sept. 11, 2000) (identifying industry concerns that restrictions on free licensing may eliminate consumer benefits), http://www.ftc.gov/bcp/workshops/warranty/comments/csia.pdf.

8 John J.A. Burke, Contracts as a Commodity: A Nonfiction Approach, 24 Seton Hall Legis. J. 285, 290 (2000). A prominent article that first addressed the issues presented by standard-form contracts is W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971).

9 See eCommerce Bustles as the PC Era Finally Yields to the Internet-Savvy Population, Predicts Forrester Research, Bus. Wire, May 31, 2000 [hereinafter eCommerce Bustles] (describing increasing prevalence of online purchasing, stock trading and bill payment), http://peryourrequest.com/cimworld/news/N531.htm; see also Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. Cal. L. Rev. 1239, 1239, 1241 (1995) (describing common practice in software industry of presenting terms after point of purchase by consumer).

10 See infra note 189 and accompanying text; see also Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (noting that "a browse wrap license is part of the web site and the user assents to the contract when the user visits the web site").

11 See Robert W. Gomulkiewicz, The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing, 13 Berkeley Tech. L.J. 891, 895-99 (1998) (noting that standard-form terms are ubiquitous in electronic commerce).

12 See infra Part I.C.

With the accumulation of a few years of experience with e-commerce, courts and lawmakers can now begin to develop a sensible answer to this question. In this Article, the first comprehensive analysis and comparison of paper and electronic business-to-consumer standard-form contracts,[13] we address the appropriate legal response to electronic standard forms. The resolution of the issues that these contracts raise requires reviewing the rationale for the current legal approach to paper-form contracts and determining whether the new dynamics of e-commerce create a fundamentally different environment requiring a new legal approach. In pursuing these goals, we analyze the business strategies and the market forces that influence the content of standard-form contracts as well as the rational, social, and cognitive forces that affect consumer attention to this content. We assert that although e-commerce changes some of the dynamics of standard-form contracting in interesting and novel ways and presents some new challenges, these differences do not call for the development of a radically different legal regime.

In fact, the virtual and paper contracting environments share many commonalities. In both worlds, experienced businesses typically draft the standard form and inexperienced consumers (or sometimes small businesses[14]) generally agree to its provisions. Because businesses can identify the most sensible allocation of contractual risks better than courts, judicial failure to enforce standard terms can harm both consumers and businesses in both environments.[15] Businesses also use their knowledge and experience in both environments to exploit consumers, knowing that consumers reliably, predictably, and

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[13] Numerous articles have been devoted to the subjects of privacy, copyright, antitrust, licensing, and consumer protection on the Internet. For an overview, see generally Symposium, Consumers in the Digital Age: Perspectives on the Intersection of Law, Technological Innovation, and Consumer Protection, 52 Hastings L.J. 795 (2001). Others have written articles discussing electronic contracts in general. See generally Dawn Davidson, Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?, 26 Wm. Mitchell L. Rev. 1171 (2000); Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., Adapting Contract Law To Accommodate Electronic Contracts: Overview and Suggestions, 26 Rutgers Computer & Tech. L.J. 215 (2000); Radin, supra note 1. No previous work, however, has presented a straightforward, general approach for assessing the applicability of standard-form contract enforcement paradigms in electronic commerce.

[14] Although we focus on consumer standard forms, much of our analysis could be applied to small businesses as well.

[15] See Karl N. Llewelyn, Prausnitz: The Standardization of Commercial Contracts in English and Continental Law, 52 Harv. L. Rev. 700, 704 (1939) (book review) (arguing that common-law judges are ill equipped to distinguish efficient from exploitative terms in standardized contracts); Todd D. Rakoff, Contracts of Adhesion, An Essay in Reconstruction, 96 Harv. L. Rev 1173, 1203 (1983) (discussing Llewellyn's argument).

completely fail to read the terms employed in standard-form contracts.[16]

Courts reviewing paper-world contracts have struggled mightily to balance the importance of enforcing reasonable contract terms against the need to defend consumers against exploitation. Few analysts have been satisfied with the results of this struggle. Some argue that the courts fail to protect consumers adequately,[17] while others contend that the courts interfere with efficient business practices.[18] Despite these criticisms, we contend that the law ultimately has coalesced around a workable set of rules that protects consumers from surprise and unfair terms while supporting the economically beneficial use of standard forms.[19]

Although the Internet environment reduces many traditional judicial concerns with standard forms, it also brings with it new concerns.[20] Even as the electronic environment provides consumers with new tools to protect themselves from businesses, it also creates novel opportunities for businesses to take advantage of consumers. Furthermore, whether consumers realize any benefit from these new tools is questionable. Businesses still know more than consumers, and consumers still fail to read and understand standard terms. Consequently, e-businesses, like traditional businesses, have incentives and abilities to induce consumers to accept standard terms that are not in the consumers' best interest.

The differences between the paper and virtual media are quite interesting, and support some new proposals for regulating the stan-

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16 See Michael I. Meyerson, The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts, 47 U. Miami L. Rev. 1263, 1269-70, 1275 (1993) ("It is no secret that consumers neither read nor understand standard form contracts .... Moreover, businesses hardly want the consumer to read form contracts.").

17 Craig Horowitz, Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts, 33 UCLA L. Rev. 940, 960 (1986) (arguing that unconscionability doctrine, in its current form, offers inadequate consumer protection); Rakoff, supra note 15, at 1229, 1237-38 (arguing that courts should not enforce boilerplate terms that generate and allocate power unfairly to drafting party); see also Meyerson, supra note 16, at 1278 (discussing Rakoff's analysis).

18 Richard Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293, 294-95 (1975); George L. Priest, A Theory of the Consumer Product Warranty, 90 Yale L.J. 1297, 1351 (1981); Alan Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 Va. L. Rev. 1053, 1064-66 (1977); Alan Schwartz & Louis L. Wilde, Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests, 69 Va. L. Rev. 1387, 1392-93 (1983) [hereinafter Schwartz & Wilde, Imperfect Information]; Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. Pa. L. Rev. 630-31 (1979) [hereinafter Schwartz & Wilde, Intervening in Markets].

19 See infra Part I.C (discussing rules).

20 See infra Part II.

dard-form contract in the electronic world.[21] These new perspectives, however, fit neatly into the existing contract law framework because the basic structure and underlying economics of the standard-form transaction are consistent in both the paper and electronic worlds. The methods businesses use have changed, but their incentives and abilities to take advantage of consumers have not.

This Article advances and defends our thesis that the existing law governing standard-form contracts adequately addresses the concerns that electronic standard-form contracts raise. To set up the contrast with electronic commerce, Part I consists of a review of the issues presented by paper-form contracts and the resolution of these issues by the courts. Part II describes electronic-form contracts and compares the process of paper-form contracting to its electronic counterpart. We conclude that general contract rules, with some refinement, suffice for both the paper and electronic contexts. Part III offers some suggestions for reforms within the existing framework that take advantage of the differences between electronic and paper transactions.

I
STANDARD-FORM CONTRACTS IN A PAPER WORLD

The principal legal issue that standard-form contracts present is whether the law should enforce boilerplate terms.[22] This basic issue remains the central question in both the paper and the virtual worlds of contracting. The doctrine governing contract enforcement has long been criticized as vague, ill-defined, and easily muddled.[23] Consequently, the underlying justifications for enforcing, or not enforcing, standard terms in the paper world must be identified before determining whether these justifications apply equally well in the virtual world.

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[21] See infra Part III.B.

[22] See Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211, 240-41 (1995) (stating that, for past forty years, contract scholars have been preoccupied with enforceability of preprinted contract terms); Meyerson, supra note 16, at 1264, 1274-81 (discussing dilemmas surrounding problem of how to treat standard-form contracts and reviewing treatments by twentieth-century scholars Edwin Patterson, Friedrich Kessler, William Prosser, Arthur Corbin, Karl Llewellyn, Todd Rakoff, Colin Kaufman, Arthur Leff, David Slawson, and Robert Keeton); Rakoff, supra note 15, at 1180-95 (showing how ordinary contract law is inadequate for analyzing adhesion contracts). We refer to the "standard terms" as boilerplate throughout.

[23] See Arthur Allan Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 487-88 (1967) (examining Uniform Commercial Code section 2-302 and its failure to define and clarify unconscionability doctrine).

A. The Basic Issues Presented by Paper Standard-Form Contracts

1. The Paper Paradigm

People encounter standard forms in most of their contractual endeavors.[24] From significant but infrequent transactions, such as leasing or purchasing a home or car, to everyday transactions, such as checking a coat or buying a ticket to a sporting event, standard forms govern contractual relationships.[25]

Although such transactions differ in detail, the standard-form exchange generally involves a face-to-face meeting between a business's agent and the consumer.[26] The agent presents a printed form to the consumer with a few basic terms to be filled in by the parties and the remaining terms already drafted and printed by the business.[27] The business repeatedly employs the form and has invested time and money perfecting it.[28] The form is long and full of legalese.[29] The consumer is in a hurry.[30]

The consumer correctly perceives several realities. First, the agent is not disposed to bargain over the boilerplate or lacks the authority to do so.[31] In short, the business presents the form on a take-

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[24] See Burke, supra note 8, at 290 (asserting that standard forms account for more than ninety-nine percent of all contracts).

[25] See Slawson, supra note 8, at 529 ("[S]tandard forms have come to dominate more than just routine transactions.").

[26] Friedrich Kessler's heavily influential article first presented this model of contract formation as representing purposeful transactions between parties. Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943). Subsequent analyses have expounded on Kessler's work. See, e.g., Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 369-70 (1960) (arguing that existing statutes may not be appropriate in defining defenses to contract enforcement); Arthur A. Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 137-43 (1970) (expanding on Kessler's theory and discussing development of adhesion contracts); see generally Slawson, supra note 8, at 529 (discussing prevalence of adhesion contracts).

[27] Rakoff, supra note 15, at 1177.

[28] Eisenberg, supra note 22, at 243.

[29] See Melvin Aron Eisenberg, Text Anxiety, 59 S. Cal. L. Rev. 305, 309 (1986) (arguing that dense form contract language discourages consumers from reading terms); Meyerson, supra note 16, at 1270 & n.33 (explaining business preference that consumers not read legalese in form contracts).

[30] See Eisenberg, supra note 22, at 242 (stating that hurried traveler may not stop to read boilerplate terms of car rental agreement); Meyerson, supra note 16, at 1270 ("Consumers simply do not have the time to read [standard-form contracts] . . . ."); Slawson, supra note 8, at 532 (observing that specialization of function in modern life has resulted in scarcity of time).

[31] Eisenberg, supra note 22, at 242 (explaining that most agents lack authority to change preprinted terms); Meyerson, supra note 16, at 1270 ("[Consumers] know that the agent behind the counter is not authorized to rewrite the contract . . . ."); Rakoff, supra note 15, at 1225 ("[T]he salesman will explain his lack of authority to vary the form."); Slawson, supra note 8, at 553 ("Surely by now even the most commercially naïve among us

it-or-leave-it basis.[32] Second, the consumer would not understand much of the language of the boilerplate even if she took the time to read it.[33] Third, the business's competitors usually employ comparable terms.[34] Fourth, the remote risks allocated by the boilerplate likely will not eventuate.[35] Fifth, the business seeks to establish and maintain a good reputation with the purchasing public and generally will stand behind its product.[36] Sixth, the consumer expects the law to enforce the boilerplate, with the exception of offensive terms.[37]

The consumer, engaging in a rough but reasonable cost-benefit analysis of these factors, understands that the costs of reading, interpreting, and comparing standard terms outweigh any benefits of doing so and therefore chooses not to read the form carefully or even at all.[38] The consumer also is under some pressure from the business's agent to sign quickly and may believe that the events described in the boilerplate are too remote to be worth worrying about. To illustrate

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knows that most sales persons have no authority to 'dicker' terms at all."); id. at 533 (comparing boilerplate to delegation of bargaining authority).

[32] See E. Allen Farnsworth, Contracts § 4.26 (3d ed. 1999) ("Sometimes basic terms relating to quality, quantity, and price are negotiable. But the 'boilerplate'—the standard terms printed on the form—is not subject to bargain. It must simply be adhered to if the transaction is to go forward."); Kessler, supra note 26, at 632 (stating that business contracts are often contracts of adhesion).

[33] See Eisenberg, supra note 29, at 309 ("The average consumer knows that he probably will be unable to fully understand the dense text of a form contract, either term-by-term or as an integrated whole. Even experts often can't understand such text."); Meyerson, supra note 16, at 1270 (asserting that consumers "generally lack the legal background to understand the subordinate clauses" of form contracts); cf. Warren Mueller, Residential Tenants and Their Leases: An Empirical Study, 69 Mich. L. Rev. 247, 274-76 (1970) (presenting empirical evidence that tenants do not understand terms in their leases).

[34] See Arthur Alan Leff, The Leff Dictionary of Law: A Fragment, 94 Yale L.J. 1855, 1931 (1985) (asserting that certain standard-form contracts are "used by all members of a particular industry such that a consumer could not acquire certain goods or services at all except on a particular set of terms").

[35] See Eisenberg, supra note 22, at 240 ("[M]ost preprinted terms are nonperformance terms that relate to the future and concern low-probability risks.").

[36] See Rakoff, supra note 15, at 1221 (noting that business may set legal liabilities lower than "obligations that the firm recognizes in its actual practice" so as to leave "room to maneuver").

[37] See Llewellyn, supra note 26, at 370-71 (arguing that assent to boilerplate clauses may include fine print that is not unreasonable and does not alter reasonable meaning of dickered terms); Burke, supra note 8, at 293 (finding, in survey of standard-form contracts, that most terms are reasonable and unreasonable terms are often unenforceable).

[38] See Eisenberg, supra note 29, at 305 ("[C]onsumers who are faced with the dense text of form contracts characteristically respond by refusing to read, and . . . it is reasonable for them to do so."); Rakoff, supra note 15, at 1179 ("Virtually every scholar who has written about contracts of adhesion has accepted the truth [that consumers do not read their forms], . . . and the few empirical studies that have been done have agreed." (citation omitted)). Eisenberg calls the consumer's response "rational ignorance." Eisenberg, supra note 22, at 214-16, 241; cf. Mueller, supra note 33, at 274 (presenting empirical evidence that tenants rarely read lease terms before signing).

all of these dynamics, analysts often employ the example of the busy traveler at an airport who is presented by an agent of the rental-car company with a long, incomprehensible standard form substantially similar to forms offered by other rental car companies.[39] The consumer has no interest in reading or understanding these terms; she just wants to be on her way.

2. *Costs and Benefits of Enforcing Standard-Form Contract Terms*

As a general legal matter, parties are entitled to judicial enforcement of contract terms, including standard terms.[40] Although standard-form contracts seem suspect and fail to satisfy contract law's notions of bargained-for exchange, courts and theorists generally consider enforcement of such terms appropriate.[41] Parties are obliged to read and understand the written terms of their contracts.[42] A clear rule holding parties to these written terms puts both parties on notice that they should read and understand written terms before signing.[43] Furthermore, standard-form contracting has advantages, even for consumers.[44] Standard forms are ubiquitous precisely because they pro-

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[39] Burke, supra note 8, at 286-87; Eisenberg, supra note 22, at 242; Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev 961, 1157 (2001) (using car rental agreement as example); Meyerson, supra note 16, at 1270 (same).

[40] Farnsworth, supra note 32, § 4.26; Richard L. Hasen, Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules, 38 UCLA L. Rev. 391, 425 (1990); see also Rakoff, supra note 15, at 1191-92 (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965), for assumption in case law that contracts of adhesion are enforceable).

[41] Farnsworth, supra note 32, § 4.26; Hasen, supra note 40, at 426-30 (discussing societal benefits from enforcement of standard-form contracts); Rakoff, supra note 15, at 1185-86 (discussing sufficiency of agreement to contract terms).

[42] See Farnsworth, supra note 32, § 4.26; Meyerson, supra note 16, at 1266-68 (discussing duty to read); Rakoff, supra note 15, at 1184-85 ("The adherent's signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract.").

[43] See Tanya J. Axenson, Comment, Mandatory Arbitration Clauses and Statutory Rights: The Legal Landscape After *Nelson*, 3 Harv. Negot. L. Rev. 271, 279 (1998) (discussing duty-to-read rule in context of employment contracts); Jack Russo, End-User Software License Disputes: The Software Rental and Copy Program Manufacturer and Distributor Problems, in Computer Litigation 1985: Trial Tactics and Techniques 392 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-4966, 1985) (discussing duty to read in context of software licenses).

[44] See Farnsworth, supra note 32, § 4.26 (explaining how standardization leads to cost reduction); Batya Goodman, Note, Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319, 325 (1999) (same). But see Eisenberg, supra note 22, at 242-43 (characterizing nature of form contracts as deliberately designed to prevent consumers from knowing their rights); W. David Slawson, The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms, 46 U. Pitt. L. Rev. 21, 44 (1984) (writing that, in author's own experience as lawyer, firm tried to draft form contracts "as one-sidedly in the interests of the corporate client as possible"); Rakoff, supra note 15, at 1204 ("The assumption of expertise may be wrong; a busi-

vide significant economies to businesses and consumers.[45] Experienced businesses best understand what risks they can bear most efficiently and what risks should be allocated to the consumer.[46] Careful allocation of these risks minimizes the costs of the goods or services businesses offer.[47]

For example, consider the standard form that the manufacturer of a durable good might use. Suppose the good sometimes fails to function properly because of defective manufacture or improper use. The manufacturer should provide a warranty that covers only the risks that the product is defective, leaving the risks associated with poor maintenance to the consumer.[48] This arrangement would place the risks the manufacturer can best control on the manufacturer and the risks the consumer can best control on the consumer, thereby avoiding expensive moral hazard and adverse selection problems.[49] The manufacturer is therefore likely to allocate risks in this manner in its standard-form sales contract.

This example reveals that the uniformity of standard provisions across different businesses within a single profession need not be suspicious.[50] Just as the drive to reduce costs pushes manufacturers to

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nessman who draws up a form may lack the information to identify the appropriate arrangement. Even if he is knowledgeable, his first instinct may well be to serve only his own interests.").

45 Hasen, supra note 40, at 426 (discussing societal benefits to enforcement of standard-form contracts); Kessler, supra note 26, at 631-32 (explaining that society overall benefits from standard-form contracts); Goodman, supra note 44, at 325 (explaining universal benefit of cost reduction).

46 See Kessler, supra note 26, at 631 (discussing benefits of standard-form contracts); Schwartz & Wilde, Intervening in Markets, supra note 18, at 630 (indicating that market intervention should occur only when imperfect information leads to noncompetitive prices and terms).

47 See Restatement (Second) of Contracts § 211 cmt.a (1979) (describing ways in which standardization leads to decreasing costs); Farnsworth, supra note 32, § 4.26 (explaining how ability to predict risks enables cost reduction, particularly by reducing insurance-type price increases); Kessler, supra note 26, at 632 (discussing cost benefits of standard-form contracts); see also Rakoff, supra note 15, at 1230 (

> An analysis recognizing the existence of contracts of adhesion in price-competitive markets admits that the costs saved by shifting risks to the customer via form terms may well be returned to the customer by means of lower prices or more advantageous terms concerning the few items that are generally bargained or shopped.).

48 See Priest, supra note 18, at 1307-13 (describing these circumstances as optimal allocation of contractual investment against risk); Schwartz & Wilde, Imperfect Information, supra note 18, at 1398-1402 (explaining comparative advantage of consumers and manufacturers in bearing different contractual risks).

49 See supra note 48.

50 See Llewellyn, supra note 15, at 704 ("[W]here bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.").

use similar component parts, it also pushes businesses to employ comparable terms to allocate contract risks. Because the best allocation of risks is not likely to vary between businesses within an industry, most businesses will offer terms similar to those offered by their competitors.[51] Less experienced businesses simply copy their senior counterparts. Uniformity of terms within an industry, in fact, might indicate that the industry is highly competitive.[52]

This analysis explains why businesses resist negotiating terms in standard-form contracts. If the standard terms allocate risks efficiently, constant renegotiation is an academic exercise, inasmuch as parties are apt to settle on the same terms.[53] Inexperienced consumers might fail to realize the efficiencies of the standard terms, but experienced businesses know that such allocations allow them to keep prices low.[54] In short, businesses standardize their risks and reduce bargaining costs by offering one set of terms to all consumers.[55]

Standard terms also save businesses and consumers litigation expenses because these terms typically will have withstood judicial scrutiny.[56] In addition, repeat use of standard terms offers consumers a better chance of understanding the meaning of the terms and offers

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[51] See Priest, supra note 18, at 1320-25 (arguing against theory that warranties are imposed on consumers anticompetitively).

