

BOILERPLATE: WHAT CONSUMERS ACTUALLY THINK ABOUT IT

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I. INTRODUCTION

One of the most difficult problems in modern contract law is the status of standard terms—often called “boilerplate”—in consumer transactions.¹ On the one hand, standard terms are good because they reduce costs and increase efficiency and predictability.² On the other hand, they can be used to impose unfair terms on consumers and even to evade important public policies.³ There is thus a vast and growing literature on the topic.⁴

We know for a fact that most consumers do not read standard terms.⁵ They

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1. Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUDS. 1, 2 (2014).

2. Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 Clev. St. L. Rev. 373, 385 (2014).

3. Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 184 (2015) (“In recent years, a new generation of contracts has surfaced imposing terms that require weaker contracting parties to forego the ability to enforce their post-*Lochner* rights in an effective manner.”)

4. See, e.g., ELENA D’AGOSTINO, *CONTRACTS OF ADHESION BETWEEN LAW AND ECONOMICS: RETHINKING THE UNCONSCIONABILITY DOCTRINE* (2014); NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (2013); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2014); Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014); Kenneth K. Ching, *Liberalism’s Fine Print: Boilerplate’s Allusion to Human Nature*, 99 MARQ. L. REV. 631 (2016); G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J. L. ECON. & POL’Y 413 (2015); Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615 (2017); Charles L. Knapp, *Is There a “Duty to Read”?*, 66 HASTINGS L. J. 1083 (2015); Peter Linzer, *Contract as Evil*, 66 HASTINGS L. J. 971 (2015); Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn’t Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215 (2017); Cheryl B. Preston, *“Please Note, You Have Waived Everything”: Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535 (2015); Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109 (2015); Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733 (2016); Neuborne, *supra* note 3.

5. See Bakos et al., *supra* note 1.

will not read them before they sign the writing or click “I agree” or “Buy now” on their screen.⁶ They will not read them when they open the box and find them inside.⁷ This behavior is entirely rational and entirely expected—no one could function if she had to read the terms and conditions of every web site she happened to visit or every product she purchased.⁸ We know that she will ignore the terms, yet enforceability of contract terms under both current law and the proposed new *Restatement of Consumer Contracts*⁹ will depend on whether the consumer had the opportunity to read the terms—or, more accurately, *opportunity to ignore them*—before the purchase is made.¹⁰

But is that opportunity of any value to consumers? Do they see any distinction between terms on a web site and terms that accompany the product when it arrives? A vast and growing legal literature focuses on this question,¹¹ but it is curiously limited. We know what judges and lawyers think that *consumers think* about boilerplate terms.¹² But what consumers themselves think is still missing. Although business school scholarship is rich with studies of consumer beliefs and consumer behavior,¹³ little of that research seems to have diffused itself into the legal world.

Our goal here is to help fill that gap. To begin to answer this question, we use a scenario-based experimental design to explore consumer attitudes toward common contract terms. In particular, we focus on (a) their understanding of baseline legal rules and commercial norms; (b) their view of the enforceability and fairness of standard terms that change those rules; and (c) whether their views of these issues change depending on whether they had a chance to view the terms before agreeing to the contract. Our goal is to determine whether current contract law—and the changes to the law recommended by the drafters of the proposed *RCC*—reflect distinctions that have any meaningful value to consumer buyers.

II. BOILERPLATE AND CONSUMER TRANSACTIONS

The average American consumer is likely a party to dozens or hundreds of standard-form contracts at any given time.¹⁴ These agreements often contain

6. See generally Jennifer Femminella, *Online Terms and Conditions Agreements: Bound by the Web*, 17 St. John's J. Legal Comm. 87 (2003) (discussing enforceability of clickwrap and shrinkwrap agreements); see also Bakos et al., *supra* note 1.

7. See generally Bakos et al., *supra* note 1; Femminella, *supra* note 6.

8. Bakos et al., *supra* note 1. See generally Preston, *supra* note 4 (discussing the consumer benefits of not reading the terms and conditions).