[52] See Schwartz & Wilde, Imperfect Information, supra note 18, at 1390-91 (indicating that firms are responsive to consumer demands for warranty protection); Slawson, supra note 8, at 549 (examining uniformity in warranties resulting from automotive-industry competition).

[53] See Schwartz, supra note 18, at 1064-65 ("In mass markets, sales do not reflect the individual preferences of every buyer, because of the high cost of particularizing such agreements."); see also Steven R. Salbu, Evolving Contract as a Device for Flexible Coordination and Control, 34 Am. Bus. L.J. 329, 376-78 (1997) (arguing that renegotiation of contract terms is often useless because it increases transaction costs, thereby reducing the potential net benefit to the consumer); Slawson, supra note 8, at 531 (discussing factors and expenses making it unlikely that form contracts will be customized).

[54] In the manufacturer-consumer example above, no consumer would be willing to compensate the manufacturer adequately for bearing the risks associated with poor maintenance because consumers are always in the best position to manage the maintenance schedule. See Priest, supra note 18, at 1314-19 (describing necessity of standardization of contract terms).

[55] See Farnsworth, supra note 32, § 4.26 ("Because a judicial interpretation of one standard form serves as an interpretation of similar forms, standardization facilitates the accumulation of experience."); Hasen, supra note 40, at 426-27 (discussing how standardization promotes efficiency and savings); Kessler, supra note 26, at 631-32 (same). For additional discussion of how standard forms "promote efficiency within a complex organizational structure," see Rakoff, supra note 15, at 1222-23.

[56] Businesses benefit in part by employing terms previously used successfully. Marcel Kahan & Michael Klausner, Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases, 74 Wash. U. L.Q. 347, 350-51 (1996) (analyzing reasons leading to contract standardization).

courts a greater opportunity to recognize and strike offensive ones, thereby fostering migration of terms towards the reasonable.[57]

Despite the potential benefits of standard provisions, however, courts are right to treat them with suspicion. The ability of businesses to identify efficient allocation of risks also gives them the opportunity to exploit consumers by getting them to accept contract terms that inefficiently shift risks to consumers.[58] Businesses understand the true risks of contracts better than consumers, and hence can include terms in the form that are much more favorable to them than consumers know or appreciate.[59] In effect, businesses have incentives and opportunities both to allocate the risks of the contract efficiently and to impose hidden risks on consumers where possible.

For example, suppose a software company sells an Internet application with a bug that makes it easier for hackers to invade the computer system of the application's users. Suppose further that the cost to the software company of remedying this bug is less than the harm it imposes on the consumers who use the software. In a well-functioning market, the manufacturer would bear the cost of fixing the bug. If consumers fail to appreciate the extent of this risk, however, the software company could, in a standard-form sales contract, allocate the risks associated with hacking to the consumers. In effect, the product becomes more expensive than it appears to consumers. Buried in the boilerplate is a term explicitly forcing consumers to bear the risks and expenses associated with hacking risks that the manufacturer knows to be real and serious, but that consumers fail to appreciate. Rather than sensibly allocating risks, the term in this example allows the business to exploit a gap in consumers' knowledge about the product's risks.[60]

These dynamics create a dilemma for courts. Failing to enforce a standard term against consumers could undermine an efficient allocation of contractual risks. Businesses likely will adjust the price for the

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[57] See Radin, supra note 1, at 1147-53 (noting that courts like standard terms, but prefer those imposed by legislatures or agencies over those that are market-developed and risk becoming adhesion contracts).

[58] See Meyerson, supra note 16, at 1269-73, 1275 ("[T]he law has given drafters of form contracts the power to impose their will on unsuspecting and vulnerable individuals."). In the contract-law literature, scholars write about exploitation that arises because one party holds either an informational or an economic advantage over the other party. Inasmuch as the Internet does little to affect the latter type of asymmetry, we concentrate on the former. Hence, when we use the term "exploitation," we refer to the ability of businesses to take advantage of their greater knowledge and experience about contract risks.

[59] See id. at 1269-75.

[60] This example is based on the facts of Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000). For a review of these concerns, see Priest, supra note 18, at 1299-1302.

underlying good or service to reflect the courts' refusal to enforce the term.[61] In the end, if the term reasonably allocated contractual risks, the judicial failure to enforce it would be a socially inefficient net loss to both businesses and consumers.[62] Enforcing a contract term against a consumer, however, might ratify a business's efforts to take advantage of consumers.

Courts have difficulty distinguishing between terms that create a reasonable arrangement of risks and terms that constitute exploitation of consumers.[63] They lack the incentives and experiences that allow businesses to identify and distinguish between sensible practices and opportunities to exploit consumers.[64] Furthermore, courts typically frame the issue as a dispute between a single consumer and a business, rather than as an aggregate policy that affects the vast majority of consumers and businesses that transact with each other contentedly.[65] Courts are thus apt to misidentify terms quite frequently.

3. *The Role of Competition*

In theory, consumers' best protection against exploitation is not the courts, but their own vigilance and acumen.[66] Consumers concerned about the possibility of exploitation can try to avoid terms they consider exploitative and refuse to transact with businesses that have reputations for offering and enforcing manipulative contract terms. In

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[61] See Schwartz, supra note 18, at 1062.

[62] See Richard Craswell, Remedies When Contracts Lack Consent: Autonomy and Institutional Competence, 33 Osgoode Hall L.J. 209, 225-26 (1995) (arguing that judges should enforce sellers' contracts when efficient, even if buyer's consent was uninformed); Schwartz, supra note 18, at 1057-63 (demonstrating how failure to enforce mutually beneficial terms harms consumers).

[63] See Michael J. Trebilcock, The Limits of Freedom of Contract 101 (1993) (arguing that scope of intervention for contracting failures should be limited); Craswell, supra note 62, at 223-25 (noting that courts must act as price regulators to determine whether consumers are exploited); Schwartz & Wilde, Imperfect Information, supra note 18, at 1458 (indicating that courts have difficulty obtaining data to prove consumer exploitation).

[64] See Schwartz & Wilde, Intervening in Markets, supra note 18, at 678-82 (arguing that courts are not good institutions for intervening in markets for contract terms).

[65] The problem of focusing in a ruling on the individual and not the aggregate policy at stake is most commonly identified in tort law. See, e.g., Carroll v. Otis Elevator Co., 896 F.2d 210 (7th Cir. 1990) ("Come the lawsuit, however, [the plaintiff] presents himself as a person not a probability."); W. Kip Viscusi, Corporate Risk Analysis: A Reckless Act? 52 Stan. L. Rev. 547, 563-65 (2000). On the difficulty of using individual disputes to construct complex social regulation generally, see James A. Henderson, Jr., Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1534-42 (1973).

[66] See A.D. Burch, State Joins Move to Curb Phone Scams, Sun-Sentinel (Ft. Lauderdale), Aug. 18, 1994, at 8B ("[T]he best defense against fraud is education: By learning to recognize rip-offs, consumers can better protect themselves."), 1994 WL 5391762; Schwartz & Wilde, Imperfect Information, supra note 18, at 1414-15 (indicating that consumer demand produces desired level of warranty protection).

addition, the aggregate decisions of many consumers can pressure businesses into providing an efficient set of contract terms in their standard forms.[67] Competition in the market for the goods or services can provide courts with some assurance that businesses will not supply exploitative terms.[68]

Furthermore, even though many, if not most, consumers lack the time, skill, or desire to shop carefully among contract terms, economists argue that even a small percentage of savvy, vigilant consumers create adequate incentives to make businesses competitive.[69] Unless a business easily can identify these alert consumers and offer more favorable treatment to them, it must choose between losing a small group of customers and offering efficient terms to the entire market.[70] In a competitive market, providers of goods and services cannot afford to lose even a small group of customers.[71] Consequently, businesses must write their boilerplate so as to compete effectively for the small group of savvy consumers.[72]

Businesses' concern with their reputations provides a similar barrier to the exploitation of consumers.[73] Businesses must worry that if they consistently include and enforce terms that exploit consumers, they will develop an unsavory reputation, just as if they offered shoddy goods or services.[74] Consumers thus can protect themselves,

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67 See Hasen, supra note 40, at 426-27 (describing potential for consumers to influence terms in competitive market).

68 See id. (describing consumer-protection theory of competitive markets, but questioning veracity of theory (citing Richard A. Posner, Economic Analysis of Law 102-03 (3d ed. 1986))).

69 See Priest, supra note 18, at 1347 (noting that manufacturers are responsive to warranty demands of relatively few customers); Slawson, supra note 8, at 548-49 ("Producers take seriously even small percentage declines in sales.").

70 See Priest, supra note 18, at 1347 (positing that changes made to standardized warranties in response to demands of few consumers lead to optimal result).

71 See id. at 1346-47 (observing that manufacturers compete over marginal consumers, not entire set of consumers).

72 Schwartz & Wilde, Intervening in Markets, supra note 18, at 635-38 (arguing that if enough consumers comparison shop to make it profitable for firms to compete on price and quality, they also are likely to compete on terms); Schwartz & Wilde, Imperfect Information, supra note 18, at 1417-18 (showing that only some consumers need to comparison shop to create incentives for firms to compete on these terms). These vigilant consumers might be exactly the ones who are most significantly affected by the terms in the boilerplate (that is, who are most likely to encounter the contingency covered by the term). Hence, it may be that the very consumers that businesses need to agree to the boilerplate to gain an inefficient advantage are the ones who diligently read the boilerplate and thereby protect themselves from such terms.

73 See Priest, supra note 18, at 1347 & n.99 (indicating manufacturers' concern over assuring repeat purchases by consumers by offering warranties).

74 See id. (noting that manufacturers cannot refuse performance on warranties if seeking repeat purchasers).

to some extent, by investigating the reputation of businesses and selecting only those with good reputations.

These factors, however, might not be adequate to ensure that all businesses consistently refrain from efforts to exploit consumers.[75] If the number of savvy consumers is too small, businesses will not find it worthwhile to compete for them. Exploiting the ignorance of the vast majority of consumers might be more lucrative for some businesses than competing for the smart consumers.[76] Furthermore, businesses might develop ways of identifying the savvy consumers and offering them different terms.[77] Such a practice would leave the vast majority of consumers unprotected. Businesses also might be able to hide their reputations or manipulate consumer perception with clever advertising.[78] To the extent that standard terms cover events that are unlikely to occur, most consumers will lack direct knowledge of businesses' practices concerning those terms. Consequently, information on businesses' reputations is apt to be unreliable.[79]

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[75] See Hasen, supra note 40, at 428-30 (describing reasons why consumers may not influence contractual terms).

[76] See Eisenberg, supra note 22, at 243-44 (observing irrationality of consumer search for optimal terms, leading most not to conduct search); Schwartz & Wilde, Imperfect Information, supra note 18, at 1450 (showing that if there are too few vigilant consumers, firms may degrade quality of warranties).

[77] See Rakoff, supra note 15, at 1225 ("The fact that any given firm will seek to do business only on the basis of its own document does not exclude the possibility that other firms will offer different mixes of form terms."); Schwartz & Wilde, Intervening in Markets, supra note 18, at 663 (noting that "if firms discriminate among customers on the basis of knowledge or sophistication . . . firms would exploit nonsearchers by charging them higher prices or providing them with lower quality products and services"). But see Meyerson, supra note 16, at 1270-71 ("Despite wishful commentary to the contrary, there is no evidence that a small cadre of type-A consumers ferrets out the most beneficial subordinate contract terms, permitting the market to protect the vast majority of consumers."). If the savvy consumers are savvy precisely because they are the only consumers who care about the terms in the boilerplate, then market segregation for contract terms is not harmful. Businesses who want to compete for the consumers who care about certain contractual risks will identify these consumers and offer them a package of terms that is efficient to them. This description of market segregation, however, assumes that consumers are rationally uninformed; that is, they ignore terms that cover contingencies they believe they will not encounter. Consumers who completely fail to read any of the terms in boilerplate, however, will be unable to determine whether they should be concerned about the issues the boilerplate addresses. If many consumers remain uninformed about contractual risks that are important to them, then businesses will be able successfully to offer contracts that inefficiently impose risks on the uninformed consumers (and offer different, efficient terms to the informed ones).

[78] Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420, 1439-50 (1999) (discussing businesses' efforts to manipulate consumer perceptions).

[79] See Schwartz & Wilde, Imperfect Information, supra note 18, at 1442 (asserting that as to products with low cost and unlikely risk, consumers are unlikely to have any knowledge of businesses' reputations); Kalinda Basho, Comment, The Licensing of Information:

Businesses' concern with their reputations also might fail to protect consumers because businesses might be managed by unsavory short-term players who are unconcerned with their reputations.[80] Just as courts in product liability cases do not rely exclusively on businesses' concern with their reputations to ensure that manufacturers provide efficiently safe products, courts worry that reputational concerns inadequately ensure that businesses provide efficient terms.[81]

Furthermore, as some commentators have argued, businesses themselves might be ignorant of the terms offered in their boilerplate agreements.[82] Businesses often delegate the job of drafting their terms to lawyers, who believe that they can best serve their clients by composing an arsenal of one-sided terms without regard to the business environment, or for that matter, anything else.[83] In addition, business managers might rely on some of the same cognitive processes that affect consumers.[84] In particular, businesses might worry too much about protecting themselves from rare events, overestimating the likelihood of such events because of a few salient incidents.[85]

Despite these concerns, courts recognize that the combination of businesses' efforts to compete for savvy consumers and businesses' concerns with their reputations often will dissuade them from at-

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Is It a Solution to Internet Privacy?, 88 Cal. L. Rev. 1507, 1517 (2000) (asserting that consumers lack sufficient knowledge about e-businesses' practices to protect themselves from exploitation).

80 Fed. Trade Comm'n, The FTC's First Five Years: Protecting Consumers Online 3 (1999) (noting that Internet "offers anonymity and easy exit").

81 See William M. Landes & Richard A. Posner, A Positive Economic Analysis of Products Liability, 14 J. Legal Stud. 535, 544-45 (1985) (asserting that "[m]anufacturers will . . . reap little consumer ill will from fooling consumers with disclaimers that consumers fail to read . . . and for the same reason competing manufacturers will not find it profitable to try to compete by offering to disclaim disclaimers").

82 See Hasen, supra note 40, at 429 (describing corporate structure in which legal staff is segregated); see also Stewart Macaulay, Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian MacNeil and Lisa Bernstein, 94 Nw. U. L. Rev. 775, 795 (2000) (describing corporate structure in which legal staff is segregated); Rakoff, supra note 15, at 1221-22 (discussing contract drafting by attorneys).

83 See Eisenberg, supra note 22, at 243 (stating that businesses will spend significant amount on legal advice to create best terms from their perspective); Rakoff, supra note 15, at 1222 ("The lawyer drafts to protect the client from every imaginable contingency. The real needs of the business are left behind; the standard applied is the latitude permitted by the law.").

84 For a discussion of consumer cognitive processes, see infra Part I.B.3.

85 Psychologists refer to this as the availability heuristic. See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124, 1127-28 (1974). For a discussion of how such heuristics and biases affect business, see Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms), 146 U. Pa. L. Rev. 101, 130-56 (1997).

tempting to exploit consumers with standard terms.[86] Courts are also mindful of their own limited ability to distinguish exploitation from sensible business practices and of the costs associated with mistakenly refusing to enforce the latter.[87] The adverse consequences of judicial reliance on market discipline might, in many cases, be less harmful than the consequences of judicial interference with sensible business practices. Therefore, courts should be certain that they have identified some failure of the market or of firm reputation before deciding to strike a standard term.[88]

B. Market Failures and Standard-Form Contracts

An imperfect market can fail to provide sufficient discipline to protect consumers.[89] Market failures take many forms, but in the context of standard-form contracts, they distill into roughly three somewhat overlapping categories. First, because consumers incur costs in monitoring standard-form language and firm reputation, they rationally could decide that such costs outweigh the benefits, even though a failure to monitor makes them vulnerable to exploitation. Second, even if they rationally decide the benefits of reading the standard terms outweigh the costs, consumers face social pressures (often arranged by businesses) against investigating the details of the contract. Finally, consumers might not react rationally to the presence of exploitative terms in standard-form contracts. Psychological research on judgment and choice combined with descriptions of how consumers think about contracts suggest that consumers will not appreciate the dangers presented by boilerplate language.

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[86] See Craswell, supra note 62, at 223-25 (suggesting that market incentives militate against exploiting consumers with standard warranty terms).

[87] See id. (noting that courts may be poor judges of optimal price and terms relative to firms, and by invalidating warranty terms courts may push prices up).

[88] See Schwartz & Wilde, Imperfect Information, supra note 18, at 1458 (arguing that courts must identify market failure before refusing to enforce standard term); Schwartz & Wilde, Intervening in Markets, supra note 18, at 631 (arguing that court should enforce standard term unless it determines that "the existence of imperfect information has produced noncompetitive prices and terms").

[89] See Meyerson, supra note 16, at 1270-71 (stating that if only small group of "type-A" consumers reliably read standard contract terms, there is no evidence they will "ferret[ ] out" terms most beneficial to majority of consumers); see also R. Ted Cruz & Jeffrey J. Hinck, Not My Brother's Keeper: The Inability of an Informed Minority To Correct for Imperfect Information, 47 Hastings L.J. 635, 636 (1996) (arguing that informed minorities cannot correct for unequal contractual power); Hasen, supra note 40, at 428-30 (explaining ways in which imperfect markets may counter informed-consumer theory); Rakoff, supra note 15, at 1226 n.190 (explaining why small net gain or loss of customers is usually insufficient stimulus to lead to change in standard terms offered).

1. "Rational" Market Failures

Reading and understanding boilerplate terms is difficult and time consuming for consumers. Consumers recognize that they are unlikely to understand the lengthy and complicated legal jargon in the boilerplate.[90] To make matters worse, consumers commonly encounter standard forms when they are in a hurry.[91] Businesses also can create boilerplate that is difficult to read by using small print, a light font, and all-capital lettering and by burying important terms in the middle of the form.

Furthermore, consumers generally would gain little from reading and comprehending the boilerplate. Consumers generally understand most of the important terms (such as price and quantity of goods) and assume that the remainder of the form addresses unlikely contingencies.[92] Consumers also recognize that even if they do understand and dislike the terms, the agent presenting the form lacks the authority to bargain over the terms.[93] Finally, the terms included in standard-form contracts tend to be uniform within an industry, so consumers see little point in attempting to shop around.[94]

Consumers also have good reason to believe that the standard terms are not something to worry about. Consumers recognize that boilerplate language is usually a matter of customary practice within an industry, rather than an attempt by a single business to exploit them.[95] As such, the standard terms could reflect an industry's at-

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[90] Eisenberg, supra note 22, at 242; see also Hasen, supra note 40, at 428 (explaining that consumers know boilerplate language contains unfavorable terms, but cannot determine when this occurs); Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 Ga. L. Rev. 583, 598-99 (1990) (noting consumer inability to discern legal meaning of contractual terms, even those in plain language, due to high costs); Rakoff, supra note 15, at 1231 (explaining that consumers' lack of knowledge means they cannot accurately assess how risks and costs should be distributed).

[91] See Eisenberg, supra note 22, at 242 (giving example of car rental agreement); Meyerson, supra note 16, at 1270 ("Consumers simply do not have the time to read [form contracts]."); Slawson, supra note 8, at 532 (observing that people contract too often in modern life to have time to reach customized terms each time).

[92] See Eisenberg, supra note 22, at 243 (describing how low probability of nonperformance makes cost of researching standard terms prohibitively high).

[93] Id. at 242; Meyerson, supra note 16, at 1270 ("[Consumers] know that the agent behind the counter is not authorized to rewrite the contract . . . ."); Rakoff, supra note 15, at 1225 ("[T]he salesman will explain his lack of authority to vary the form."); Slawson, supra note 8, at 553 (claiming as common knowledge salespersons' lack of authority to negotiate terms).

[94] Slawson, supra note 8, at 548-49 (noting tendency towards uniformity in standard-form contract terms in competitive industries); cf. Rakoff, supra note 15, at 1225 ("[T]he prevalence of contracts of adhesion does not prove that competition is absent.").

[95] See Burke, supra note 8, at 286-90 (observing that "universal" use of standard-form contracts is "unquestioned" as efficient business practice).

tempt to identify the optimal allocation of contractual risks.[96] If consumers believe that the market for a good or service is reasonably competitive, they also should trust that the terms in the boilerplate allocate risks in such a way as to minimize the overall cost of the good or service. Consumers may sign standard-form contracts without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.[97]

Finally, consumers might refrain from reading standard forms if they believe that courts will strike unreasonable terms.[98] This poses a dilemma for courts: Full enforcement of boilerplate often will leave consumers justifiably unpleasantly surprised, but it will also give notice to consumers to pay more attention to boilerplate.

All of these factors create a "free-rider" problem for consumers.[99] For any single consumer, the costs of monitoring a business's standard-form contract outweigh the benefits. At the same time, however, all consumers benefit from a sufficient number taking care to monitor businesses' practices closely enough to dissuade businesses from including exploitative terms in their standard-form contracts. Because consumers do not realize all of the benefits of their vigilance, the market likely underproduces savvy consumers.[100]

2. *Social Forces*

Rational calculation alone cannot explain consumers' general failure to read standard forms. In some circumstances, the market

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[96] See Farnsworth, supra note 32, § 4.26 (explaining benefits of contracting around unpredictable judicial system).

[97] See Daniel T. Ostas, Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner, 36 Am. Bus. L.J. 193, 229 (1998) (arguing that consumers do not read boilerplate because they trust terms are customary to industry and reasonable "in light of community notions of fair dealing"); see also Stephen J. Ware, Comment, A Critique of the Reasonable Expectations Doctrine, 56 U. Chi. L. Rev. 1461, 1482 (1989) (noting that, in insurance industry, policyholders expect insurers will not "risk a bad reputation in the market by sticking to the fine print").

[98] See Ostas, supra note 97, at 229 (contending that consumers trust courts will not enforce "totally unreasonable" provisions); Ware, supra note 97, at 1481 (observing that courts will not enforce insurance policy standard terms if they are more restrictive than implied in accompanying policy summary).

[99] See R. George Wright, Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively, 75 B.U. L. Rev. 1397, 1415 (1995) (describing free-riding consumer behavior).

[100] To be sure, businesses that offer efficient terms have an incentive to gain the attention of consumers and educate them. This incentive would eliminate the free-rider problem if informing and educating consumers about the value of these terms were costless. Marketing and advertising terms, however, is costly, especially inasmuch as these activities must overcome social and cognitive pressures that lead consumers to ignore contractual terms. See infra Part I.B.2, I.B.3.

should produce a sufficient number of consumers who recognize the unlikely contingencies covered by the standard form such that businesses feel disciplined.[101] Nevertheless, most commentators agree that only a tiny fraction of consumers read and understand boilerplate.[102] Other factors therefore also must affect consumer behavior.

Social forces induce consumers to sign standard-form contracts quickly, even when they should take the time to read and understand them. Businesses often present standard-form contracts at a moment when consumers are hurried and when stopping to read and understand the boilerplate will feel awkward or unpleasant.[103] For example, businesses sometimes present forms to consumers when other consumers, also in a hurry, are waiting in line, such as at the car rental counter.[104] Businesses want consumers to believe that by reading the boilerplate, they are wasting everybody's time. At the very least, the business's agent may send signals that he is in a hurry.

Consumers know that reading the boilerplate may not only waste people's time, but can appear confrontational.[105] By stopping to read the boilerplate, a consumer signals to the agent, and any others present, that the consumer does not trust the business or its agent. Particularly after a long negotiation over other terms (such as the price of a car), the consumer often will develop a relationship with the business's agent. Consumers will feel uncomfortable suddenly indicating distrust to the reassuring agent by studying terms covering unlikely events.

Finally, businesses can deliberately (or even unintentionally) reduce consumers' willingness to read the terms by the manner in which

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101 See Schwartz & Wilde, Intervening in Markets, supra note 18, at 659-62 (noting assumption that enough comparison shoppers will reduce price of goods bearing costly warranty terms).

102 See Rakoff, supra note 15, at 1179 n.22 ("Virtually every scholar who has written about contracts of adhesion has accepted the truth [that form readers do not read their forms], and the few empirical studies that have been done have agreed."); see also Hasen, supra note 40, at 430-31 (explaining this general belief in absence of empirical research).

103 See Meyerson, supra note 16, at 1270 (explaining why consumers usually "fail to read the form contracts that pass before them every day"); see also Eisenberg, supra note 22, at 242 (providing example of car rental agreement).

104 Eisenberg, supra note 22, at 242; Meyerson, supra note 16, at 1269 (same); Slawson, supra note 8, at 529 (giving examples of commonplace standard-form contracts—parking lot and theater tickets—which are ordinarily transacted when consumers are under time pressure).

105 See Eisenberg, supra note 22, at 243 (

> [I]t [does] not take much imagination to picture the indignation of the garage owners 'if their potential customers, having taken their tickets and observed the reference therein to contractual conditions . . . were one after the other to get out of their cars, leaving the cars blocking the entrances to the garage, in order to search for, find and peruse their notices.).

they present the contract.[106] For example, people prefer commensurate over one-sided exchanges and expect their counterparts to have the same preference.[107] Consequently, people generally feel that if they have received a concession in a social exchange, they are obliged to follow up with one. In one systematic study of this phenomenon, psychologists found that people were twice as willing to donate two hours of their time to a charity if they had already declined to donate two hundred hours of their time to the same charity.[108] People were more willing to donate their time because they felt badly about turning down the initial request.[109] Businesses frequently take advantage of this technique. They offer consumers the standard-form contract only after concluding a long negotiation in which the business has made the consumer feel that she had won many concessions. Car dealers, for example, know to defer discussion of the boilerplate until after agreement to the basic terms so that the consumer believes there has been some give-and-take. In their efforts to ensure that they sell as many cars as possible, car dealerships structure their transactions so as to convince consumers that they can safely trust the salesperson and ignore the fine print in the sales contract.[110]

Businesses' agents also can take advantage of the generally good-natured approach most people bring to any social interaction. For example, people often require little in the way of a justification for doing favors. In one study, office workers using a photocopy machine were equally willing to allow a person to interrupt their work to make copies when the interrupter said she was in a rush as when she merely said she had to make copies.[111] People mindlessly do these little fa-

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106 See, e.g., id. at 220 ("[D]oor-to-door sellers can manipulate the preferences of buyers.").

107 See Robert A. Hillman, The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages, 85 Cornell L. Rev. 717, 725 (2000) ("The rule of reciprocity predicts that people will reject unfair bargains even when they would benefit from the exchange.").

108 Robert B. Cialdini et al., Reciprocal Concessions Procedure for Inducing Compliance: The Door-in-the-Face Technique, 31 J. Personality & Soc. Psychol. 206, 208-09 (1975).

109 Id. at 213 ("When the requestor moves from his extreme proposal to a smaller one, the target must agree to the second proposal to relieve any felt pressure for reciprocation of concessions.").

110 See Robert B. Cialdini, Influence: The Psychology of Persuasion 205-06 (1993) (describing how car dealer can create sense of "liking" in consumer to induce purchase without consumer reflecting accurately on deal's merits); see also id. at 13 (discussing other persuasive tactics involved in selling clothing).

111 Ellen Langer et al., The Mindlessness of Ostensibly Thoughtful Action: The Role of "Placebic" Information in Interpersonal Interaction, 36 J. Personality & Soc. Psychol. 635, 636-38 (1978) (finding people mindlessly willing to allow others to interrupt upon hearing any excuse to do so, however inadequate).

vors for others in the ordinary course of social interaction, so long as the party receiving the favor offers some justification, however dubious.[112] This tendency suggests agents often will have little difficulty extracting a quick signature by winking and, with some exasperation, blaming lawyers for burdening them with unnecessary paperwork.

The precise social technique that businesses rely upon to complete the transaction does not matter for this analysis. Suffice it to say that businesses can draw upon a host of social conventions and influences that lead people into quiet compliance when signing standard-form contracts.[113] In addition, businesses inadvertently can create social pressure on consumers to sign their forms. Over time, experienced agents will discover methods of presenting standard terms that smooth the transaction and save time by discouraging consumers from reading their forms.[114]

3. *Cognitive Factors*

In addition to the rational and social factors in the environment of form contracting that dissuade consumers from reading standard forms, consumers also rely on decisionmaking strategies about contractual risks that keep them from reading the boilerplate.[115] Consumers have limited cognitive resources with which to assess the risks associated with a contract.[116] Consequently, they rely on mental shortcuts or rules of thumb to guide complex decisions about risks.[117]

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112 See Cialdini, supra note 110, at 4-5 (noting that in some circumstances people will more likely do favors if given nominal reason for request); see also id. at 4-12 (describing how automatic responses such as doing favors can be exploited to influence consumer behavior).

113 Cf. id. at 1-16 (providing several examples to illustrate how businesses subtly exploit automatic human responses to influence consumer decisionmaking).

114 Social pressures can be offensive enough to provoke protective legislation, at least when the sales promotion is in the form user's home. See, e.g., Rule Concerning Cooling-Off Period for Sales Made at Homes or Certain Other Locations, 16 C.F.R. § 429.1 (2001) (requiring door-to-door seller to provide adequate written and oral notice to buyer of right to cancel transaction within three business days); see also Farnsworth, supra note 32, § 4.29 n.4 (describing ways in which cooling-off period is beneficial); Anthony T. Kronman, Paternalism and the Law of Contracts, 92 Yale L.J. 763, 764 (1983) (discussing role of cooling-off periods in contract law); Louis E. Wolcher, The Accommodation of Regret in Contract Remedies, 73 Iowa L. Rev. 797, 802 n.19 (1988) (discussing statutes providing cooling-off periods for door-to-door sales).

115 See Eisenberg, supra note 22, at 240-44 (discussing reasons for consumer unwillingness to assess standard terms).

116 See id. at 214-16 (explaining limitations on human cognition, including computational ability, ability to calculate consequences, ability to organize and utilize memory, and ability to process information); Hillman, supra note 107, at 720 (summarizing limitations on "human capability to process information").

117 See Eisenberg, supra note 22, at 214-16 (discussing how people in earthquake-prone areas are more likely to follow rules of thumb or neighbors' advice than conduct analyses

These rules of thumb lead people to worry too much about risks in some circumstances, and not enough about risks in others.[118] Although excessive concern with risk could induce consumers to overcome some of the rational and social factors that discourage them from reading boilerplate, several features of the business-to-consumer standard-form contract suggest that consumers are more apt to worry too little about contractual risks.

First, psychologists long have believed that when making a decision, such as whether to enter into a contract, people rarely invest in a complete search for information, nor do they fully process the information they receive.[119] Instead, they rely on casually acquired, partial information, sufficient to make them comfortable with their choice: a process referred to as "satisficing."[120] Consumers engaged in a process of satisficing will stop investigating their decisions before they have all the information they need to make informed choices.[121] Consumers are therefore unlikely even to consider whether the assessment of the remote risks described in boilerplate terms is important to their decision to enter into a contract.[122]

Second, and related to the satisficing process, people have difficulty making decisions that require a balancing of many different fac-

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of actual risk); Hillman, supra note 107, at 721 (arguing use of "mental shortcuts" for processing information causes systematic mistakes).

118 See Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630, 696-714 (1999) (reviewing research indicating that people both over- and underestimate small risks).

119 The latter phenomenon is called "bounded rationality." See Eisenberg, supra note 22, at 214-16; Hillman, supra note 107, at 720; see also Jeffrey E. Thomas, An Interdisciplinary Critique of the Reasonable Expectations Doctrine, 5 Conn. Ins. L.J. 295, 305 (1998) (noting that consumers rarely undertake evaluations when making purchasing decisions).

120 See Thomas, supra note 119, at 311, 305-16 (concluding that most home and automobile insurance consumers retain initial choice of insurance as long as they are generally satisfied). The term "satisficing" was coined by Herbert Simon and James March. James G. March & Herbert A. Simon, Organizations 140-41 (1958) (arguing that "[m]ost human decision-making, whether individual or organizational, is concerned with the discovery and selection of satisfactory alternatives; only in exceptional cases is it concerned with the discovery and selection of optimal alternatives" (emphasis omitted)); see also David M. Grether, Alan Schwartz & Louis L. Wilde, The Irrelevance of Information Overload: An Analysis of Search and Disclosure, 59 S. Cal. L. Rev. 277, 287 n.18 (1986) (noting that March and Simon coined term "satisficing").

121 See Eisenberg, supra note 29, at 307 ("Consumers may respond to too much information not by overloading, but by refusing to load any information at all."). Commentators have argued, however, that recognition of the satisficing process does not support legal intervention in markets. Grether, Schwartz & Wilde, supra note 120, at 294.

122 See Eisenberg, supra note 22, at 309 ("Reading text one can't understand is both extremely inefficient and emotionally frustrating. The consumer's reaction to the prospect of reading such text is therefore likely to be anxiety and avoidance.").

tors.[123] To simplify matters, people tend to reduce their decisions to a small number of factors, even as they claim to use multiple factors.[124] This narrow cognitive focus might be sensible, in fact. Numerous studies indicate that people who rely on simplified decisionmaking models also tend to make better decisions than if they used complicated models.[125] Some scholars have argued that this tendency to simplify decisionmaking means that people essentially cannot evaluate the many situations covered by the terms in standard-form contracts.[126] Instead, they focus their attention on a small number of aspects of a contract, such as price and quantity.[127]

This narrow cognitive focus that people bring to complex decisions creates a temptation for businesses to offer enticing prices and terms concerning the negotiable portions of the form and to make up for any concessions by drafting one-sided boilerplate terms.[128] Consumers will focus their cognitive skills on the "important" terms, such as price, but ignore the hidden costs buried in the boilerplate. Consumers also mistakenly might believe that they have digested all of the boilerplate terms.

Third, consumers who have decided to enter into a contract largely based on a few salient factors such as price and apparent quality *want* to believe that refraining from reading the boilerplate is rea-

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123 See generally Robyn M. Dawes, The Robust Beauty of Improper Linear Models in Decision Making, in Judgment Under Uncertainty: Heuristics and Biases 391, 394-95 (Daniel Kahneman et al. eds., 1982) (noting that people—even experts in field—have trouble integrating information and typically select known factors for their decisionmaking processes).

124 Id. at 394. For example, in one study, although criminal-trial judges reported that they considered a range of factors when deciding whether to grant bail, the only factor that correlated with their decision was the prosecutor's recommendation. Ebbe Ebbeson & Vladimir J. Konecni, Decision-Making and Information Integration in the Courts: The Setting of Bail, 32 J. Personality & Soc. Psychol. 805 (1975) (discussing study).

125 Dawes, supra note 123, at 401-02.

126 See Eisenberg, supra note 22, at 243 ("Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, . . . a rational form taker will typically decide to remain ignorant of the preprinted terms."); Eisenberg, supra note 29, at 307-10 (explaining that consumers often chose not to read dense contract text because they know they will be unable to understand its meaning).

127 See Russell Korobkin, The Efficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality, and Market Failure, 85 Cornell L. Rev. 1, 56-59 (1999) (noting that healthcare consumers tend to make purchasing decisions based largely on price). But see Schwartz & Wilde, Intervening in Markets, supra note 18, at 675-76 (contending that "no one can predict when consumers will experience 'overload' in real world situations," and that, therefore, consumers' narrow cognitive focus cannot justify consumer-protection measures).

128 See Eisenberg, supra note 22, at 244 (giving example of bank shifting costs of negotiating terms such as rates and fees to nonsalient account characteristics that can be written into form contract); Rakoff, supra note 15, at 1226-27 (noting that result of this practice is shifting of more and more risks to adhering party over time).

sonable.[129] Although there are few studies on consumer responses to standard-form contracts,[130] psychologists have demonstrated that people often engage in such "motivated reasoning," meaning that they make inferences consistent with what they want to believe.[131] People also interpret ambiguous evidence in ways that favor their beliefs and desires.[132] Because consumers usually encounter standard terms *after* they have decided to purchase the good or service,[133] they will process the terms in the boilerplate in a way that supports their desire to complete the transaction. One empirical study, for example, demonstrated that tenants tend to believe that the terms of leases they have signed are more favorable to them than is actually the case.[134]

Finally, although people commonly overestimate the importance of adverse risks, they underestimate adverse risks they voluntarily undertake.[135] For example, automobile drivers overestimate their ability to avoid accidents.[136] This overoptimism also extends to legal obliga-

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129 See Eisenberg, supra note 22, at 243 (explaining that choice not to read terms is rational given costs of understanding them and low probability of their occurrence).

130 For a notable exception, see Dennis P. Stolle & Andrew J. Slain, Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue, 15 Behav. Sci. & L. 83 (1997), which finds that exculpatory clauses, if read, may deter customers from pursuing legal rights.

131 Ziva Kunda, The Case for Motivated Reasoning, 108 Psychol. Bull. 480, 495 (1990) (explaining motivated reasoning—process by which people "are more likely to arrive at those conclusions they want to arrive at").

132 See Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment 97-98 (1980) (discussing study showing that people draw conclusions based on their existing theories and expectations, even if evidence does not support those conclusions); see also Anthony G. Greenwald, The Totalitarian Ego: Fabrication and Revision of Personal History, 35 Am. Psychologist 603 (1980) (describing tendency to associate own actions with desired outcomes).

133 This is, of course, not universal. Nevertheless, we suppose that consumers would not be interested in taking the time to understand the boilerplate unless they already had decided that the product or service was worth purchasing at the stated price. Also, as noted above, businesses have incentives not to present the boilerplate to consumers until this point in the transaction.

134 See Mueller, supra note 33, at 274 (finding that tenants profess to understand ambiguous lease terms but have difficulty applying this "understanding" to hypothetical situations).

135 See Jean Braucher, Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission, 68 B.U. L. Rev. 349, 367 (1988) (arguing that consumers' "cognitive illusions" lead them to agree to certain terms and underestimate impact of others); Eisenberg, supra note 22, at 216 ("[E]vidence shows that as a systematic matter, people are unrealistically optimistic."); Hillman, supra note 107, at 723-24 (suggesting that decisionmakers are overconfident "based on their belief that adverse low-probability risks will not occur" and their "inflated view of their own capabilities").

136 Richard J. Arnould & Henry Grabowski, Auto Safety Regulation: An Analysis of Market Failure, 12 Bell J. Econ. 27, 34-35 (1981) (citing study where drivers surveyed significantly underestimated their risk of car accident); see also Ola Svenson, Are We All Less Risky and More Skillful Than Our Fellow Drivers?, 47 Acta Psychologica 143, 145-46

tions.[137] Because consumers voluntarily enter into contracts, they will tend to believe that they can also safely discount the low-probability events covered by standard terms. People intending to purchase a product likely will overstate their own ability to assess the reputation and good faith of the person or company with whom they are interacting.[138]

4. *Summary of the Paper-World Paradigm*

In the paper world of standard-form contracting, consumers consistently fail to read their standard terms. This failure undermines market pressure to provide mutually beneficial terms. Despite their institutional limitations, courts therefore have reason to police the terms of standard-form contracts to protect consumers from exploitation.

C. *The Law Governing Standard-Form Contracts*

Courts and theorists generally accept this account of standard-form contracting, including, at least implicitly, the analysis of market failures.[139] Courts recognize that standard-form transactions do not involve the required "bargain" of classical contract law.[140] They understand that despite this lack of bargaining, competitive market pressures might ensure that standard-form provisions include a mutually

(1981) (finding that drivers typically believe themselves to be safer and more skillful than average driver).