9. Restatement of Consumer Contracts § 2 (Am. Law Inst., Council Draft No. 5 2018).

10. See generally Knapp, *supra* note 4, at 1086; Preston, *supra* note 4.

11. See RADIN, *supra* note 4.

12. *Id.*

13. As typified in a plethora of scholarly journals such as *Journal of Consumer Behaviour*, *Journal of Consumer Psychology*, *Journal of Consumer Research*, *Research in Consumer Behavior*, *Journal of Consumer Affairs*, and *Journal of Consumer Culture*.

14. See generally Bakos et al., *supra* note 1.

many pages of “fine print” or “boilerplate” terms that specify in great detail the duties and obligations of the parties.¹⁵ These contracts are drafted entirely by one party—always the seller or service provider—and are presented on a take-it-or-leave-it basis.¹⁶ No one except the lawyers who write them and litigate over them ever read them.¹⁷ We know, in fact, that of those who buy online, only some 0.1 percent of consumers ever click on the “terms and conditions” link, and that and ninety percent of those who do spend less than two minutes looking at the dense and legalistic verbiage.¹⁸

These facts become important because under American contract law the question of whether standard terms become part of the contract depends primarily on *whether the seller provided the terms to the buyer before the transaction closed*.¹⁹ Consumers will ignore these terms whether they are received before or after the transaction closes, but enforceability will depend on whether the buyer had what we can think of as the *opportunity to ignore* the terms in advance.²⁰ If the buyer actually ignored the terms, they apply.²¹ If the buyer lacked the *opportunity to ignore*, they do not.²² This concept is neatly set out in the proposed *Restatement of Consumer Contracts* (“RCC”), which provides:

(a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction *after* receiving:

(1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and

(2) a reasonable opportunity to review the standard contract term.

(b) When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if:

(1) *before manifesting assent* to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and

15. *Id.*; see also Preston, *supra* note 4.

16. Oman, *supra* note 4, at 217.

17. See generally *id.*

18. These figures are from the very exhaustive and fascinating study in Bakos et al., *supra* note 1, at 19-22. The authors pursue a wide range of variables but find no situation in which any significant number of buyers spend any significant amount of time looking at contract terms.

19. See generally Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797 (2007) (discussing courts’ willingness to uphold the terms of shrinkwrap, clickwrap, and browsewrap agreements as long as they were provided to the consumer, regardless of affirmative consent).

20. See generally Preston, *supra* note 4, at 539-40.

21. See generally Kim, *supra* note 19 (arguing that contractual assent should be split into “actual” and “presumed” assent as a means to address consumer ignorance of Terms of Use and boilerplate terms online).

22. See generally *id.*

explaining that the failure to terminate would result in the adoption of the standard contract term; and

(2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and

(3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power.

(c) If the consumer manifests assent to the transaction, a contract exists even if some of the standard contract terms are not adopted. In such case, the terms of the contract are those adopted under subsections (a) and (b), and, if the consumer elects, the unadopted standard terms, along with any terms supplied by law.²³

While the proposed *RCC* in general is controversial,²⁴ this provision faithfully tracks existing law.²⁵ Under existing rules and the proposed *Restatement*, for example, we can distinguish among four different formation scenarios: traditional signed writings, “clickwrap,” “browsewrap,” and “shrinkwrap.”

Traditional signed writing. If the consumer signs a physical piece of paper that embodies the terms, they are binding even when they have been neither read nor understood. The consumer had access to them, and thus failure to read them does not make them unenforceable.²⁶ They may be policed for unconscionability, illegality, or violation of public policy, but only the most outrageous terms are likely to be struck under those doctrines.²⁷

*Clickwrap.*²⁸ A clickwrap contract is one in which an online purchaser is presented with a set of standard terms and must click a button that says “I accept”

23. Restatement of Consumer Contracts § 2 (Am. Law Inst., Council Draft No. 5 2018) (emphasis added).

24. See, e.g., Nicholas Malfitano, *Criticism Follows Powerful Law Group To Next Project—A ‘Troubling’ Take On Consumer Contracts*, FORBES.COM (June 25, 2018), <https://www.forbes.com/sites/legalnewsline/2018/06/25/criticism-follows-powerful-law-group-to-next-project-a-troubling-take-on-consumer-contracts/#7de2e4be2f60> [https://perma.cc/3ED6-K9Y7].

25. RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981).

26. *Id.*

27. *Id.*

28. The term “-wrap” for various types of electronic contracting comes from the original concept of the “shrinkwrap” contract, so-called because of manufacturers who put terms inside software and hardware boxes that were sealed with plastic film. See *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (breaking the film and opening the package was viewed as assent). In the same manner that “-gate” became the go-to suffix for all political scandals, “-wrap” became a common term for electronic contracts. There are other variants. See, e.g., *Berkson v. Gogo LLC*, 97 F. Supp.3d 359, 394-401 (E.D.N.Y. 2015) (adding “scroll-wrap” and “sign-in-wrap” to the lexicon). Employee handbooks that contain contract terms are sometimes called “cubewrap.” See Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963.

(or something similar) before the transaction will be processed.²⁹ The analogy to the traditional writing is obvious; in these cases, if the consumer clicks the button, the standard terms are enforceable for the same reasons as the traditional written contract.³⁰

Browsewrap. This is the term used in situations where a party uses a web site that states that use of the site signifies acceptance of the site's standard terms, but there is no formal "I agree" place to click.³¹ Under current law, enforceability will vary from person to person and website to website, depending on such factors as design of the specific site and exactly what the individual consumer happened to see.³²

Shrinkwrap. A licensor or manufacturer will often put its standard terms inside product packaging, along with a statement that using the product indicates acceptance of the terms.³³ Thus, where a purchaser who buys at a retail store or by telephone will not see the terms until after the purchase contract is complete.³⁴ The terms in this case are enforceable or not depending on the state and court in which the suit happens to have been brought.³⁵

Thus, the same term may become part of the contract between the same buyer and the same seller depending entirely on how the buyer goes about buying the goods or services. Two recent cases involving identically situated consumers contracting for the same service from the same business on identical contract

29. Natch Greyes, *A New Proposal for the Department of Justice's Interpretation of the Computer Fraud & Abuse Act*, 17 VA. J.L. & TECH. 293, 321 (2013).

30. *Id.* at 321-22.

31. *Id.* at 322-23.

32. *Id.* at 323-25. Cases finding that no contract exists include *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 38 (2d Cir. 2002); *McKee v. Audible, Inc.*, No. CV 17-1941-GW(Ex), 2017 WL 7388530, at *6 (C.D. Calif. Oct. 26, 2017); *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *9 (N.D. Cal. Oct. 9, 2013); *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058, 1064-65 (D. Nev. 2012); *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 789, 793 (N.D. Ill. 2011). Cases coming to the opposite conclusion include *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401-04 (2d Cir. 2004); *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 06-CV-0891-B, 2007 WL 4823761, at *4-6 (N.D. Tex. Sept. 12, 2007); *Cairo, Inc. v. CrossMedia Servs., Inc.*, No. C 04-04825 JW, 2005 WL 756610 (N.D. Cal. Apr. 1, 2005); *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV-997654, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003). These cases tend to very fact-intensive.

33. *Femminella*, *supra* note 6, at 88-89.

34. *Id.* at 89.

35. *See id.* at 91-95. The list of cases finding shrinkwrap terms enforceable includes *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997); *DeFontes v. Dell, Inc.*, 984 A.2d 1061 (R.I. 2009); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998); *M.A. Mortenson Co., v. Timberline Software Corp.*, 140 Wash.2d 568, 998 P.2d 305, 308 (Wash. 2000). Cases taking the opposite approach include *Rogers v. Dell Computer Corp.*, 138 P.3d 826 (Okla. 2005) (not enforceable); *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389 (N.Y. Civ. Ct. 2001); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

terms, illustrate this nicely. In *Carey v. Uber Technologies, Inc.*,³⁶ the driver (in Cleveland) clicked on a link on the web page to join the Uber ride-sharing service, which incorporated linked terms which he did not review.³⁷ In *Mohammed v. Uber Technologies, Inc.*,³⁸ the driver (in Chicago) asked an Uber representative to set up the account and gave her his user name and password.³⁹ In the course of the setup she clicked the link on his behalf.⁴⁰ Both drivers subsequently sued Uber, and Uber defended itself in each case by invoking its standard terms.⁴¹ Both drivers were similarly situated and equally ignorant of the terms.⁴² Yet Carey lost and Mohammed won, because Mohammed did not personally see the link and click on it.⁴³ The two cases suggest, as the *RCC* would have it, that while consumers consistently and quite reasonably ignore the terms in standard-form contracts, the *opportunity to ignore* them is so important that it will often control whether the terms become part of the contract.