[137] For example, couples about to get married grossly underestimate the likelihood that they will get divorced; most claim that they are less likely than average to get divorced. Lynn A. Baker & Robert E. Emery, When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 Law & Hum. Behav. 439, 443 (1993). The same study also reveals that eighty-one percent of women about to get married believe their future spouse would pay alimony if they divorced. Id.

[138] See Schwartz & Wilde, Imperfect Information, supra note 18, at 1429-30 (noting that consumer overoptimism might create market failure, but also arguing that businesses would want to cure this failure); see also id. at 1436-38 (arguing that cognitive errors tend to produce random mistakes about risk, not systematic ones). Although businesses also might be prone to committing some of the same cognitive errors as consumers, on the whole, businesses are apt to be less susceptible to erroneous judgment than consumers. Businesses have much more experience judging their contractual risks and therefore have many more opportunities to learn that they are making mistakes. Furthermore, businesses get a steady stream of feedback on their practices through their profitability or lack thereof. Businesses that fail to correct for errors in judgment ultimately risk insolvency, leaving only those that do adapt. Consumers face fewer such pressures and therefore are comparatively more likely to rely on inappropriate cognitive processes.

[139] See Hasen, supra note 40, at 426-30 (arguing that consumer needs protection from standard-form contracts).

[140] See Farnsworth, supra note 32, § 4.26; Slawson, supra note 8, at 551-53 (examining Thompson Crane & Trucking Co. v. Eyman, 267 P.2d 1043 (Cal. Dist. Ct. App. 1954), as instance where courts void contract terms that are not bargained for).

beneficial exchange.[141] Nevertheless, courts also realize that the consumer market can fail. Precisely because of the dynamics of standard-form transactions—the reasonable failure of the user to read the form, the social pressures to refrain from reading the terms, and the cognitive limitations of consumers—courts also worry that the process does not prevent businesses from exploiting consumers.[142] As a consequence, courts enforce boilerplate terms except when they believe businesses have gone too far.[143]

For the most part, the current legal approach supports Karl Llewellyn's vision that the law should create a presumption of assent (or "blanket assent") to standard terms.[144] Llewellyn recognized that businesses generally compete to offer reasonable goods and services to consumers, and assumed that businesses, better than judges, could determine the "particular set of terms that 'fits' the practical problems and needs that arise . . . in carrying out the transactions."[145] Market failures attributable to the rational, social, and cognitive factors and business strategies discussed above were also implicitly part of Llewellyn's vision, and he believed that courts must be empowered to strike "unreasonable or indecent" clauses.[146] In sum, Llewellyn based his framework on the perspective that, so long as the terms are not unfair in presentation or substance, courts should presume consumers' "blanket assent" to the details they may have ignored.[147]

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141 See supra Part I.A.3.

142 See Slawson, supra note 8, at 530-31.

> The effect of mass production and mass merchandising is to make all consumer forms standard, and the combined effect of economics and the present law is to make all standard forms unfair . . . . Competitive pressures have worked so long and so thoroughly to make standard forms unfair that we no longer even notice the unfairness.

Id.

143 See supra Part I.B.

144 See Rakoff, supra note 15, at 1199-2000 (discussing Llewellyn).

145 Id. at 1204 (discussing Llewellyn).

146 Llewellyn, supra note 26, at 370 (arguing that courts should interpret assent to boilerplate clauses reasonably, while remaining aware of unreasonable and unfair clauses); see also Llewellyn, supra note 15, at 704 (arguing that presumption of assent should not extend to "utterly unreasonable clauses").

147 Llewellyn, supra note 26, at 370-71.

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

Id. at 370. Llewellyn incorporated this approach into his draft of Article 2 of the Uniform Commercial Code. See Rakoff, supra note 15, at 1198-99 (discussing Llewellyn).

Thus, the limited role of the courts in policing standard terms has been to bar only those terms that offend public norms.[148] The courts have developed legal doctrines that curb form abuse largely from three sources: the unconscionability doctrine, the *Restatement (Second) of Contracts* section 211(3), and the doctrine of reasonable expectations.

1. Unconscionability

The unconscionability doctrine, embodied in section 2-302 of the Uniform Commercial Code (U.C.C.)[149] on sales of goods and liberally applied by courts to other types of contracts, allows courts to strike contracts or terms in order to prevent "oppression and unfair surprise."[150] The doctrine obviously affords courts considerable discretion to strike unfair terms directly rather than covertly by stretching less-applicable rules in order to reach a fair result.[151] Given their limited ability to discern exploitative from mutually beneficial contracts, courts might not always exercise this discretion wisely.[152] Nevertheless, courts have refined the standard by following a framework set forth by Arthur Leff.[153]

Leff proposed judicial inquiry into the manner in which the parties entered the contract to police the quality of assent (procedural unconscionability) and judicial perusal of the fairness of the resulting substantive terms (substantive unconscionability).[154] Procedural un-

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148 See Craswell, supra note 62, at 224 (arguing that, at best, courts can refuse to enforce warranty terms substantively unfair to consumers); Rakoff, supra note 15, at 1176 ("[T]here is a central theme that runs through the old law and the new: contracts of adhesion, like negotiated contracts, are prima facie enforceable as written.").

149 U.C.C. § 2-302 (1978).

150 U.C.C. § 2-302 cmt.1 (1978); Waters v. Min Ltd., 587 N.E.2d 231, 233 (Mass. 1992). See generally Robert A. Hillman, The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law 129-43 (1997) (explaining justification for, history, and application of unconscionability doctrine). Section 2-302 provides in part:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (1978).

151 See Slawson, supra note 8, at 563 (noting that unconscionability doctrine renders "unnecessary" judicial construction "to make words lead to a result already reached on other grounds").

152 See Craswell, supra note 62, at 224-25 (arguing that judicial approach to enforcement of standard terms recognizes inherent limits of courts).

153 Leff, supra note 23, at 486-87. Ironically, despite authoring the legal framework for applying unconscionability, Leff was not a fan of section 2-302, calling it "amorphous[ly] unintelligib[le]." Id. at 488.

154 Id. at 487.

conscionability consists either of infirmities approaching duress, undue influence, misrepresentation, or of sneaky drafting strategies, such as hiding offensive terms in fine print, contradictory provisions, or incomprehensible terms.[155] In searching out procedural unconscionability, courts examine the transaction to ascertain whether businesses have taken undue advantage of the rational and social factors that hamper consumers from identifying the meaning of terms contained in the boilerplate.[156]

Substantive unconscionability encompasses manifestly unjust terms, such as terms that are immoral, conflict with public policy, deny a party substantially what she bargained for, or have no reasonable purpose in the trade.[157] Following Leff, courts generally find unconscionability when the bargaining process was deficient *and* the substantive terms oppressive, although some courts have found unconscionability where one factor was especially strong.[158]

The role of unconscionability in policing standard forms is not difficult to discern. When a form contains incomprehensible boilerplate, fine print, or otherwise hidden terms that undermine the user's purpose of contracting or otherwise "shock the conscience," courts unhesitatingly apply unconscionability.[159] Not surprisingly, when the

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155 Hillman, supra note 150, at 138.

156 Procedural unconscionability has been described as consisting of a "lack of a meaningful choice . . . [considering] all of the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print." Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (internal quotations omitted) (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); see also M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 315 (Wash. 2000) (adopting *Schroeder* definition of procedural unconscionability); Nelson v. McGoldrick, 896 P.2d 1259 (Wash. 1995) (same).

157 See Hillman, supra note 150, at 138. In one recent case, for example, a court found substantively unconscionable a mandatory arbitration provision that required payment by the purchaser of a $4000 arbitration fee in advance (only half of which could be refunded upon prevailing) and other travel fees, use of International Chamber of Commerce (ICC) arbitration rules when the ICC and its rules were difficult to locate, and liability for attorney's fees if the purchaser lost the arbitration. See Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574-75 (App. Div. 1998).

158 See Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995) (finding dual requirement "more coincidental than doctrinal"); Sosa v. Paulos, 924 P.2d 357, 360-61 (Utah 1996) ("Gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability." (quoting Res. Mgmt. Co. v. Weston Ranch, 706 P.2d 1028 (Utah 1985))); see also James J. White & Robert S. Summers, Uniform Commercial Code 138-39 (4th ed. 1995) (discussing procedural unconscionability and citing Jefferson Credit Corp. v. Marcano, 302 N.Y.S.2d 390 (Civ. Ct. 1969), and Seibel v. Layne & Bowler, Inc., 641 P.2d 668 (Or. Ct. App. 1982), review denied, 648 P.2d 852 (Or. 1982), for proposition that unfair surprise may render contract unenforceable).

159 See Burke, supra note 8, at 295 (arguing that unconscionability is primary test used by courts when they do not want to enforce particular term in standard-form contract); see

context is not so stark the judicial approach is less predictable.[160] Should courts overturn terms heavily favorable to a business (but not unreasonable) simply because the business has not pointed out and explained the terms? Courts generally have been unwilling to go this far, at least under the rubric of unconscionability, based on the principle that consumers have a duty to read terms that do not rise to the level of unreasonableness.[161] Put another way, the unconscionability doctrine maintains Llewellyn's legal presumption that consumers impliedly assent to reasonable boilerplate terms.

2. Restatement (Second) *Section 211(3)*

Also reflecting Llewellyn, section 211(1) of the *Restatement (Second) of Contracts* initially embarks down the traditional duty-to-read path.[162] However, the reader encounters a fork in the road in section 211(3): "Where the [business] has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[163] The section, applied thus far most frequently to insurance contracts,[164] authorizes courts to excise terms that are not procedurally unconscionable, although still requiring that courts find more than simply consumer surprise.[165] A comment to section 211 illustrates the kind of terms a business should reasonably understand a consumer would resist, namely those terms that defeat the purpose of the deal, that are "bizarre or oppressive," and that conflict with bargained-for terms.[166]

Courts have expanded upon the rule set forth in *Restatement* section 211(3) and changed its focus from the expectations of the drafter to those of the consumer. In Arizona, which by 1997 had contributed

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also *Walker-Thomas Furniture Co.*, 350 F.2d at 449-50 (holding that where, for example, important terms are "hidden in a maze of fine print," the "usual rule that the terms of the agreement are not to be questioned should be abandoned").

160 See Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L.J. 459, 472-74 (1995) (describing varying approaches undertaken by courts in assessing procedural and substantive elements of unconscionability).

161 See Burke, supra note 8, at 286-87 (explaining that courts generally enforce standard-form contract terms under theory of constructive consent).

162 See Restatement (Second) of Contracts § 211(1) (1979) ("[W]here a party to an agreement signs or otherwise manifests assent to a writing . . ., he adopts the writing as an integrated agreement with respect to the terms included in the writing."); see also Rakoff, supra note 15, at 1190 (discussing adherent's duty to read).

163 See Restatement (Second) of Contracts § 211(3) (1979).

164 See Curtis J. Berger & Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 Colum. L. Rev. 289, 330 (1999).

165 See Restatement (Second) of Contracts § 211(3) (1979) (stating middle ground between unconscionability and surprise where courts still can excise terms).

166 Restatement (Second) of Contracts § 211 cmt.f (1979), discussed in Rakoff, supra note 15, at 1190-95.

about half of the cases construing section 211(3), courts have ignored the section's endorsement of testing assent through the lens of the reasonable business, and instead measure expectations from the consumer's perspective.[167] In addition, Arizona courts have liberally interpreted the requirement that a consumer escape a term only when she would have refused to enter the contract had she been aware of the term.[168] Instead, courts focus on the consumer's state of mind and whether she reasonably expected the term.[169] In short, courts have refocused section 211(3) from the business's expectations to those of the consumer. In doing so, courts have transformed section 211(3) into an inquiry not unlike the doctrine of reasonable expectations, discussed below.

3. *The Doctrine of Reasonable Expectations*

The reasonable-expectations doctrine, also prominent in insurance form-contract cases, holds that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[170] As worded, the doctrine allows courts to overturn express contract language if the term contradicts the consumer's reasonable expectations.[171]

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167 See James J. White, Form Contracts Under Revised Article 2, 75 Wash. U. L.Q. 315, 346-47 (1997); see also Berger & Berger, supra note 164, at 329 ("This section enables courts, in construing a standardized agreement, to consider the 'reasonable expectations' of the weaker or adhering party. Where the contract provision lies outside that person's reasonable expectations, the court may excise the offending term and replace it with fairer language.").

168 White, supra note 167, at 346-47.

169 Id. To bolster their decisions, courts often discuss factors such as the consumer's lack of education and inexperience and the business's failure to point out and explain the term. See Berger & Berger, supra note 164, at 330-31 (citing Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992) (striking mandatory arbitration clause in contract between abortion provider and twenty-one-year-old plaintiff after malpractice claim).

170 C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975) (quoting Rodman v. State Farm Mut. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973)). Judge Keeton originally uttered the definition. See Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970); see also Gyler v. Mission Ins. Co., 514 P.2d 1219, 1221 (Cal. 1973); Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 400, 401 (Del. Super. Ct. 1987); Home Indem. Ins. v. Merchs. Distribs., Inc., 483 N.E.2d 1099, 1101 (Mass. 1985); Meier v. N.J. Life Ins. Co., 503 A.2d 862, 869-70 (N.J. 1986); Atl. Cement Co., Inc. v. Fid. & Cas. Co. of N.Y., 459 N.Y.S.2d 425, 429 (App. Div. 1983), aff'd, 471 N.E.2d 142 (N.Y. 1984); Collister v. Nationwide Life Co., 388 A.2d 1346, 1351-54 (Pa. 1978).

171 See Thomas, supra note 119, at 297-99 (reviewing various applications of reasonable-expectations doctrine). For example, an insured who purchased burglary insurance would be covered if the insured's premises were burglarized even though there was no evidence of forced entry and the policy defined burglary to require visible evidence of forced entry on the exterior of the insured's building. See id. at 301-03 (citing *C & J Fertilizer, Inc.*, 227

When applied, the doctrine of reasonable expectations thus creates an affirmative duty on the part of the business to point out and explain reasonably unexpected terms even if they clearly were stated in the contract. The doctrine reflects the reality that consumers fail to read their contracts and agree to be bound only to reasonable boilerplate.[172] The reasonable-expectations doctrine therefore is consistent with Llewellyn's call for enforcement of reasonable boilerplate, provided that courts do not broaden the category of "reasonably unexpected" (and therefore unenforceable) terms to include those that are merely one-sided, but not "unreasonable or indecent."[173]

N.W.2d at 171-81). The court in the leading case so holding concluded that an insured reasonably would expect the policy to cover the loss because the definition of burglary in the policy was inconsistent with a lay person's understanding of the term. See id. at 302-03, 325-27 (citing *C & J Fertilizer, Inc.*, 227 N.W.2d at 177). The majority and dissent disagreed over whether the burglary definition was in fine print. See *C & J Fertilizer, Inc.*, 227 N.W.2d at 182-83 (LeGrand, J., dissenting). In addition, the definition negated the insured's purpose for purchasing the insurance. See Thomas, supra note 119, at 326 (citing *C & J Fertilizer, Inc.*, 227 N.W.2d at 177-81).

172 Stephen J. Ware, A Critique of the Reasonable Expectations Doctrine, 56 U. Chi. L. Rev. 1461, 1464 (1989).

173 Llewellyn, supra note 26, at 370. A weaker version of the doctrine simply allows courts to interpret ambiguous terms consistent with the insured's reasonable expectations. See Berger & Berger, supra note 164, at 329-30.

Seeking to increase the flow of information to consumers and to police against deceptive practices of businesses, state legislatures have drafted consumer protection legislation that ensures consumers certain procedural rights. See Michael M. Greenfield, Consumer Law: A Guide for Those Who Represent Sellers, Lenders, and Consumers § 4.1, at 160-61, § 5.1, at 228, § 9.3.2, at 559-60 (1995). See generally Ga. Code Ann. § 10-1-393 (1990) (broadly prohibiting "unfair or deceptive acts" in addition to listing specific prohibitions); Ill. Comp. Stat. Ann. ch. 815, § 510/2 (Smith-Hurd 1993) (listing specific prohibitions); Iowa Code Ann. § 714.16 (2) (West 1993) (broadly prohibiting deception or fraud in addition to listing specific prohibitions); Mass. Gen. Laws Ann. ch. 93A, § 2(a) (West 1997) (broadly prohibiting unfair or deceptive acts); Ohio Rev. Code Ann. § 1345.02 (Baldwin 1994) (broadly prohibiting unfair or deceptive acts and listing specific prohibitions), Ohio Rev. Code Ann. § 4165.02 (West 2001) (listing various deceptive trade practices); Or. Rev. Stat. § 646.608(u) (1999) (general prohibition against deceptive conduct). For example, state laws sometimes require conspicuous disclosure of terms, often in plain English. E.g., N.Y. Gen. Oblig. L. § 5-702 (McKinney 2001); Farnsworth, supra note 32, § 4.26; Debra R. Cohen, Competent Legal Writing—A Lawyer's Professional Responsibility, 67 U. Cin. L. Rev., 491, 502-03 (1998) (crediting New York's § 5-702 as first such law); James B. Hughes, Jr., Taking Personal Responsibility: A Different View of Mortgage Anti-Deficiency and Redemption Statutes, 39 Ariz. L. Rev. 117, 118 (1997). Other laws requiring plain English include Conn. Gen. Stat. Ann. § 42-152 (West 2000); Minn. Stat. Ann. § 325G.29-325G.36 (West 1995); Mont. Code Ann. §§ 30-14-1101 to -1113 (2001); Or. Rev. Stat. §§ 180.540, 180.545 (1999). Some state laws also require separate signing of particular terms. E.g., N.Y. U.C.C. § 2-209(2) (McKinney 1993); see also Farnsworth, supra note 32, § 4.26. State consumer-protection legislation also creates substantive rights to ensure fairness of terms and to deal with bargaining power discrepancies. Hughes, supra, at 118-20. For example, "lemon law" statutes allow consumers to rescind contracts because of defective products. See id. at 118. Other statutes authorize more general policing of terms by courts for substantive unfairness. See id. at 118-19.

4. Conclusion

The current bundle of judicial approaches to policing paper-form contracts reflects Llewellyn's vision and provides a workable solution to the issues raised by paper standard forms. The law presumes the general enforceability of standard terms, while negating terms that are procured unfairly, are unreasonable or indecent, or are reasonably unexpected.

The contemporary legal doctrine is not without critics. Some theorists argue that the courts understate the importance of market forces in policing businesses.[174] They also worry that any judicial meddling with contract terms inevitably will provide terms worse than the boilerplate.[175] Conversely, others contend that the current rules place too much faith in the market.[176] They argue that the absence of consumer discipline on standard terms leaves consumers vulnerable to exploitation and that, therefore, the courts should adopt a presumption of nonenforceability of these terms.[177] Both of these critical positions are too extreme: The first places too much faith in the power of the market to discipline businesses, and the second undermines the real benefits of the standard-form contract.

Despite criticism, Llewellyn's notion of "blanket assent" dominates contemporary judicial treatment of standard-form provisions. "Blanket assent" is best understood to mean that, although consumers do not read standard terms, so long as their formal presentation and substance are reasonable, consumers comprehend the existence of the terms and agree to be bound to them.[178] The purchaser of manufactured goods assumes the manufacturer has used appropriate parts and therefore impliedly agrees to their use even though painfully ignorant of the particulars.[179] The law enforces the sale of goods with such

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174 See Rakoff, supra note 15, at 1198-1206 (reviewing and critiquing Llewellyn's suggestion that judges should defer to businesspersons' expert understanding of market conditions in standard-form contract cases).

175 Id.

176 See, e.g., id. at 1197-1229 (critiquing Llewellyn and reviewing Leff's, Slawson's, and Kessler's, as well as own, theories); Slawson, supra note 8, at 529 (observing prevalence of unfair form contracts).

177 See Rakoff, supra note 15, at 1176. Rakoff apparently would enforce standard terms only when the form provider can establish that they are "important to the preservation of the ability of firms to initiate new enterprises and practices, and that such enforcement thereby contributes concretely to the functioning of business as a social force independent of governmental control." Id. at 1242.

178 Rakoff, supra note 15, at 1199-1200.

179 See Thomas, supra note 119, at 308 n.63 (

> [N]umerous studies [indicate] that consumers drastically limit their search for information about durable products like furniture and cars, and services such as those of general practitioners . . . . [M]ost consumers for domestic appli-

parts, provided they are fit for their ordinary purpose, because the purchaser implicitly has agreed to delegate to the manufacturer the choice of parts. Similarly, the law appropriately holds that, by voluntarily agreeing to enter into the standard-form contract with full knowledge of the existence of standard terms, the consumer delegates to the business the duty of drafting reasonable standard terms that comprise the details of the parties' deal.[180]

Granted, the consumer would not necessarily have picked the particular terms that the business has selected.[181] The concept of "blanket assent" comprehends the constraints of economic pressure and the consumer's lack of bargaining power.[182] "Blanket assent" means only that, given the realities of mass-market contracting, the consumer chooses to enter a transaction that includes a package of reasonable, albeit mostly unfavorable to her, boilerplate terms. This conception of assent leaves to the courts the difficult task of drawing a line between permissible and impermissible pressure and terms. Current law correctly draws this line based on the factors prominent in the legal doctrines discussed earlier, including the manner of presentation of terms, the consumer's purpose for making the deal, and the needs and general practices of similarly situated businesses.

> ances visit a single store, fail to consult advertising, use restricted price information, consider only one make, and employ perceptions of the manufacturer's reputation and packaging rather than make evaluations of the product/service attributes to arrive at judgments of quality.

(quoting Gordon R. Foxall & Ronald E. Goldsmith, Consumer Psychology for Marketing 31 (1994))).

Few would suggest that contracts for durable goods should be presumptively invalid on the basis of these truths. Reasonable standard terms should not be treated any differently. But see Eisenberg, supra note 22, at 309 ("The same consumer who is willing to read simple narrative text that discloses a product attribute (such as a list of ingredients) is often unwilling to read the dense text that comprises a form contract.").

180 See Hanoch Sheinman, Contractual Liability and Voluntary Undertakings, 20 Oxford J. Legal Stud. 205, 209 (2000) ("[T]he phenomenon of standard contracts is sometimes interpreted as a counterexample to [the] view [that there exists an important connection between voluntary obligation and contractual obligation]. But . . . standard contracts are genuine contracts, provided that they are entered into freely and partly in order to incur an obligation."). But see Leff, supra note 23, at 488 (reviewing standard contract-law defenses and critiquing U.C.C. section 2-302's treatment of unconscionability); Lewis A. Kornhauser, Note, Unconscionability in Standard Forms, 64 Cal. L. Rev. 1151, 1177-79 (1976) (arguing that many exchanges governed by standard-form contracts are untainted by procedural defects, but aggressive nonetheless, and may be more amenable to legislative than judicial correction).

181 See Schwartz, supra note 18, at 1064-65 (observing that mass-market sales contracts do not reflect preferences of each buyer).

182 See Trebilcock, supra note 63, at 242-43 (indicating that economic forces may impinge on autonomy of consumers and third parties); John Dalzell, Duress by Economic Pressure I, 20 N.C. L. Rev. 237, 244-45 (1942) (discussing inequality of parties and lack of power of consumers to protest unfavorable terms in economic-duress cases).

Llewellyn's approach to paper-form contracting resonates closely with the rational, social, and cognitive explanations for why users refrain from reading standard-form provisions. It recognizes the reality of contracting in that users rationally fail to read boilerplate, are induced not to read boilerplate, and underestimate the importance of the terms contained in boilerplate. Consequently, consumers generally sign their standard forms while relying heavily on businesses to stand behind their products. When the courts find reason to believe that market forces have failed to discipline businesses, they intervene to protect consumers.

II
ELECTRONIC STANDARD-FORM CONTRACTING

The widespread availability of information technologies in general, and the Internet in particular, has changed consumer activity significantly. Every month witnesses the emergence of new approaches and technologies created to facilitate commerce, such as new interface designs, coding standards, and "information appliances."[183] (Will we someday enter into contracts with our refrigerators?[184] One can only speculate at this point.) The dust of these changes has not yet settled, as new companies rise and fall in a struggle to claim and defend the high ground in the new economy.[185]

Despite this torrent of innovation, e-commerce relies on methods developed in the real world.[186] E-commerce, like conventional commerce, depends upon brand recognition and loyalty, clever marketing strategies, and consumer contracts that carefully allocate the risks and

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183 Every year Las Vegas hosts the Consumer Electronics Show (Comdex), which gives companies an opportunity to show off their latest and greatest gizmos. International Consumer Electronics Show webpage, at http://www.cesweb.org (last visited Mar. 21, 2002). The most recent convention showcased e-commerce devices (such as cell phones that can act as credit cards and be scanned at the register, or can allow you to order online). See Jon Fortt, Cell Phones Taking PCs, E-Commerce, to the Next Level, Chi. Trib., Jan. 29, 2001, at 4.

184 Refrigerators with bar code scanners have been shown in movies. See, e.g., The 6th Day, Columbia Pictures (2000) (starring Arnold Schwarzenegger); see also Laura McNeill Hutcheson, The Exclusion of Embedded Software and Merely Incidental Information from the Scope of Article 2B: Proposals for New Language Based on Policy and Interpretation, 13 Berkeley Tech. L.J. 977, 982-84 (1998) (discussing challenge that practice of embedding software in conventional products presents for legal system).

185 See Winn, supra note 4, at 6 (discussing first-move advantages for Internet companies).

186 This is evidenced by the growing success of traditional bricks-and-mortar companies relative to their virtual peers. See E. Scott Reckard, WhyRunOut Outlasts Larger Rivals, Internet: Affiliation with Stater Bros. Chain May Represent Industry's Latest Business Model, L.A. Times, July 14, 2001, at C1 (noting that grocery delivery service aligned with established food chain was more successful than Webvan's Internet-only grocery).

liabilities in agreements between those who provide goods and services and those who consume them.[187] Notably, electronic contracts, like transactions in the paper world, are dominated by standard forms.[188] We contend that despite new innovations, the logic of Llewellyn's "blanket assent" and the legal doctrine that it generates provides a sensible foundation for assessing the standard-form contracting business practices of the new economy.

A. The Electronic Contracting Environment

Consumers enter into electronic contracts in two distinct ways: "browsewrap" and "clickwrap" contracts. In browsewrap contracts, Internet users, if they bother to look, will find a "terms or conditions" hyperlink somewhere on web pages that offer to sell goods and services.[189] These contracts generally provide that using the site to purchase the goods or services offered (or just visiting the site) constitutes acceptance of the conditions contained therein. Clickwrap contracts require consumers to click through one or more steps that constitute the formation of an agreement. Software consumers encounter clickwrap contracts, for example, when installing new software on their personal computers.[190] Installation processes typically include a step wherein the user must agree to the business's terms in order to complete installation. By clicking in all of the appropriate places, the user has formed the contract. Consumer assent is obviously more problematic when consumers enter browsewrap contracts.[191]

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187 See Debora Vrana, California Dealin': Financing the State's Emerging Companies Buy.com, Palm Inc. IPOs to Highlight 1st Quarter, L.A. Times, Jan. 3, 2000, at C1 (noting that downsizing of Value America Internet retail store "highlights the competitive disadvantages of [online] companies . . . and the importance of brand recognition").

188 See Gomulkiewicz, supra note 11, at 897-99 (noting prevalence of standard-form contracting).

189 See Winn, supra note 4, at 16 n.50 (discussing "Web interface that places the terms and conditions of the agreement behind a jumplink labeled 'terms and conditions' or 'legal' tucked unobtrusively at the bottom of the page where it is unlikely to be noticed by any but the most cautious or dilatory user").

190 Note that software also can be delivered over the Internet and then installed. In such cases, users might agree to terms and conditions twice: once when downloading the software, and once when installing it. See David Mirchin, Legal Developments in Electronic Contracting, in 2 Fourth Annual Internet Law Institute 45-47 (PLI Intellectual Prop. Course Handbook Series No. G-611, 2000) (presenting example of two step clickwrap process from http://www.silverplatter.com).

191 A search conducted using Google on March 21, 2002, for the phrase "terms and conditions" produced 3,870,000 hits. Google basic search, at http://www.google.com (search run Mar. 21, 2002). Arguably, our report of this result violates Google's own "Terms of Service" which prohibits the "commercial use" of Google's search results. Google Terms of Service, at http://www.google.com/terms_of_service.html (last visited Mar. 21, 2002). We cannot easily determine whether the academic use of search results fits

1. The Electronic Business Climate Generally

To assess the appropriate legal resolution of electronic standard-form contracts, we must understand the business climate that produces these contracts.[192] Although the e-commerce environment is evolving rapidly, some dominant characteristics have emerged. E-commerce's most salient feature is its rapid expansion. Already more than one-third of households with Internet access conduct commercial transactions over the Internet,[193] and, by the year 2003, two-thirds of American households will be connected to the Internet.[194] Despite recent setbacks in the stock market and some weeding out of new companies, e-commerce continues to thrive.[195]

The opportunities for growth that e-commerce presents have spawned thousands of new companies selling everything from software to golf clubs through the Internet.[196] Competition in the new economy is fierce, as companies worry that the early entrants into the world of e-commerce will establish the standards and customs of the business, thereby freezing out competition.[197] Consequently, new companies have worked to gain market share, often with a complete indifference to revenue and profits.[198] Although the recent shakeout in the new economy has revealed that investors will tolerate this indifference only for so long, e-commerce companies still struggle primarily to gain market share.[199]

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within their understanding of "commercial use" and interpret this ambiguity against the drafter.

192 See A. Michael Froomkin, Article 2B as Legal Software for Electronic Contracting—Operating System or Trojan Horse? 13 Berkeley Tech. L.J. 1023, 1026 (1998) (contending that "information technologies . . . are themselves in a state of ferment," making it difficult to generate useful policies governing e-commerce).

193 eCommerce Bustles, supra note 9.

194 Bob Thompson, The Selling of the Clickerati, Wash. Post Mag., Oct. 24, 1999, at W11.

195 See Deflated Dreams Series: After the Bubble Burst, St. Petersburg Times, Feb. 11, 2001, at 1H [hereinafter Deflated Dreams Series] (noting that "the Internet is still evolving as a crucial force in our lives and in the economy"), 2001 WL 6961522; Matt Richtel, Layoffs Don't Faze Dot-Com Workers; More Jobs Still Available in Online Companies, Plain Dealer (Cleveland), July 2, 2000, at 1E (noting that dot-com layoffs are "a company phenomenon, not an industrywide or economywide phenomenon"), 2001 WL 5154648.

196 See Zhan G. Li & Nurit Gery, E-Tailing For All Products? 43 Bus. Horizons 49 (2000) (examining which products are better-suited for e-tailing), available at 2000 WL 8786302.

197 See Deflated Dreams Series, supra note 195, at 1H ("If you were a dot-com, what mattered most was being the 'first mover in your space' to grab market share.").

198 See Richtel, supra note 195 ("[T]he challenge these days for a number of e-commerce companies is simply to keep from going broke.").

199 See id. (citing statement by Douglas Henton: "Call it old-fashioned, but at some point, these companies had to start making money"); see also Jennifer Beauprez, Amazon.com CEO Confident E-tailing Will Be Validated, Denver Post, Nov. 8, 2000, at D1

Despite its rapid growth, significant hurdles still confront e-commerce. The companies of the new economy lack experience with the new medium and sometimes lack business experience.[200] To address these problems, e-businesses invest heavily in novel marketing techniques made available by the Internet.[201] Internet design companies consult traditional marketing gurus, but also cognitive psychologists and anthropologists in an effort to maximize the number of site visitors and to induce these visitors to engage in the desired responses.[202]

E-consumers need to be cautious about conducting business on the Internet. Because Internet sites are much easier and cheaper to create than conventional bricks-and-mortar stores, the Internet makes it easy for a shady, fly-by-night operation to set up shop and begin selling shoddy merchandise to unwitting consumers.[203] Compounding the problem, many e-commerce companies are new, and therefore lack well-developed reputations.[204]

Technological impediments to e-commerce also persist. Many would-be e-consumers lack bandwidth and reliable connections necessary to conduct business on the Internet,[205] or have access to it only at work, where they may feel restricted in their use. Concerns about pri-

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(discussing Amazon.com's plans to expand to international markets despite economic downturn and major devaluation of its stock).

200 See, e.g., Jim Rose, It's the Management, Stupid, Mgmt. Today, June 2000, at 45 (noting that Internet opens doors to inexperienced people "lacking the professional management skills to create businesses that will last").

201 See Patricia Wallace, The Psychology of the Internet 114 (1999) ("Web designers [are] eager to please their audiences and attract more traffic by introducing fancy graphics and multimedia elements into their sites . . . .").

202 See, e.g., Intel Architecture Labs, Research: Real People, Real Lives (last visited Feb. 28, 2002) (advertising use of psychologists, anthropologists, and social scientists to gain insights "into the relationship between human behavior and technology"), at http://www.intel.com/ial/about/research.htm#studies.

203 The FBI Internet Fraud Complaint Center has received reports of credit fraud, bank fraud, nondelivery of goods, and investment fraud. See Complaint Help for Consumers, York Daily Rec., July 3, 2001 (citing FBI Director as crediting Internet Fraud Complaint Center "as an electronic clearinghouse that helped alert state and federal law enforcement officials to various fraudulent schemes"), 2001 WL 5447910; see also John Rothchild, Protecting the Digital Consumer: The Limits of Cyberspace Utopianism, 74 Ind. L.J. 893, 929 (1999) (discussing ability of Internet to facilitate fraudulent practices).

204 See Sirkka L. Jarvenpaa & Emerson H. Tiller, Customer Trust in Virtual Environments: A Managerial Perspective, 81 B.U. L. Rev. 665, 666 (2001) ("[T]he Internet's open technology architecture lowers the market costs of new entrants, possibly increasing the number of fly-by-night operations who will default on their merchant-customer agreements.").

205 Cf. Scott Thurm & Glenn R. Simpson, Tech Industry Seeks Salvation in High-Speed Internet Connections, Wall St. J., June 25, 2001, at B1 (discussing attempts to increase Internet access, especially in rural or economically depressed areas).

vacy and security on the Internet deter some consumers.[206] Efforts to protect users' privacy and security can backfire, as Internet users suffer from "password overload" (failing to remember all of their passwords for various sites).[207] These concerns, as well as the possibility that many people treat the Internet primarily as amusement, information-gathering for real-world transactions, or window shopping, explain why searches over the Internet occur far more often than completed transactions. Some companies report that about three-quarters of their electronic customers withdraw from purchasing before the transaction is completed.[208]

As these problems reveal, consumers in the new economy differ somewhat from those in the old economy. Because e-consumers must have the understanding and means to own and operate new technologies, they tend to be younger, wealthier, and better educated than conventional consumers.[209] Companies engaged in e-commerce therefore direct much of their marketing efforts at these groups.[210]

2. *Electronic Boilerplate*

Although e-commerce incorporates a host of innovations, standard-form contracts still dominate.[211] Whether they are entering into contracts for goods or services over the Internet or installing software,

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206 See Alan T. Saracevic, The All-Important Last Mile to Your Front Door; Delivery Companies Strive To Improve Fulfillment Services, S.F. Examiner, Mar. 7, 2000, at D8 (mentioning concerns about Internet privacy), 2000 WL 6160307; Winn, supra note 4, at 8 (noting difficulties of security-system designs on Internet). A recent survey found that in 1999 eighteen percent of people did not trade stocks electronically because of security concerns, although that number fell to nine percent in 2000. eCommerce Bustles, supra note 9 (citing Technographics Benchmark Data Overview).

207 See Julie Hinds, Password Proliferation Gives Computer Users Headache, Augusta Chron., Jan. 8, 2000, B082000 WL 5215157.

208 Saracevic, supra note 206.

209 See Amanda Lenhart, Pew Internet & American Life Project, Who's Not Online: 57% of Those Without Internet Access Say They Do Not Plan To Log On 5 (Sept. 21, 2000) ("[A]ging Baby Boomers and senior citizens are the most resistant to the Internet; and the young are the most likely to go online eventually."), http://www.pewinternet.org/reports/toc.asp?Report=21. But see Naveen Donthu & Adriana Garcia, The Internet Shopper, 39 J. Adver. Res. 52, 56 (1999) (reporting data indicating that online consumers tend to be older than other consumers).

210 The *Washington Post* reports that about forty million teens and children will have access to the Internet by 2003; this constitutes seventy-two percent of teens and greater than fifty percent of children twelve and under. See Thompson, supra note 194. Although children typically do not have access to credit cards, they can persuade their parents to set up accounts with Internet companies. See id.

211 Gomulkiewicz, supra note 11, at 897-99.

e-consumers face a host of standard terms presented in electronic form.[212] Electronic boilerplate has flourished along with e-commerce.

As with their paper-world counterparts, e-consumers face an unavoidable set of realities when confronted with standard-form language. E-businesses present standard terms in a distinct take-it-or-leave-it fashion.[213] The terms are also long, detailed, full of legal jargon, about remote risks, and one-sided.[214] They include the usual litany of terms that are sometimes unenforceable in the paper world, such as arbitration provisions and limitations on remedies.[215] Furthermore, e-consumers cannot negotiate because web pages and installation software do not allow for interaction with a live agent. E-consumers often cannot find answers to their questions about the terms.[216] As with her paper-world counterpart, the e-consumer knows (or quickly recognizes) that reading through the boilerplate is unlikely to be of any benefit. Instead, she likely casually believes there is little risk to agreeing to standard terms.

These generalizations about e-commerce and electronic contracting describe the new ways in which consumers confront standard terms. The harried traveler who faces a complex form after waiting in

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212 See Winn, supra note 4, at 16 (noting that consumers face "the same dense, impenetrable boilerplate" in electronic and paper contracts).

213 Llewellyn Joseph Gibbons, No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace, 6 Cornell J.L. & Pub. Pol'y 475, 528 (1997) (emphasizing how take-it-or-leave-it terms minimize companies' legal obligations and shift their potential liability); Neil Weinstock Netanel, Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory, 88 Calif. L. Rev. 395, 477 (2000) (noting Internet issues usually addressed in take-it-or-leave-it contracts); Katy Hull, Note, The Overlooked Concern with the Uniform Computer Information Transactions Act, 51 Hastings L.J. 1391, 1395 (2000) (explaining that shrinkwrap and clickwrap licenses typically fall under Farnsworth's take-it-or-leave-it proposition).

214 Among many examples, GoHip!, an Internet web site, offers free software under Terms and Conditions that allowed GoHip! to modify a user's web browser homepage, e-mail signature file, and start-up files in Windows (all for the purposes of promoting GoHip! products). GoHip!, http://www.gohip.com/terms.html (last visited Mar. 21, 2002); see also Dave Peyton, Proceed Cautiously When Downloading from GoHip, Chi. Trib., Oct. 23, 2000, at 7, 2000 WL 3724398. Until recently, the Terms and Conditions Section included with all MSN Hotmail accounts gave Microsoft proprietary rights over any information sent using a Hotmail account. See The E-mail Ate My Copyright, Sunday Business Post, Apr. 29, 2001, 2001 WL 8742766. Amazon.com's "Conditions of Use" assigns the risk of events such as loss of a product during shipment. Amazon.com, Conditions of Use, at www.amazon.com/exec/obidos/tg/browse/-/508088/102-7991463-0176109 (last visited Mar. 21, 2002). The user also agrees to submit all disputes with Amazon.com to a confidential arbitration proceeding to be held in Seattle, Washington. Id.