Outcomes such as these raise obvious questions. If the standard terms used by a particular business (such as Uber) are not unfair or unreasonable, why aren't *all* consumers bound? On the other hand, if the terms are unfair or unreasonable, why are *any* consumers bound? On what ground might we say that the applicability of particular terms should depend on how the contracting process was conducted.

One possible answer is that consumers value the ability to see the terms in advance. Perhaps the mere chance to look at them makes consumers feel empowered, or perceive some other benefit. If so, then the rules may make sense, because it is axiomatic that contract law is designed to achieve the parties' goals. But we do not know whether that opportunity—so important to lawyers and judges—has any perceived value for actual consumers. Hence our study.

III. THE STUDY AND OUR FINDINGS

We used a scenario-based experimental design in which we presented study participants with a situation involving a defective product and then asked a series of questions about the seller's duty to compensate the buyer. We chose this warranty/damages scenario for several reasons. To minimize confusion, we wanted to use a situation that would be easily understandable, commonly encountered, and reasonably important. Many standard terms in contracts—*e.g.*, clauses relating arbitration, forum selection, choice of law, class-action

36. *Carey v. Uber Techs., Inc.*, No. 1:16-cv-1058, 2017 U.S. Dist. LEXIS 44340 (N.D. Ohio Mar. 27, 2017).

37. *Id.* at *1.

38. *Mohammed v. Uber Techs., Inc.*, 237 F. Supp. 3d 719 (N.D. Ill. 2017).

39. *Id.* at 724.

40. *Id.*

41. See *Carey*, 2017 U.S. Dist. LEXIS 44340, at *3-4; *Mohammed*, 237 F. Supp. 3d at 731.

42. *Carey*, 2017 U.S. Dist. LEXIS 44340, at *10; *Mohammed*, 237 F. Supp. 3d at 731.

43. *Carey*, 2017 U.S. Dist. LEXIS 44340, at *17-19; *Mohammed*, 237 F. Supp. 3d at 730-32.

waivers—can be difficult to understand and become important in only the tiny sliver of serious disputes that have reached a lawyer’s desk. Virtually every consumer, however, has faced a product that fails to work and has had to invoke the warranty the seller provides. Using a familiar scenario allowed us to isolate *only* the timing of the consumer’s receipt.⁴⁴

To test this experimentally, we asked study participants to imagine their new laptop computer has self-combusted. The manufacturer offers to replace the admittedly defective equipment. The consumer, now leery of the reliability of the manufacturer’s equipment, instead requests a refund of the purchase price, but the manufacturer refuses. In a follow-on scenario, the consumer also seeks damages for harm to additional property caused by the combusting computer. While few consumers have likely dealt with this precise situation, we believe it is one that is easy for the average consumer to understand.

By way of background—this was not revealed to subjects—under current law the computer’s failure in our scenario would amount legally to a breach of the general warranty of merchantability.⁴⁵ The normal default remedy for a buyer in that situation is an award of money damages: “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.”⁴⁶ In this case, the buyer’s damages would likely amount to the value the computer “would have had” if it had worked properly (presumably the purchase price) and its current value (zero).⁴⁷ The refund would thus likely approximate the buyer’s normal damages.⁴⁸ In addition, the seller ordinarily would be liable for the damage to other property as consequential damages of the breach.⁴⁹

But sellers are not required to provide the warranty of merchantability and are permitted to limit damages.⁵⁰ They are free to substitute a repair-or-replacement warranty for the ordinary warranty of merchantability, and they are free to disclaim consequential damages.⁵¹ Thus, if the seller’s repair-and-replace

44. We note that consumers may have strong views about the warranties that products should carry, and the responsibilities that merchants should face. Some, for example, may believe that merchants have a duty to provide more than standard repair-and-replacement warranties would require. This might well affect their views as to the enforceability of such a clause. We do not believe that this is a problem in our scenario because the consumer’s substantive opinion of a warranty—whether positive or negative—should have little effect on their views as to when it should be disclosed.

45. *See* U.C.C. § 2-314 (Am. Law Inst. & Unif. Law Comm’n 2004).

46. *Id.* § 2-714 (2).

47. *Id.*

48. *Id.* § 2-714.

49. *Id.* § 2-715(2).

50. *See id.* § 2-316(2)-(3).

51. *See id.* § 2-719(1)(a) (“the agreement may provide for remedies . . . in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to . . . repair and replacement of non-conforming goods

warranty is part of the contract, it is enforceable against the consumer. As noted above, the question whether it is part of the contract may depend on *when* the buyer is presented with it.⁵²

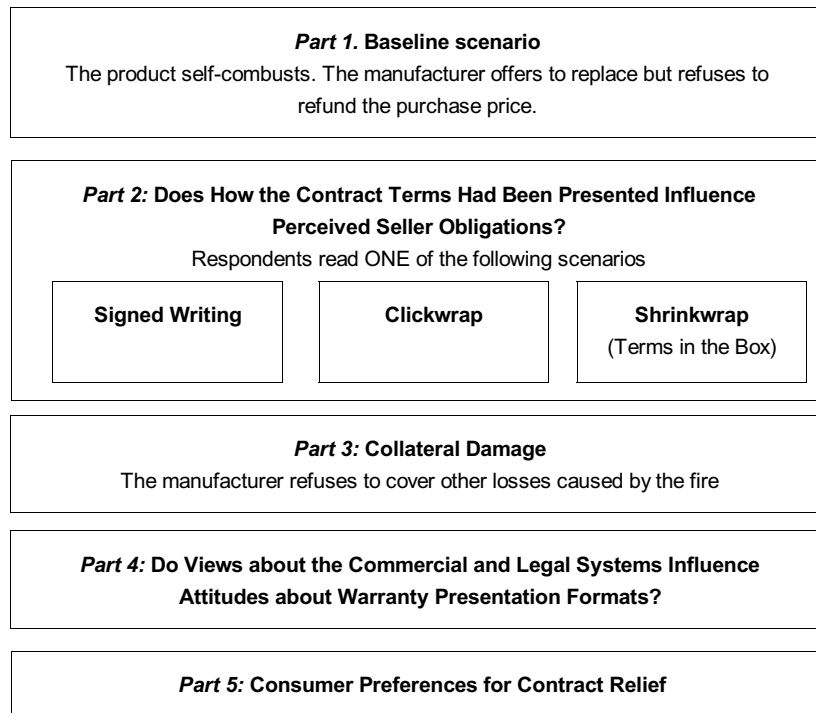
Accordingly, some consumer participants were informed they had signed off on the contract terms at the computer store prior to purchase in a signed written agreement (we call this the “signed writing” scenario). A second group was informed that they had clicked “I agree” to the terms presented on a computer screen prior to purchase (“clickwrap”). A third group was told that they had been presented with the contract terms of sales after opening the box in which the computer had been delivered (“shrinkwrap”). We randomly assigned consumer participants to one of the three conditions. In other words, a respondent saw the signed writing, or the click-through, or terms in the box, but not all three.

Research participants’ reactions to the manufacturer’s refusal to refund the purchase price were assessed at three points in time: first, after learning of the manufacturer’s refusal; then, after reviewing how contract terms of sale had been presented to them; and finally, after being made aware of collateral damage created by the faulty equipment. We assessed respondents’ perceptions of the manufacturer’s behavior using three variables: the seller’s *legal* obligation to refund the purchase price, the seller’s *moral* obligation to refund the purchase price, and the *fairness* of the manufacturer’s policy.