215 See Winn, supra note 4, at 15 (discussing case law on electronic contracts' arbitration provisions).

216 Although e-mail communication could alleviate this problem, e-mail is slower than face-to-face interaction. Furthermore, one-third of the top one hundred online businesses have no customer service personnel or do not respond to e-mail questions. See Jonathan Gaw, Online Shopping Still Hit or Miss with Customers, L.A. Times, Dec. 17, 1999, at C1.

a long line at the car rental counter has been replaced by the impatient college student buying virus-protection software delivered via the Internet. She sits comfortably in her dorm room as she searches the Internet for a product. After settling on a product, she might casually browse through some online reviews of the software she wants to purchase, posted by anonymous reviewers to an electronic bulletin board. Once deciding to purchase, she opens an online account with the vendor, using her credit card, and downloads the desired software. She quickly clicks "I agree" to terms and conditions on the website or while installing the software, without scrolling down through several pages to read the boilerplate completely. At the same time, she is listening to a compact disk from her cd-rom drive and playing "Minesweeper" (or she is perhaps sitting in a contracts class at a well-wired law school).[217]

3. *Reputation in the E-Business Climate*

E-commerce brings several new realities to standard-form contracting, many of which make e-businesses more concerned with their reputations than conventional businesses. First, the intense drive to capture market share in the electronic world makes e-businesses highly sensitive to their reputations.[218] Many e-businesses also tend to be relatively new companies that recognize that they must establish a respectable brand name.[219]

Second, the ease with which shoddy companies can operate[220] makes it imperative that serious e-businesses distinguish themselves with good service and fair treatment. In the real world, consumers often rely on the presence of expensive fixed assets as an assurance that a company will remain in business and remain interested in maintaining a favorable reputation. Consequently, companies often invest in visible specialized assets that cannot easily be transferred to other

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217 See Ian Ayres, Lectures vs. Laptops, N.Y. Times, Mar. 20, 2001, at A25.

218 See Jarvenpaa & Tiller, supra note 204, at 667 (noting that consumer trust provides companies with source of differentiation from competitors); Virgil Scudder, The Opportunities and Dangers of the Internet, New Straits Times, July 21, 2001, at 22, 2001 WL 22334891.

219 Scudder, supra note 218; Ben Hurst, Business: Reputation Key to Success, Birmingham Evening Mail, Dec. 28, 2000, at 25, LEXIS, News Library, Newspaper Stories, Combined Papers File; cf. also New Liabilities—Don't Get Caught in the Web, Post Mag., July 12, 2001, at 14, 2001 WL 8999171 (noting that "brand continue[s] to be identified in surveys as [a] fundamental concern[ ] underpinning 21st century business").

220 See Fed. Trade Comm'n, supra note 80, at 3 (noting how easy and cheap it is for "fraudster" to enter and exit Internet marketplace).

companies as a way of reassuring their potential customers.[221] E-businesses, much like businesses that cannot rely on specialized assets, cannot easily convey a similar message.

Finally, e-businesses understand that word of exploitative behavior will spread quickly in the new electronic media.[222] E-businesses realize that with a few mouse clicks, disgruntled e-consumers can broadcast their dissatisfaction to thousands of potential customers.[223] Just as the Internet allows e-consumers to research goods and services cheaply and easily, it also provides them with the ability to investigate businesses themselves.[224] Numerous electronic bulletin boards allow disgruntled consumers to broadcast their complaints about shoddy service or unreasonable treatment worldwide.[225] E-consumers can search for these complaints quickly and easily. Just as the Internet makes it easier to set up fraudulent businesses, it also makes it easier for consumers to ferret them out.

The intense focus on reputation created by the e-business environment diminishes the likelihood that e-businesses will offer inefficient terms in their standard forms.[226] Because of the plethora of new companies and cheap information, e-businesses must be careful about the content of their boilerplate, or at least might refrain from enforcing some of it.[227]

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221 Benjamin Klein, Robert G. Crawford & Armen A. Alchain, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & Econ. 297, 298-99 (1978).

222 See Gomulkiewicz, supra note 11, at 899 (noting that watchdog groups have arisen to monitor standard-form terms e-businesses use). Undoubtedly, however, the e-consumer will have difficulties enforcing claims against fly-by-night operations that may be difficult to find and who may be judgment proof.

223 See Scudder, supra note 218 (asserting that "anybody with a cheap computer and US $19.95 . . . can destroy your company").

224 See Tamara Chuang, Buyer Beware, Orange County (Cal.) Reg., Nov. 21, 2000 (listing number of websites where consumers can access reputational information regarding e-retailers), 2000 WL 29969833.

225 In some cases, e-consumers have instant access to a whole categorized or searchable history of comments by other e-consumers. See, e.g., PlanetFeedback, Ratings (last visited Jan. 20, 2002), at http://planetfeedback.com/ratings/Industry/ (example of service).

226 See Jarvenpaa & Tiller, supra note 204, at 667 (describing relevance of consumer trust to online merchants). A major assault on a business's reputation can cause its downfall. For example, when hackers stole Social Security numbers and patient files from the system of a medical company, the company failed. See Carolyn Shapiro, Cyber Shoppers Should Ask Where, How Vendors Store Credit Card Data, Newport News Daily Press, June 4, 2001, 2001 WL 22767780.

227 See Andrew Brandt & William Wallace, What Have You Signed away Today?, PC World, Aug. 2001, at 54, 54 (reporting that several companies have "felt the sting of a backlash against particularly unreasonable terms," including Microsoft, which retracted some terms of service for its Passport product).

Of course, some of these aspects of the Internet also affect the paper world. Consumers just as easily can use the Internet to investigate the reputations of brick-and-mortar companies as to check upon e-businesses. The easy availability of such information might reinvigorate concern with reputation among many companies, old and new, electronic and conventional, thereby lessening the need for judicial scrutiny of standard-form terms across the board. Inasmuch as e-businesses' biggest customers are also most likely to use the Internet to investigate the goods and services, however, the availability of Internet research will have a greater effect on e-businesses than on conventional businesses.

4. Market Segregation in the E-Business Climate

Businesses that use the Internet can collect a tremendous amount of data on their potential customers.[228] E-businesses can use data on consumer behavior collected from their prior transactions and offer different terms to those consumers who are most likely to read the boilerplate (or who have already read it during a prior site visit).[229] Internet businesses already tailor advertising to individual consumers,[230] and at least one major Internet company

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228 See Jonathan Weinberg, Hardware-Based ID, Rights Management, and Trusted Systems, 52 Stan. L. Rev. 1251, 1268-69 (2000); Alex Frangos, How It Works, Wall St. J., Apr. 23, 2001, at R12 (noting that one company, DoubleClick, maintains database of at least 100 million individual user profiles); Suein L. Hwang, Ad Nauseum, Wall St. J., Apr. 23, 2001, at R8 (describing use of technology to identify efficacy of electronic advertisements); Keeping the Customer Satisficed: Managing Customers: All Customers Are Important, but Some Are More Important Than Others, Economist, July 14, 2001, at 9.

229 Cf. Jeff Smith, Web Bugs Are Getting Nosier and Nosier, Denver Rocky Mtn. News, Feb. 15, 2001, at 1B (explaining that web bugs are deployed by companies to track consumer activity), 2001 WL 7363769; Leslie Walker, Bugs That Go Through Computer Screens, Wash. Post, Mar. 15, 2001, at E1. (explaining web bugs' ability to transmit information from individual's computer back to web site or third party). Businesses can identify what sites an Internet consumer has visited in the past. See, e.g., Barnes & Noble.com, Privacy Policy, at http://www.barnesandnoble.com/help/nc_privacy_policy.asp (last visited Jan. 18, 2002) (describing how company tracks consumers); see also Frangos, supra 228 (noting that "advertising technology is so sophisticated that it can track almost every move made on the Internet").

230 See Diamond Technology Partners' Glickman Contends Internet Revolution Needs Fundamental Design and Learning Concepts, PR Newswire, June 20, 2000 (noting range of experts used by e-businesses to help enhance usability among different consumers); Stephanie Miles, People Like Us, Wall St. J., Apr. 23, 2001, at R30 (discussing ability to tailor advertisements based on tracking of individuals' Internet usage); Stockreporter Announces Investment Opinion on HMG Worldwide, Bus. Wire, Mar. 13, 2000 (discussing new "Smart Displays" that enable customized marketing and advertising initiatives at point of purchase).

has been accused of offering different prices to different consumers.[231]

Price discrimination based on identifying customers who value goods and services more than others is relatively common and benign. (Consider, for example, the many different prices of airline seats on the same flight.) Offering different contract terms to consumers according to whether they read the boilerplate, however, is a more serious problem. Careful segregation of consumers on the basis of their willingness to read and shop for terms would ensure that the small number of careful consumers would not discipline businesses concerning the terms they offer the rest of the consumers and would allow businesses to take advantage of the latter.[232]

A few considerations mitigate the concern with consumer segregation. At present, consumer identification protocols are far from perfect; they tend to identify a particular computer rather than a particular user.[233] Also, e-businesses concerned with their reputations might avoid such practices.[234] Further, the absence of human interaction deprives e-businesses of some information readily apparent to their paper-world counterparts, such as the race and gender of the consumer, which may signal the consumer's "willingness to pay."[235] Nevertheless, as e-businesses refine their techniques and become more concerned with the bottom line than with market share, consumer segregation will become a more significant concern.

5. *Competition Among Businesses*

Whether e-businesses will compete for customers with more advantageous contract terms is an open question. Consumers who look carefully will find some important differences in the terms offered by e-commerce competitors. For example, at the time of this writing,

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231 See David Pogue, Darkness in the Amazon Jungle, Macworld, Mar. 1, 2001, at 170 (describing magazine's finding that Amazon's prices varied by as much as ten dollars, depending on customer), 2001 WL 2924812.

232 See Schwartz & Wilde, Intervening in Markets, supra note 18, at 663-65 (distinguishing benign price discrimination from exploitation and noting that segregation is normally difficult in mass markets, unless businesses have good information about consumers).

233 See Frangos, supra note 228 (describing how targeted advertising works).

234 Amazon claims to have abandoned the practice of price discrimination. See Jeff Gelles, Privacy Safeguard May Miss Its Mark, Phila. Inquirer, May 28, 2001, 2001 WL 22766894. But see David Wessel, How Technology Tailors Price Tags, Wall St. J., June 21, 2001, at A1 (noting that other e-businesses are engaged in same practice, and that "Amazon.com's biggest mistake was getting caught").

235 Fiona M. Scott Morton et al., Consumer Information and Price Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities 2 (Yale Sch. of Mgmt., Working Paper No. Es-15; U.C. Berkeley Haas Sch. of Bus., Marketing Working Paper No. 01-2, Oct. 2001), http://papers.ssrn.com/abstract=288527.

Amazon's terms assign the responsibility for account and password activity to the user,[236] whereas we can find no such language on the Barnes & Noble website.[237] Just as the Internet has continued to allow dispersion in the prices of products,[238] it also might be producing some diversity in the contract terms e-businesses offer.

Perhaps because e-businesses are somewhat novel, companies within an industry frequently have not settled on uniform terms and conditions.[239] Hence, comparison shopping among standard terms actually might pay off. The current diversity, however, could be a product of the novelty of e-commerce and therefore might not persist as e-business develops. Indeed, diversity of terms may decline faster in e-commerce than it has in other businesses, as the electronic media facilitates the copying and distributing of standard terms within an industry.[240]

Studies of e-commerce confirm the suspicion that the Internet is not yet a consumer's paradise.[241] In theory, the easy access to information that the Internet provides should reduce prices and reduce

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[236] See Amazon.com, Conditions of Use, at http://www.amazon.com/exec/obidos/tg/browse/-/508088/102-7272717-9540102 (last visited Feb. 26, 2002) ("YOUR ACCOUNT: If you use this site, you are responsible for maintaining the confidentiality of your account and password and for restricting access to your computer, and you agree to accept responsibility for all activities that occur under your account or password.").

[237] Barnes & Noble.com, Safe Shopping Guarantee, Guarantee Details, at http://www.barnesandnoble.com/help/nc_safe_shopping.asp (last visited Jan. 18, 2002).

The terms offered by various web auction sites also vary greatly. Amazon.com guarantees that the seller will receive payment and the buyer will receive delivery of the promised product (including protection from material alteration from advertised good). Amazon.com, A-to-Z Guarantee Protection, at http://www.amazon.com/exec/obidos/tg/browse/-/537868/refHP_hp_ls_2_4/002-2522628-2713631 (last visited Mar. 21, 2002). Most sites, such as eBay, assign all risk to the buyer and seller individually, with no remedy offered through the site. eBay, User Agreement, eBay is Only a Venue, at http://www.pages.ebay.com/help/community/png-user.html (last visited Jan. 18, 2002).

[238] See Jeffrey R. Brown & Austan Goolsbee, Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry 1 (John F. Kennedy Sch. of Gov't., Harvard Univ. Working Paper No. 00-007, Oct. 2000) (on file with the *New York University Law Review*) (noting emerging "conventional wisdom" that Internet may have increased product differentiation and price discrimination more than it has increased price competition).

[239] Radin, supra note 1, at 1149-54.

[240] See id. (asserting that standardized terms will proliferate through machine-made contracts). One web site is even devoted to creating standard-form contracts for businesses. Provider Marketing Group, at http://www.provider.com/contracts.htm (last visited Jan. 20, 2002). We thank Shane Cooper for this reference.

[241] See Michael D. Smith, Joseph Bailey & Erik Brynjolfsson, Understanding Digital Markets: Review and Assessment, in Understanding the Digital Economy: Data, Tools, and Research 99, 104-05 (Erik Brynjolfsson & Brian Kahin eds., 2000) (citing studies that show persistence of high price dispersion in online markets).

price dispersion between businesses that supply similar goods.[242] Although e-commerce has had this effect on some commodities, wide dispersions in prices can be found.[243] In some cases, the disparities are no lower on the Internet than in the real world.[244] These results indicate that e-consumers have yet to exploit the full benefits of the electronic environment. Despite the Internet's apparent benefits for consumers, these findings reveal that businesses still have many opportunities to exploit consumers' lack of information about goods and services.

6. *Market Forces and the E-contracting Environment: Summary*

The foregoing analysis reveals four principal differences between the real and the virtual business climates that might affect the enforcement of terms in standard-form contracts. These are identified in Table 1, below.

TABLE 1
DIFFERENCES BETWEEN THE REAL AND ELECTRONIC BUSINESS CLIMATES THAT AFFECT ENFORCEMENT OF TERMS IN STANDARD-FORM CONTRACTS[245]

Description of Factor	*	Difference in Electronic Contracts
Reputation	–	E-businesses more concerned with reputation
Diversity of terms offered	–	Greater diversity of terms currently offered in e-commerce
Consumer segregation	+	Potential for consumer segregation in e-commerce
Fraud	+	Greater potential for fraud

First, because they are new and need to distinguish themselves as trusted companies, e-businesses are more concerned with their reputations than conventional businesses. Consequently, courts might be

242 See J. Yannis Bakos, Reducing Buyer Search Costs: Implications for Electronic Marketplaces, 43 Mgmt. Sci. 1676, 1677-78 (1997) (noting that electronic marketplaces should move commodity markets closer to ideal price competition); Smith, Bailey & Brynjolfsson, supra note 241, at 104 (noting that, in theory, low search costs and easy availability of information should make price dispersion lower on Internet than in conventional markets).

243 See Smith, Bailey & Brynjolfsson, supra note 241, at 104-05.

244 Id. (citing two studies in which price dispersion in particular Internet markets was no lower than in corresponding conventional markets).

245 In this Table, "-" indicates that there is less reason to be concerned about business abuse and market failure in e-commerce than in conventional commerce; "+" indicates that there is more reason to be concerned; "=" indicates that there is equal concern.

able to trust e-businesses to offer competitive terms more so than conventional businesses. Second, at present, e-businesses seem to offer a greater diversity of contract terms, thereby allowing consumers an opportunity to protect themselves from terms they consider inefficient or onerous. Third, the ease with which businesses can collect information on consumers affords e-businesses an opportunity to identify uninformed consumers and offer them inefficient terms. Such segregation, if practiced, would undermine reliance on the market to provide efficient terms. Finally, the Internet facilitates fraudulent business practices, thereby suggesting the need for greater judicial vigilance.

The extent to which the concern with reputation and diversity of terms will protect consumers remains unclear. As e-businesses begin to feel greater pressure to show a profit, they might abandon their concerns with reputation. Also, as e-businesses gain experience, they likely will begin to identify a standard set of terms that works best for them, just as has occurred in the paper world. Thus, even though some aspects of e-commerce suggest greater deference to contract terms, it is unclear how long these factors will remain important.

The new potential forms of fraud and market segregation on the Internet likewise should not change the basic approach towards the enforcement of standard terms, inasmuch as courts can guard against these practices specifically. Courts should be able to recognize a fly-by-night operation organized to defraud consumers when they encounter one and refrain from enforcing their egregious terms. Similarly, they can determine whether a business is engaged in an effort to segregate consumers, presumably through discovery requests in the ordinary course of litigation.

B. Market Failures in Electronic and Paper Standard-Form Contracts Compared

Given the benefits of standard-form contracting to both businesses and consumers, it should not be surprising that e-businesses use them as frequently as their paper-world counterparts.[246] Electronic boilerplate can efficiently allocate contractual risks just as easily as paper boilerplate. The use of electronic boilerplate might, in fact, be essential to e-commerce inasmuch as negotiating the terms of a contract would likely require interrupting the electronic transaction and interjecting a human agent to conduct the negotiation for the busi-

246 See Gomulkiewicz, supra note 11, at 897-99.

ness.[247] This interruption would eliminate a critical efficiency associated with electronic contracting—namely, that it does not require businesses to use human agents.

At the same time, the novelty of e-commerce suggests that many of the benefits associated with paper boilerplate have not, as yet, been realized. Many new companies are run by their technology-oriented founders who have no expertise with the kinds of contractual efficiencies that more established businesspersons might understand.[248] E-commerce itself is so new that many companies engaged in e-commerce are unlikely to have identified the efficient allocation of contractual risks between consumers and businesses. Furthermore, the standard terms used by companies selling electronic goods and services might be untested in the courts.

Nevertheless, courts still should worry about the overregulation of standard terms in electronic boilerplate that could upset the efficient allocation of risk between businesses and consumers. Even inexperienced businesspeople probably still understand their trade better than judges. Furthermore, as e-commerce develops, e-businesses will identify sensible allocations of contractual risk, just as in the paper world. Thus, judicial failure to uphold electronic boilerplate risks trampling on those efficiencies in the electronic world, just as it does in the paper world.[249]

If the electronic environment affords courts greater assurance that market forces are protecting consumers, then judicial refusal to enforce standard terms would be more likely to upset a sensible allocation of risks than to promote beneficial consumer protection. Several factors should influence a judicial determination of whether the courts can relax their scrutiny of standard terms in the new media of electronic commerce. Table 2, below, organizes these considerations,

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[247] See id. at 897-98 (noting that, absent mass licensing, many products would not be viable). However, perhaps the electronic world also can standardize the negotiation process.

[248] Cf. Robert McGarvey, Ding!, Entrepreneur, Jan. 2001, at 75, 76 (noting that, in view of one Internet consulting firm, first generation of online businesses tended to hire managers who were inexperienced or bad).

[249] It is also possible that courts will be able to avail themselves of the Internet in their efforts to distinguish efficient from inefficient contractual terms. Courts, like consumers, easily can compare the substance of contracts offered by a litigant with those of other companies in the same business, and can also easily identify the procedures used to offer these terms. Such information, however, is almost certainly available already to courts, even without the Internet. The notion that the Internet can improve the judicial process is compelling, but has yet to be realized. A particularly imaginative model of online justice can be found in Michael Abramowicz, Cyberadjudication, 86 Iowa L. Rev. 533 (2001), which describes a system for making judicial decisions according to the market prices of certain publicly available securities, traded online.

maintaining our distinction made above between rational, social, and cognitive forces that can undermine the discipline that the market imposes on businesses. The text that follows explains this analysis.

TABLE 2
FACTORS AFFECTING JUDICIAL ASSESSMENT OF THE LIKELIHOOD OF MARKET FAILURE IN PAPER AND ELECTRONIC STANDARD FORMS[250]

Factor Type	Description of Factor	*	How Electronic Contracts Might Differ
Rat'l	Language hard to understand	=	Same
Rat'l	Fine or other difficult print; terms hard to find	+	New ways of disguising terms
Rat'l	Limited time: Consumer usually receives form when hurried	+/–	More time: Consumer usually enters into contract at home; however, e-consumers tend to be impatient
Rat'l	Agents lack negotiating authority	+	No contact with agent; meaning of mouse click
Rat'l	Boilerplate covers unlikely events	=	Same
Rat'l	Consumers assume courts will not enforce unjust terms	=	Same
Soc'l	Reading terms wastes others' time	–	User is in home; no concern over other users or agent
Soc'l	Reading signals lack of trust	+/–	No agent to signal to
Soc'l	Agent has established relationship with consumer	–	No agent to trust
Soc'l	Agent uses subtle social pressures to deter user from reading boilerplate	+/–	No agent, but research can reduce the number of consumers who read terms
Cog.	Consumers satisfice	=	Same
Cog.	Consumers focus on a few terms	=	Same
Cog.	Consumers want to ignore terms	=	Same
Cog.	Consumers are overconfident	=	Same

[250] In this Table, "-" indicates that there is less reason to be concerned about business abuse and market failure in e-commerce than in the conventional commerce; "+" indicates that there is more reason to be concerned; "=" indicates that there is equal concern.