In addition to these primary variables, we asked about the buyer’s perceived assent to the terms, the reasonableness of the seller’s presentation method, and the reasonableness of the buyer’s incomplete reading of the terms. We also inquired about the respondents’ real-life methods for dealing with defective products. Finally, to provide some evidence of face validity of the experiment, we inquired as to the familiarity and believability of hypothetical conditions. The structure of the study is presented in Figure 1.

...”). *Id.*

52. *See supra* notes 26-35 and accompanying text.

Figure 1. Survey Design

The survey was administered via the Internet to 212 business students at a major southwestern university. Survey assignment to the three presentation format conditions was roughly equal with 67 study subjects assigned to the signed writing format, 74 to the clickwrap, and 71 to the shrinkwrap. We compared responses between groups. Below are the findings.

Part 1: Baseline Scenario

Method

Respondents were asked to carefully read the scenario and indicate the manufacturer's obligation to refund the purchase price. All respondents read the following:

Three weeks ago, you purchased a \$1,000 laptop from a well-known company that manufactures and retails computers and related equipment. You used the computer without incident since then, but this morning, when you booted up the computer, a small electric explosion flared out of the keyboard and started a fire which destroyed the computer.

You contacted the computer company and reported the loss. The company agrees that a defect likely caused the fire, and offers to ship a new one of the same model, free of charge, overnight.

You didn't like having to deal with the fire. And you know that replacing the lost data on your computer will be a big hassle.

And so you are unwilling to risk using that computer model again, and request a refund of your purchase price. The company refuses.

We then asked respondents about the manufacturer's obligation, if any, to refund the purchase price under these circumstances. Respondents indicated their response by sliding a lever along a continuum of 0 to 10 anchored by Strongly disagree/Strongly agree:

The computer company is morally obliged to refund the purchase price to you

The computer company is legally obliged to refund the purchase price to you.

Results and Discussion

Recall at this point consumer participants have not yet been informed of any warranty provisions. Without that information, study participants thought the manufacturer had a high moral and only a moderate legal obligation to refund the purchase price. On a ten-point scale, the moral obligation was rated 6.99 (standard deviation = 2.88) and the legal 5.23 (standard deviation = 0.21). The difference is statistically significant, meaning that the higher moral obligation rating is unlikely due to chance. Notice that the standard deviation was very small for the legal obligation. That means most respondents had similar answers. In contrast, there was more variability in the moral obligation meaning some respondents perceived a much higher obligation and others a much lower obligation.

Part 2: Does How the Contract Terms Had Been Presented Influence Perceived Seller Obligations?

Method

Next, we informed the study participants of the contract terms of service. These terms, as set forth below, limit the computer manufacturer's liability to repair or replacement of the defective computer.⁵³ Recall that contract theory

53. This is a relatively common provision in sales of consumer goods, and such limitations are generally enforceable. *See* U.C.C. § 2-316.

generally assumes buyers' assent to warranty terms when they have at least had an opportunity to read and accept or reject the terms, but assumes that assent is more doubtful if buyers have not been able to review the terms in advance.⁵⁴ Do consumers' subjective understandings match what contract theory suggests?

To find out, we told some consumer participants they had signed off on the contract terms at the computer store prior to purchase ("signed writing"). We informed other consumer participants that they had clicked "I agree" to the terms presented on a computer screen prior to purchase ("clickwrap"). We told still other consumer participants that they had been presented with the contract terms of sales after opening the delivered box ("shrinkwrap").⁵⁵ In all cases, we told the buyers that they had only glanced at the terms. Table 1 shows the scenarios.

54. *See id.* § 2-206.

55. *See Femminella, supra* note 6.