1. *Rational Factors*

The switch to electronic transactions both increases and undermines the competitive pressures on businesses to provide mutually beneficial terms in standard-form contracts. On the one hand, the Internet is generally, and correctly, thought of as enhancing the rational consumer's power against businesses.[251] The growing influence of e-commerce has been shown to make markets work more efficiently in other contexts.[252] Other factors tend to neutralize these benefits to e-consumers, however.

Several factors suggest that consumers can defend themselves against undesirable terms more easily in the electronic environment. E-consumers can shop in the privacy of their own homes, where they can make careful decisions with fewer time constraints. They can leave their computers and return before completing their transactions, giving them time to think and investigate further. Also, at present, e-consumers tend to be better educated and wealthier than paper-world consumers, suggesting that they can better fend for themselves in the marketplace.[253]

The Internet also has taken comparison shopping to a level that is unimaginable in the real world.[254] The ease with which consumers can compare business practices, including the content of standard forms, suggests that consumers do not need judicial intervention to protect themselves from business abuse.[255]

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[251] See Bakos, supra note 242, at 1676-77 (noting that due to lower search costs, electronic marketplaces can promote price competition among sellers and, in heterogeneous goods market, can increase allocational efficiency while reducing sellers' profits).

[252] See Brown & Goolsbee, supra note 238, at 1 (concluding that introduction of Internet price-comparison sites apparently made market for term life insurance significantly more competitive).

[253] See supra note 209 and accompanying text.

[254] Some websites, in fact, are devoted entirely to finding a specific product at the lowest price. See, e.g., Consumer Reports Website at http://www.consumerreports.org/main/home.jsp (last visited Jan. 18, 2002). See generally Michelle Maltais, Virtually Everything: That's What Savvy Shoppers Can Find by Browsing Through These Sites, L.A. Times, May 17, 2001, at T3 (listing various "shopping bots"). Similarly, the Internet has spawned numerous electronic bulletin boards dedicated to creating a forum for consumers to rate goods and services publicly, which can be searched electronically. See Chuang, supra note 224 (listing several websites where consumers can rate businesses).

[255] Those consumers who enter into contracts while installing their software will not be able to comparison shop quite as easily as those who enter into contracts on the Internet. The terms and conditions might be available only during the installation process, making comparisons impossible. Even as to installed software, however, the consumer who also has Internet access will have easy access to information about a business's reputation. See, for example, the ratings of companies in the computer software industry, found through PlanetFeedback, at http://www.planetfeedback.com (last visited Jan. 21, 2002).

Several factors undermine the benefits to e-consumers of having extra time. Most notably, the language contained in electronic boilerplate often is as inaccessible and as impenetrable as the language in paper forms. Furthermore, e-businesses probably have more avenues for tinkering with the presentation format of their electronic boilerplate.[256] Businesses can collect information as to which presentation formats induce customers to visit the link to the "terms and conditions" of their agreements, and which deter them from doing so. This information could allow businesses to experiment with different ways of presenting the boilerplate and to rely on those designs that reduce the number of consumers who read them.[257] Just as businesses utilize fine print and hidden terms in the paper world to increase the costs of finding and reading terms, certain methods of presentation of the terms and conditions can also discourage e-consumers from reading the boilerplate.

E-consumers who try to read electronic boilerplate must struggle to understand pages of legalese filled with jargon that would be difficult for an experienced attorney to decipher. Exacerbating the problem, reading from a computer screen is harder on the eyes than reading a paper form, and few users are likely to take the time to print an electronic contract. E-consumers cannot be expected to comparison shop among terms they do not understand. Instead, they might simply assume, just as their paper-world counterparts do, that the courts will refuse to enforce terms that are unreasonable. Thus, the extra time available to e-consumers and the diverse offering of terms does not necessarily translate into term shopping by e-consumers.

Furthermore, e-consumers might be more impatient, rather than more informed. Because of their relative youth and their frequent use of the Internet to save time, e-consumers might be a little too eager to complete their transactions.[258] Younger users may not pay attention to the legal concerns addressed in the boilerplate. E-consumers also have become accustomed to speed and instant gratification when using the Internet and therefore might be intolerant of the delays associ-

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256 Cf. Peter Loftus, Pay for Performance, Wall St. J., Apr. 23, 2001, at R16 (discussing increasing tendency of online advertisers to measure success of individual advertisements, sometimes reformulating advertisements to achieve better results).

257 For an example of presentation methods that seem to be designed to deter users from accessing the terms and conditions, see Williams v. America Online, Inc., 43 U.C.C. Rep. Serv. 2d (CBC) 1101, 1104 (Mass. Super. 2001), which notes that "the actual language of the TOS [Terms of Service] agreement is not presented on the computer screen unless the customer specifically requests it by twice overriding the default."

258 See Donthu & Garcia, supra note 209, at 56 (noting Internet shoppers tend to be more impulsive than conventional shoppers).

ated with an effective search and comparison of terms.[259] Put another way, overeager, "click-happy" e-consumers may engage in impulse purchasing without investigating standard terms at all. As noted above, the Internet has yet to produce an efficient market for many of the goods and services offered.[260] The benefits of the Internet for consumers might as yet be more theoretical than real.

In addition, the lack of an agent in e-commerce and the inability to find answers to questions about the terms (except by e-mail, which would probably be slower than a face-to-face exchange) sends the clearest possible message to the e-consumer that electronic boilerplate comes as a take-it-or-leave-it proposition. Inasmuch as the electronic boilerplate generally covers remote contingencies, most e-consumers are apt to decide, quite reasonably, that understanding the boilerplate is not worth their time and effort. Even if they face less time pressure, consumers are still unlikely to find it worth their while to determine what the standard terms mean.

In sum, factors such as more time, better educated consumers, diversity of terms offered, and ease of information appear to support less judicial intervention in electronic contracting. Closer scrutiny of these factors, however, indicates that they are not likely to provide consumers with much real protection.

2. *Social Factors*

The electronic medium ameliorates the social factors that support judicial scrutiny of standard-form contracting in the paper world. Indeed, perhaps the most obvious difference between electronic and paper contracting is that, in the paper world, salespeople usually deal with consumers face to face, whereas electronic consumers transact business from the privacy of their homes or offices. All of the social factors that deter consumers from reading standard terms depend upon the influence of a live social situation that electronic contracting lacks. E-businesses cannot easily duplicate the effects of an endearing, but manipulative, agent in the electronic format. To the extent that the courts worry that businesses use their agents to manipulate consumers into signing contracts precipitously, then reliance on electronic contracting alleviates these concerns.

Internet contracting raises some new social concerns, however. Consumers are accustomed to the importance of signing their

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[259] See Winn, supra note 4, at 14 (arguing that firms investing in improved contract interfaces will not benefit due to consumers' cognitive biases).

[260] See supra notes 241-44 and accompanying text.

names.[261] For many people, a signature denotes a binding commitment and is the essence of a contract.[262] The importance that most consumers place on signing their names is, in fact, a prime reason that agents use social pressures—consumers may balk when the time arrives to put their names on the dotted line. The requirement of a signature is nothing less than the law's signal to consumers that the document in front of them is important and that they should be cautious about agreeing to it.[263] After years of judicial enforcement of electronic agreements, consumers will perhaps become as accustomed to the equal importance of clicking "I agree." It is unclear, however, whether contemporary e-consumers attach the same importance to a mouse click.

Disreputable businesses could take advantage of the casual approach consumers bring to this new way of entering contracts. Businesses could devise web sites that distract consumers from the importance of the "assent" click. Most e-businesses, however, currently carefully signal the significance of clicking "I agree."[264] Some allow a known user (who already has opened an account) to enter into an agreement with a single mouse click, but make the meaning of the click clear.[265] Although courts should be vigilant about ensuring clear assent in the electronic format, mouse-click assent does little to alter the basic approach to the enforceability of electronically presented standard terms.

More importantly, the Internet raises the prospect of more subtle manipulations that can replace social persuasion. Internet businesses can (and do) experiment with different presentation styles on their

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261 See McIntosh v. Murphy, 469 P.2d 177, 179 (Haw. 1970) ("[T]he requirement of a writing has a cautionary effect which causes reflection by the parties on the importance of the agreement . . . ."); Deborah A. Schmedemann & Judi McLean Parks, Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses, 29 Wake Forest L. Rev. 647, 676 (1994) (presenting empirical evidence that lay persons identify signature requirement as component of enforceable agreement).

262 But see Schmedemann & Parks, supra note 261, at 685 (noting that existence of signature had "only mild impact" on whether respondents read contractual obligation into document).

263 See id. (noting that because signature is active and potentially public form of assent, one expects it to enhance signer's commitment).

264 See Wittie & Winn, supra note 2, at 303-11 (explaining common clickwrap presentation methods and demonstrating how these methods conform to requirements of UETA).

265 See Richard M. Moose & John E. Vick, Jr., E-Commerce Patents: Moving at the Speed of Light, S.C. Law., Jun. 12, 2001, at 18, 20-21 (discussing one-click purchasing and recent litigation by Amazon.com alleging Barnes & Noble.com infringed upon its patent of this concept), WL 12-JUN SCLAW 18.

sites.[266] They can tinker with font sizes, graphics, and arrangements, in an effort to induce more consumers to visit their sites, spend more time at the sites, and use the sites to complete a transaction.[267] These manipulations are, in reality, no different from the efforts of shopkeepers to make their stores aesthetically attractive so as to induce sales.[268] On the Internet, however, adjusting the storefront requires only simple, electronic adjustments, rather than an expensive reconstruction of physical space. Furthermore, Internet businesses easily can collect detailed information on the effects of their marketing techniques on consumers' behavior, thereby allowing Internet businesses to measure the effects of different styles of presentation precisely.[269]

Window dressing designed to increase sales might be harmless enough,[270] but businesses also can learn how to arrange their electronic boilerplate in ways that minimize consumer scrutiny.[271] Although manipulations by a live agent or by subtle presentation methods will not deter a consumer determined to read the boilerplate, these e-business methods can reduce the percentage of consumers who read the terms and conditions to a point at which they can be ignored.

Furthermore, electronic boilerplate is integrated into the webpage, thereby blending marketing tools and contracts together. Graphics designers and webmasters work with lawyers in the presentation of Internet contracts.[272] Although sophisticated advertising influences paper-world consumers, these readers have an opportunity to cool off because of a time lag between viewing the advertising and purchasing.[273] Electronic consumers, on the other hand, likely will

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266 When IBM reorganized its site, making it easier to search, sales increased by four hundred percent. Mary Wolfinbarger & Mary C. Gilly, Shopping Online for Freedom, Control, and Fun, 43 Cal. Mgmt. Rev. 34, 44 (2001).

267 E-businesses use so-called "clickstream analysis" to identify frequently clicked links so they can be positioned at more accessible points on the site. See id. (describing IBM's use of clickstream analysis to identify most frequently accessed pages on official Olympics site, so they could be moved closer to top level of site); cf. Loftus, supra note 256, at R16 (discussing extensive use of data on success of various Internet advertisements, including data on subsequent behavior of advertisement respondents).

268 See Hanson & Kysar, supra note 78, at 1444-45 (discussing such efforts).

269 See Loftus, supra note 256, at R16 (discussing increasing use of fine-grained data on success rates of Internet advertisements).

270 But see Hanson & Kysar, supra note 78, at 1444-50 (arguing that such marketing efforts can be detrimental to consumers).

271 Winn, supra note 4, at 6-7 (noting that web site "may have been designed to make the experience as painless and convenient as possible for the customer by marginalizing disclosures . . . or simply removing them altogether").

272 Id. at 5.

273 See Kronman, supra note 114, at 763-65 (describing importance of cooling-off periods).

commit to the form contract directly after seeing the advertising on the web page.[274]

The integration of marketing and contracting suggests that businesses might deter consumers from reading standard terms even without attempting to or knowing that they have done so.[275] Businesses that tinker with their web sites as part of an effort to sell more of their goods or services will adopt those website configurations that produce more sales, regardless of why the configurations work. If a website configuration deters consumers from reading standard terms that consumers reasonably would find unpalatable, then such a configuration might increase sales. If businesses only monitor sales, and not the details of consumers' browsing habits, then businesses will fail to attribute their sales increases to the lack of consumer perusal of the terms. In such a case, businesses would be unaware of the manipulation of consumers, thereby making judicial policing of manipulative practices difficult.

On balance, social factors that affect consumers support a more deferential judicial approach to enforcing standard-form provisions in electronic contracting. E-commerce cannot, as of yet, duplicate the paper-world social influences that enable some businesses to induce consumers to sign agreements without reading the boilerplate. Even though businesses eventually might develop marketing techniques that mimic the effects of some of these social pressures, these techniques usually require businesses to engage in efforts that courts can identify.

3. Cognitive Factors

The cognitive factors that we have identified arise from factors internal to consumers rather than from their environment. Consequently, a change in the nature of the contracting environment is not likely to alter these factors.[276] Consumers underestimate the likelihood that adverse events will occur because of their optimism, not because of the form of presentation of the contract terms. Similarly, they cease their decisionmaking processes before understanding all of the relevant facts because their intuition and hunches have mistakenly

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274 "[O]nline ads still hold a powerful trump card over other ad types by permitting impulse buying." Jim Krane, DoubleClick Revenues Fall 20 Perc., AP Online, July 10, 2001, 2001 WL 24710744.

275 See Hanson & Kysar, supra note 78, at 1423-25 (discussing how businesses can take advantage of consumers).

276 See Michael H. Birnbaum, Testing Critical Properties of Decision Making on the Internet, 10 Psychol. Sci. 399, 402-05 (1999) (presenting data indicating that Internet users fall prey to similar cognitive illusions in judgment as their real-world counterparts).

led them to believe they have enough information. The contracting environment does not influence these factors.[277]

The cognitive factors undermine many of the benefits to consumers of electronic contracting. Indeed, they may explain why the Internet has failed to produce the efficient competition that theorists have anticipated. E-consumers who are satisfied with limited information about businesses have no use for the extra search time that Internet shopping offers.[278] E-consumers also might worry about accumulating too much information, impairing their decisionmaking processes. Moreover, if e-consumers are as overly optimistic as the research on conventional consumers suggests, they will not take advantage of the lower search costs offered by e-commerce. Consumers who do not believe that anything will go wrong will disregard their ability to compare standard terms with just a few mouse clicks. In short, the overly optimistic, "satisficed" consumer does not want additional information; more information simply will clutter her decisionmaking processes. She is already happy with her decision to enter the contract and is unlikely to see much value in shopping for more advantageous terms covering remote contingencies.

Furthermore, as they struggle to increase consumer acceptance of e-commerce, e-businesses inadvertently might take greater advantage than conventional businesses of excess consumer optimism. Currently, consumers remain leery of Internet fraud,[279] and Internet businesses have difficulty closing their transactions with consumers who often abandon their purchases at the last minute.[280] Internet businesses have to overcome this reticence through presentation methods that make the e-consumer feel more secure. With the impressive ability of Internet businesses to test website formats, they eventually will stumble upon formats that induce a greater percentage of consumers to complete their transactions.[281] The successful formats likely will feed into consumers' tendencies to disregard contractual risks. As

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277 To be sure, there is some evidence to the contrary. See Grether, Schwartz & Wilde, supra note 120, at 287-94 (contending that ideal disclosure can lower search costs and thus improve consumers' decisionmaking abilities).

278 See A. Michael Froomkin, The Death of Privacy?: A New Legal Paradigm?, 52 Stan. L. Rev. 1461, 1501-05 (2000) (contending that consumers using Internet myopically ignore important information in standard terms, particularly terms that relate to privacy issues).

279 In a recently released survey, people's concerns about fraud on the Internet outweighed concerns about censorship, viruses, and noncompetitive markets. Keith Perine, The Net Is Still Popular, but Not for Shopping, TheStandard.com, July 10, 2001, 2001 WL 6874154.

280 See Saracevic, supra note 206 (reporting that seventy-five percent of customers back out of transactions).

281 See Loftus, supra note 256 (discussing increased use of detailed data to measure success of, and fine tune, Internet advertisements).

successful Internet businesses drive out competitors, the Internet eventually will encourage even greater consumer optimism than the paper world.

4. Conclusion: Balancing the Factors

Shifting from the world of paper contracting to electronic contracting presents something of a mixed bag for courts and lawmakers concerned about standard forms. The Internet has created new procedures that naturally should affect courts' assessment of procedural unconscionability. Generally speaking, the electronic environment enhances consumers' ability to investigate products and businesses, thereby making it easier for consumers to protect themselves from exploitation. This new tool seems to suggest a lesser need for legal protection.

As the above analysis shows, however, this generalization does not apply to all cases. Several other new features of the electronic environment by which businesses using standard forms might exploit consumers do reflect the need for courts to apply the same level of vigilance to electronic standard-form contracting that they have applied to the paper world. Like George Orwell's animals, some factors are more equal than others.[282] Specifically, cognitive factors involving consumers' beliefs about the risks associated with standard-form contracting demand the greatest weight in making such a determination regarding judicial deference. Extra time and greater access to information are of no value to a consumer who is not inclined to use them. Despite the rational benefits to the consumer of the electronic world, and the elimination of social pressures, in the main, e-consumers are as unlikely to investigate and to understand the importance of the standard terms as their paper-world counterparts. Thus, courts must continue to be concerned that consumers unwittingly will enter into standard-form agreements that are primarily exploitative rather than mutually beneficial.

Courts should, however, remain attuned to emerging empirical evidence and change their degree of deference as necessary. Our analysis is based on an extrapolation of psychological evidence from many contexts into the world of Internet contracting. We might be overstating the importance of consumers' cognitive processes.[283] Although some studies of the effect of the Internet on commerce have

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[282] George Orwell, Animal Farm (Alfred A. Knopf 1993) (1946).

[283] See Robert E. Scott, Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices, 59 S. Cal. L. Rev. 329, 329-31 (1986) (arguing that cognitive psychological defects in consumers generally are not causes for legal reform).

emerged,[284] research is still minimal.[285] Systematic, published empirical studies of the effect of the Internet on standard terms do not yet exist.[286] Courts, therefore, should be on the lookout for empirical evidence that emerges on Internet contracting and on consumers' ability to control exploitation by businesses through the use of standard forms.

Nevertheless, the enforceability of electronic standard terms will remain an important issue for lawmakers. In the absence of convincing empirical research, lawmakers must make their best assessment of whether the electronic contracting environment increases or decreases the risk to consumers of businesses' use of standard terms. We believe that e-consumers are unlikely to use the extra time and resources provided by the electronic environment to understand and weigh the importance of standard terms, and that any incentives to avoid unfair terms based on reputational concerns that businesses might face are likely to be fleeting.[287]

The few cases that courts have decided concerning Internet contracting support our view of the potential for market failures. We now turn to these cases as well as suggest how courts and lawmakers should resolve the specific issues they will face in the coming years.

III
RESOLVING SPECIFIC ISSUES: EXISTING LAW AND ANALYSIS

Because the electronic contracting environment is so new, clear law has yet to develop. Those courts and legislatures that have addressed the enforceability of standard terms largely have followed the principles we have advanced. That is, they have endorsed the concept that existing contract doctrine can sensibly resolve disputes arising in electronic contracts. Although a new paradigm is not necessary to govern electronic contracts, lawmakers must consider the differences between the electronic and paper media set forth in this Article. In this Part, we discuss the existing legal approach to electronic com-

284 See Brown & Goolsbee, supra note 238 (investigating Internet's effect on market for insurance); Smith, Bailey & Brynjolfsson, supra note 241, at 101-05 (reviewing research on effect of Internet on competition).

285 Wallace, supra note 201, at 2 ("Research about actual online behavior is still sparse . . . .").

286 Our own assessment that the Internet includes a diversity of terms, for example, is based on casual empiricism and the intuitive inference that new e-businesses are unlikely to have yet settled into using a shared pattern of standard terms. Perhaps it is too easy to use psychological evidence to overstate consumers' irrationality.

287 At most, consumers use this time to comparison shop over prices, quality of the goods or services, and perhaps businesses' reputations.

merce and then summarize the implications of our analysis for the specific issues that electronic standard-form contracting raises.

A. Existing Law Governing Electronic Contracts

Only a few cases have produced judicial opinions on the enforceability of standard terms in electronic contracting. Thus far, courts have analyzed these terms using contract doctrine developed in the paper world without significant revision. Llewellyn's framework of enforcing bargained-for terms, presumptive enforceability of standard terms, and judicial policing of standard terms for procedural and substantive unconscionability have dominated judicial thinking on electronic commerce.

Courts have had little difficulty enforcing standard terms offered in electronic format. In an early case addressing the clickwrap presentation of terms, *ProCD v. Zeidenberg*,[288] Judge Frank Easterbrook laid the foundation for enforcement of these terms. In *ProCD*, the defendant, Zeidenberg, purchased a disk containing a valuable database compiled by the plaintiff, ProCD. To use the database, Zeidenberg had to install software that presented him with a screen that offered him an opportunity to read and agree to ProCD's terms. The software prevented a user who failed to agree to the terms from using the database, whereupon the user could return the disk for a refund. Among the terms included were restrictions on the use of the data, including a prohibition against reselling the data contained on the disk. In response to ProCD's claim that he violated this prohibition, Zeidenberg argued that the prohibition was not part of the agreement because the software presented the term after he had purchased the disk. Easterbrook rejected Zeidenberg's defense and found that the contract was formed when Zeidenberg agreed to the terms by using the product after he had the opportunity to read the terms.

Although the *ProCD* case involved the physical acquisition of software by a one-person business, rather than a consumer ordering goods and services over the Internet, Easterbrook's holding establishes several important principles for e-commerce. First, it recognizes the enforceability of clickwrap contracts with standard terms, where the user agrees by clicking on a box labeled "I agree" or some similar format. The rationale behind the enforcement of these contracts is that, at the time of agreement, the consumer has the opportunity to read the terms accompanying the product and to reject them. Rejection of the terms prevents the consumer from completing the installa-

[288] 86 F.3d 1447 (7th Cir. 1996).

tion and using the product, whereupon the consumer can return the good or software and obtain a refund.[289] Judge Easterbrook's holding establishes this method of presenting electronic standard terms as an acceptable means of entering into a contract.[290]

An equally important aspect of the *ProCD* holding for electronic boilerplate is Judge Easterbrook's determination that the pop-up presentation style of clickwrap terms constitutes reasonable notice of the terms contained therein. A contrary determination would have meant that clickwrap terms are procedurally unconscionable. Courts following *ProCD* will treat clickwrap terms as functionally identical to boilerplate in the paper world, and will presume that the consumer has read the terms and agreed to them. Several courts already have followed the *ProCD* holding, uniformly determining that the consumer's click on the "I agree" box forms the contract and that the on-screen availability of terms constitutes adequate notice.[291]

To be upheld as a valid contracting device, however, the clickwrap format must offer the consumer a real choice. In one case involving downloaded software, *Williams v. America Online, Inc.*,[292] a court expressed unwillingness to enforce a clickwrap contract that presented the terms only *after* the consumer clicked "I agree" and installed the software, thereby depriving the consumer of any opportunity to review the terms.[293] Even though, as we have argued, few (if any) consumers will read such terms, this court's holding acknowledges that the opportunity to review the terms creates sufficient protection for consumers.

Courts have been somewhat less solicitous of browsewrap. In *Specht v. Netscape Communications Corp.*, a New York federal district court held that Netscape's browsewrap presentation of terms did not

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289 Judge Easterbrook himself noted that the electronic delivery of software with clickwrap terms available upon installation creates similar issues. Id. at 1453.

290 See Gomulkiewicz, supra note 11, at 902-03 (citing *ProCD* holding that costs of alternative would be too high).

291 Hill v. Gateway, 105 F.3d 1147, 1148-49 (7th Cir. 1997); In re Realnetworks, Inc., Privacy Litigation, No. 00 C 1366, 2000 WL 631341, at *5-*6 (N.D. Ill. May 8, 2000); Beverly v. Network Solutions, Inc., No. C-98-0337-VRW, 1998 WL 917526, at *1 (N.D. Cal. Dec. 30, 1998); Rinaldi v. Iomega Corp., No. CIV.A.98C-09-064RRC, 1999 Del. Super. LEXIS 563, at *9-*13 (Del. Super. Ct. Sept. 3, 1999); Caspi v. Microsoft Network, 732 A.2d 528, 531-32 (N.J. Super. Ct. App. Div. 1999); Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 202-04 (Tex. App. 2001); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000). But see Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 98 (3d Cir. 1991) (refusing to enforce terms contained in shrinkwrap; contending that contract was formed earlier and no effective modification occurred).

292 43 U.C.C. Rep. Serv. 2d (CBC) 1101 (Mass. Super. 2001).

293 *Williams*, 43 U.C.C. Rep. Serv. 2d at 1103-05.

constitute reasonable notice of the existence of standard terms.[294] Consumers could download the software at issue without manifesting assent or even viewing Netscape's license. Netscape had included a hyperlink labeled, "please review and agree to the terms of the . . . licensing agreement before downloading and using the software," that a consumer could pursue to gain access to the boilerplate.[295] The court held that this hyperlink constituted more of an invitation than a notice to the consumer that enforceable contract terms would follow.[296] Although the court may have enforced clearer language, this decision calls into question the browsewrap strategy because many web pages using browsewrap employ even less satisfactory notices. Businesses often use a hyperlink labeled simply "Conditions of Use"[297] or even "Legal notices."[298]

Two other recent decisions also question (but ultimately uphold) the browsewrap approach. Both *Register.com, Inc. v. Verio, Inc.*[299] and *Pollstar v. Gigmania Ltd.*[300] involved business-to-business browsewrap contracts with terms restricting the purchaser of software from subsequent commercial use of information contained in the software. As such, neither case presented a particularly sympathetic purchaser to dispute the enforceability of a standard-form contract. Furthermore, the defendant in *Register.com, Inc.* admitted that it was aware of the terms in the browsewrap but had chosen to ignore them.[301] Thus, these two cases do not constitute a ringing endorsement of browsewrap contracts. Furthermore, the *Pollstar* court expressed skepticism about browsewrap contracts, even as it refused to invalidate a standard term.[302]

The developing case law involving browsewrap and clickwrap contracts demonstrates the application of Llewellyn's paper-world principles to the world of electronic contracting. The courts in the electronic world search for the functional equivalent of the paper world's formal requirements of a reasonable presentation of terms and a manifestation of assent, despite the recognition in both worlds

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294 Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001).

295 Id. at 588.

296 Id. at 595-96.

297 http://www.amazon.com (last visited Mar. 20, 2002).

298 http://www.aol.com (last visited Mar. 20, 2002).

299 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

300 170 F. Supp. 2d 974 (E.D. Cal. 2001).

301 *Register.com, Inc.*, 126 F. Supp. 2d at 248.

302 See *Pollstar*, 170 F. Supp. 2d at 982 (concluding that "the browser wrap license agreement may be arguably valid and enforceable").

that consumers do not read the terms.[303] As with the paper world, if the e-consumer has a reasonable opportunity to read and the e-consumer manifests assent, the courts presume the enforceability of the terms. The reasonable opportunity to read the terms and the purchaser's click meet the formal requirements of Llewellyn's "blanket assent" to the standard terms.

Furthermore, courts in these cases have been careful to balance the possibility of substantive unconscionability with their procedural concerns. For example, courts review choice-of-forum clauses to assess the reasons businesses selected them and how onerous these clauses will be for consumers.[304] In *Williams v. America Online, Inc.*,[305] the court was concerned in part because submission of the case to a remote jurisdiction would have been particularly onerous for those plaintiffs who had suffered only minimal damages.[306] Thus, courts seem to be applying the same contextual balancing of procedural and substantive unconscionability in both the paper and electronic worlds.

Although legislation governing e-commerce has yet to develop fully, it is also consistent with the existing paradigm in the paper world. The Uniform Computer Information Transactions Act (UCITA), drafted by the National Conference of Commissioners on Uniform State Laws,[307] follows the model of the U.C.C. for enforceability of standard-form contracts.[308] UCITA provides that a person manifests assent to a contract term if he has had an "opportunity to review" the term and has engaged in some conduct manifesting assent.[309] UCITA goes further to define "opportunity to review" as making a term "available in a manner that ought to call it to the atten-

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303 In addition to presentation and notice issues, the courts in the clickwrap and browsewrap cases also review a business's presentation method for other factors constituting procedural unconscionability, such as small font size of the terms in dispute or other attempts at obfuscation. See Caspi v. Microsoft Network L.L.C., 723 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (finding "nothing about the style or mode of presentation that can be taken as a basis for concluding that the forum selection clause was proferred unfairly, or with a design to conceal or de-emphasize its provisions").

304 See *Caspi*, 732 A.2d at 531 ("Given the fact that the named plaintiffs reside in several jurisdictions and that, if the class were to be certified, many different domestic and international domiciles would also be involved, 'the inconvenience to all parties is no greater in Washington than anywhere else in the country.'").

305 No. 00-0962, 2001 WL 135825 (Mass. Super. Feb. 8, 2001).

306 Id. at *3.

307 UCITA (2000), http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (recommendation drafted by National Conference of Commissioners urging states to adopt as Act).

308 See Raymond T. Nimmer, Breaking Barriers: The Relation Between Contract and Intellectual Property Law, 13 Berkeley Tech. L.J. 827, 875-77 (1998) (noting that article 2B of the U.C.C. followed general U.C.C. model of unconscionability).

309 UCITA, supra note 307, § 112(a).

tion of a reasonable person and permit review."[310] This opportunity can occur before the transaction, such as at a web page that the consumer had to visit before entering into the contract.[311] The key requirement in UCITA is the reasonableness of the presentation method, which will determine whether the term is procedurally unconscionable,[312] just as in the paper world. Despite some alarmist claims about UCITA in the popular press and in some law review articles,[313] we contend that UCITA maintains the contextual, balanced approach to standard terms that can be found in the paper world.[314]

B. Specific Analysis of Issues in Electronic Standard-Form Contracting

As the case law continues to develop, we believe the courts will continue to apply existing contract-law doctrine, as we have described. As some of the reasoning in the cases governing electronic standard terms suggests, however, even as the courts maintain the existing approach to standard terms, they will encounter novel circumstances that e-commerce creates. In this Section, we analyze how courts and lawmakers should resolve many of the issues that they are likely to encounter as the case law evolves.

1. Blanket Assent in Electronic Contracts

Llewellyn's concept of blanket assent should apply to both clickwrap and browsewrap standard terms. Some courts and commentators have argued that these formats do not conform well to Llewellyn's model,[315] but we disagree. The enforcement of terms presented in these contexts carries advantages for businesses and con-

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310 Id. § 112(e)(1).

311 Id. § 211.

312 Id. § 112 cmt.11; id. § 111 (regarding unconscionability).

313 See, e.g., Brandt & Wallace, supra note 227, at 54-55 (alleging, for example, that nationwide adoption of UCITA would give "ominous legal power" to previously unenforceable parts of end-user license agreements).

314 UCITA is limited in scope. It applies only to the transfer of information, such as software or databases, across the Internet and does not apply to the sale of goods or services on the Internet. Furthermore, only two states, Virginia and Maryland, have adopted it. See Nat'l Conf. of Comm'rs on Uniform State Laws, Introductions & Adoptions of Uniform Acts: UCITA, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucita.asp. Nevertheless, UCITA's reliance on paper-world concepts and its status as model legislation suggests that legislatures are not apt to create an entirely new paradigm for enforceability of standard terms.

315 See Specht v. Netscape Communications Corp., 10 F. Supp. 2d 585, 594-96 (S.D.N.Y. 2001) (refusing to enforce browsewrap term where consumers may not have known they entered contract); Lemley, supra note 9, at 1248-53 (noting that courts have considered shrinkwrap terms to constitute attempts to modify contract formed at point of sale or unenforceable contracts of adhesion).

sumers comparable to the presentation of standard forms in the paper world. Failure to enforce clickwrap and browsewrap terms would deprive both businesses and consumers of the potential for efficient methods of electronic contracting.

Furthermore, as we have discussed, e-consumers have some power to protect themselves from exploitative terms, including time to contemplate and investigate and access to information. If e-consumers have some opportunity to read the standard terms before deciding whether to enter into the contract,[316] then courts should apply Llewellyn's presumption of enforceability of such terms. Just as in the paper world, consumers understand the existence of standard terms and agree to be bound by them, even though they rarely choose to read them.

2. *Procedural Unconscionability in Electronic Commerce*

Even as they apply the principle of blanket assent, courts must continue to scrutinize the electronic environment for abusive contracting procedures and terms, just as in the paper world. First, courts cannot simply assume that the new tools available to e-consumers will suffice to protect them against exploitation. As discussed, the cognitive perspective consumers adopt makes them unlikely to take full advantage of these new tools. Second, courts should be sensitive to the new kinds of procedural abuses available to e-businesses. Although the electronic environment may reduce social pressures on consumers, the e-commerce environment provides businesses with new information about consumers that can lead to additional abuse. As discussed, businesses can use web tracking to develop website designs that discourage consumers from visiting or scrolling through electronic boilerplate.[317] Such efforts should undo the presumption of enforceability of a standard term. Instead, courts should adopt a rule analogous to the paper-world rule that disfavors efforts by businesses to disguise contract terms by using small print or hidden terms. Further, businesses can identify and offer different terms to those savvy consumers who comparison shop for terms. Businesses employing this strategy exploit the ignorance of the uninformed.[318] Courts should presume

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316 Cases in which the consumer has no such option, such as Williams v. America Online, Inc., 43 U.C.C. Rep. Serv. 2d (CBC) 1101 (Mass. Super. 2001), or in which the consumer cannot return the product for a refund after having the opportunity to read the standard terms, fall outside the scope of blanket assent, just as they would in the paper world.

317 See supra Part II.A.

318 This practice is distinguishable from benign forms of price discrimination, in which businesses identify consumers who value goods or services more than most of their peers.

that businesses that engage in this practice are exploiting consumers, thereby undoing the presumption of blanket assent.

Monitoring businesses for these practices and guarding against them would do much to ensure that consumers realize the potential benefits of e-commerce. Guarding against businesses' efforts to exploit consumers could support some greater degree of deference to standard terms.

3. *Browsewrap Versus Clickwrap*

Judicial skepticism of browsewrap contracts is appropriate, but can be overstated. Like all standard-form contracts, browsewrap contracts have benefits. Consumers want contract formation on the Internet to be simple and easy. Internet businesses legitimately seek to place contractual restrictions on the use of their publicly available websites. Just as requiring consumers to sign a written contract setting forth the terms for browsing in a department store would be cumbersome and unnecessarily time-consuming, requiring a consumer to enter into a clickwrap contract before using a web site would significantly and unnecessarily slow the Internet. Courts, therefore, should be willing to consider enforcing browsewrap.

Nevertheless, judicial skepticism about the adequacy of notice browsewrap affords is also appropriate. Because consumers must voluntarily follow a hyperlink to the terms, browsewrap obviously calls into question the adequacy of presentation of terms, particularly when paired with research and redesign efforts to encourage consumers to complete their transactions. Relative to clickwrap, browsewrap is easily ignored by consumers, leaving them more vulnerable to exploitation.

Determining whether to enforce a term contained in a browsewrap contract requires judicial sensitivity to the purpose and the nature of the underlying term. For example, businesses likely include a browsewrap term that forbids commercial reproduction of the information gathered from a website as a means of maintaining control of their information, not to exploit consumers. Such terms would not be important to most users, who would find the presentation of terms in clickwrap form an imposition. By contrast, a browsewrap term that imposes unusual limitations on remedies and warranty disclaimers should raise suspicion of exploitation. Furthermore, Internet businesses that sell goods and services generally must require consumers to complete a form at the point of purchase to provide information

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See Schwartz & Wilde, Intervening in Markets, supra note 18, at 662-66 (explaining difference); supra notes 231-32 and accompanying text.

about delivery and payment options. These consumers, who are not rapidly browsing through the site, would not be slowed significantly by a clickwrap presentation of terms. The use of browsewrap for such terms is more apt to represent an effort to reduce the number of consumers who read the terms. Consequently, courts should treat browsewrap in such contexts with greater suspicion than they treat clickwrap, but without establishing a general doctrine that browsewrap contracts should not be enforced.

4. Internet Fraud

Finally, lawmakers should be concerned with the ease with which fraudulent businesses can be set up in the electronic environment. State and federal attorneys general need to be vigilant about such things, much as they are with respect to telemarketing fraud.[319] Nevertheless, courts long have been able to identify fraud in the paper world, and so the electronic world does not support the need for any new doctrine.

5. Uncertainty and the Novelty of E-Commerce

Because of the novelty of e-commerce, this contextual approach to Internet contracting lacks certainty, which can be a serious problem for both businesses and consumers.[320] As case law evolves, courts will develop clearer rules as to when the balance of formation issues and substantive concerns renders a contractual term unenforceable in the electronic environment. Decisions already demonstrate that the clickwrap format presents few procedural difficulties. E-businesses confident that their terms are not substantively troubling can find a safe harbor by using the clickwrap format. As case law develops, courts will come to identify those substantive terms and notice procedures that can be enforced with browsewrap styles as well.

6. Summary

In sum, in policing the electronic contracting environment, courts should apply the rule of blanket assent to electronic contracts. At the same time, they should search for efforts to duplicate the less scrupulous marketing techniques of paper-world businesses. Courts should patrol for practices that depend upon careful use of data, including

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[319] See Fed. Trade Comm'n, supra note 80, at 4-14, app.1 (stating that as of 1999, FTC had already brought one hundred cases against illegal activities online, including pyramid schemes and credit card scams).

[320] See Richard A. Epstein, Re: High-Tech Warranty Project—Comment, P994413 (comments submitted to the FTC, High-Tech Warranty Project, Sept. 20, 2000), http://www.ftc.gov/bcp/workshops/warranty/comments/epsteinrichardа.pdf.

efforts to segregate consumers and adopt presentation methods that reduce the number of consumers who read the boilerplate. They also should continue to balance procedural and substantive unconscionability, being more suspicious of browsewrap than of clickwrap, at least for the time being.

CONCLUSION

Although the electronic environment is a truly novel advance in the history of consumerism, existing contract law is up to the challenge. The influences that affect the judicial approach to the enforcement of standard terms in the paper world also tend to affect the electronic world or have close parallels in the electronic world. The basic economics of the two kinds of commerce are identical. In both the paper and electronic worlds, businesses choose between adopting a set of boilerplate terms that are mutually beneficial or exploitative. In both worlds, they know more than consumers about the contractual risks, thereby creating an opportunity to exploit consumers. Also in both worlds, consumers can defend themselves by investigating these terms or by making their purchasing decisions based on a business's reputation. E-commerce brings new weapons and defenses to both businesses and consumers, but the basic structure remains intact. Courts in both worlds either must trust the market and enforce the standard terms, or decide that the market has failed and refuse to enforce them. Consequently, the careful judicial balancing of caution at interfering with contracts with concern about exploitation that courts have developed in the paper world applies equally well to the electronic world.

Furthermore, at present, the relative balance of suspicion and deference with which courts approach paper boilerplate is probably the same balance with which they should approach electronic boilerplate. Although some may argue that the electronic environment gives consumers more opportunity to protect themselves, as our analysis shows, this new power is easily overstated. The cognitive perspective that consumers tend to adopt with respect to contractual risks makes it unlikely that many will take advantage of these new tools. Moreover, the electronic environment gives businesses new opportunities to exploit consumers.