Table 1. How Research Respondents Were Informed of the Terms of Sale¹

Signed Writing	Clickwrap	Shrinkwrap
<p><i>Subjects in the “signed writing” condition were asked to carefully read the scenario.</i></p> <p>You had purchased the computer at their company-owned store. At the time of purchase, you signed a two-page “Terms of Sale” agreement for the computer and paid the purchase price.</p> <p>On the second page of the “Terms of Sale” was the following:</p> <p>COMPANY’S RESPONSIBILITY FOR MALFUNCTIONS AND DEFECTS IN HARDWARE (INCLUDING COMPUTERS AND ALL PERIPHERALS), AND ANY DAMAGES ARISING FROM SUCH MALFUNCTION OR DEFECT, IS LIMITED TO THE REPAIR AND REPLACEMENT OF THE MALFUNCTIONING OR DEFECTIVE UNIT, AND COMPANY SHALL HAVE NO OTHER OBLIGATION.</p> <p>You only glanced at the “Terms of Sale” and did not see the capitalized language.</p>	<p><i>Subjects in the “clickwrap” condition were asked to carefully read the scenario.</i></p> <p>You purchased the computer from the computer company’s website.</p> <p>Before you could confirm the purchase, you were presented with a screen labeled “Terms of Sale,” with a link to the computer company’s terms. The screen said: “I have read and agree to the Company’s Terms & Conditions for this purchase.” It would not let you continue with the transaction unless you clicked “I agree.”</p> <p>On the second page of the “Terms of Sale” was the following:</p> <p>COMPANY’S RESPONSIBILITY FOR MALFUNCTIONS AND DEFECTS IN HARDWARE (INCLUDING COMPUTERS AND ALL PERIPHERALS), AND ANY DAMAGES ARISING FROM SUCH MALFUNCTION OR DEFECT, IS LIMITED TO THE REPAIR AND REPLACEMENT OF THE MALFUNCTIONING OR DEFECTIVE UNIT, AND COMPANY SHALL HAVE NO OTHER OBLIGATION.</p> <p>You did not read the terms, but simply clicked “I agree” and proceeded with the transaction.</p>	<p><i>Subjects in the “shrinkwrap” condition were asked to carefully read the scenario.</i></p> <p>You had purchased the computer by telephone from the computer company’s toll-free number. When the box arrived, it contained a multi-page “Terms of Sale” sheet.</p> <p>On the second page of the “Terms of Sale” was the following:</p> <p>COMPANY’S RESPONSIBILITY FOR MALFUNCTIONS AND DEFECTS IN HARDWARE (INCLUDING COMPUTERS AND ALL PERIPHERALS), AND ANY DAMAGES ARISING FROM SUCH MALFUNCTION OR DEFECT, IS LIMITED TO THE REPAIR AND REPLACEMENT OF THE MALFUNCTIONING OR DEFECTIVE UNIT, AND COMPANY SHALL HAVE NO OTHER OBLIGATION.</p> <p>You only glanced at the “Terms of Sale” and did not see the capitalized language.</p>

Respondents read only one of the above three scenarios.

We then asked respondents about warranty performance obligations under the circumstances. Respondents indicated their responses by sliding a lever along a continuum from 0 to 10 anchored by Strongly disagree/Strongly agree:

The computer company is morally obliged to refund the purchase price to you.

The computer company is legally obliged to refund the purchase price to you.

It is fair that the computer company would limit their responsibility to repairing and replacing, rather than refunding the money for, the defective unit.

We also inquired about the consumer's perception of assent to the terms and the reasonableness of the company's presentation format (slider scale of 0 to 10 anchored by No/Yes):

Would you say you had actually agreed to the "Terms of Sale" of this purchase?

Including the clause in the Terms of Sale you signed was a reasonable way for the company to communicate the terms to you.

You acted reasonably in not reading the Terms of Sale carefully.

You acted responsibly in not reading the Terms of Sale carefully.

Results and Discussion

31We uncovered no statistically significant differences between the signed writing, clickwrap, and shrinkwrap groups with respect to the moral and legal obligations of the company to refund the purchase price, to the fairness of the company's policy, perceived assent, the reasonableness of the communication method, nor the buyer's reasonableness and responsibility about not reading the terms more carefully. Full results are shown in Table 2.

Table 2. Consumer Perceptions of Warranty Obligations Related to Purchase Refunds

Item	Scenario	Mean¹	SD¹	Are the differences in the means statistically significant?²
Company is morally obliged to pay for extra damage	Signed Writing	5.54	3.19	No (p < .22)
	Clickwrap Terms	5.31	3.18	
	Shrinkwrap Terms in the Box	6.17	2.77	
	Total	5.67	3.06	
Company is legally obliged to pay for extra damage	Signed Writing	1.61	2.26	No (p < .54)
	Clickwrap Terms	1.76	2.57	
	Shrinkwrap Terms in the Box	2.08	2.61	
	Total	1.82	2.49	
Fair for company to avoid extra damage liability	Signed Writing	5.11	2.90	No (p < .23)
	Clickwrap Terms	5.92	2.85	
	Shrinkwrap Terms in the Box	5.60	2.70	
	Total	5.56	2.82	
You had actually AGREED to the Terms of Sale	Signed Writing	5.22	3.33	No (p < .80)
	Clickwrap Terms	5.50	3.03	
	Shrinkwrap Terms in the Box	5.18	3.11	
	Total	5.30	3.14	
Including the clause in the Terms of Sale you received was a reasonable way for the company to communicate the terms to you.	Signed Writing	4.85	2.95	No (p < .69)
	Clickwrap Terms	4.75	2.75	
	Shrinkwrap Terms in the Box	5.15	2.86	
	Total	4.92	2.84	

Table 2. Consumer Perceptions of Warranty Obligations Related to Purchase Refunds

Item	Scenario	Mean ¹	SD ¹	Are the differences in the means statistically significant? ²
You acted reasonably in not reading Terms of Sale carefully	Signed Writing	3.73	2.86	
	Clickwrap Terms	3.89	2.61	
	Shrinkwrap Terms in the Box	3.79	2.50	
	Total	3.81	2.64	No (p < .94)
You acted responsibly in not reading Terms of Sale carefully	Signed Writing	2.05	2.17	
	Clickwrap Terms	2.48	2.36	
	Shrinkwrap Terms in the Box	2.19	1.73	
	Total	2.25	2.10	No (p < .47)

¹ Mean and SD refer to mean and standard deviation of the sample.

² This column shows results from a test that the difference between the means of the three warranty presentations is statistically significant. The p value (probability value) refers to the likelihood that the null hypothesis is true. P ranges from 0 to 1. Large p values (typically, >.05), as observed in this table, suggest any differences in the mean scores in the three warranty presentation format scenarios is due to chance.

Respondents were ambivalent about whether they had actually agreed to the terms of sale. Overall, respondents rated their agreement at 5.3, indicating they might or might not have agreed. Similarly, respondents were ambivalent about the reasonableness of the seller's approach to communicating the terms of sale, with an overall rating of 4.9, indicating they neither agreed nor disagreed with the reasonableness. Curiously, respondents were harsher on themselves, giving themselves low marks for the reasonableness (3.81) and responsibility (2.25) of not reading the terms more carefully.

In summary, when it comes to examining consumer attitudes toward warranty performance, we found no differences based on how the warranty was presented. We based our investigation on a familiar and common contract provision, namely refusing to refund the purchase price in the case of defective merchandise. The consumer was still held whole, in that the company agreed to replace the defective merchandise.

But what if the consumer's out-of-pocket losses were more sizable and the seller did not reimburse the consumer? Faced with bigger losses, would consumers be equally indifferent to the way the terms of sale were presented? Our next scenario addresses this.

*Part 3: Consequential Damages***Method**

To understand whether, in the face of more consequential losses, consumers would be equally indifferent to the way the terms of sale were presented, we presented an additional scenario to our study participants. We explained the fire created collateral damage not covered by the warranty:

Assume that in addition to the loss of the laptop, the fire it started required assistance from the Fire Department and resulted in \$3,000 in damage to the furnishings in your residence, not including the value of the computer.

The Fire Department tells you that the fire was obviously caused by an electrical fault in the computer.

You request that the company pay for the additional damage caused by the computer. The company refuses.

We then asked a battery of questions similar to those asked in Part 2.

Results and Discussion

Once again, we found no statistically significant differences related to the presentation format for the computer company's moral or legal obligation to cover the collateral damage, or the fairness of the company's refusal to cover the collateral damage. Similarly, there were no statistically significant differences in the perceived agreement to the terms nor to the reasonableness of the presentation method. Details are presented in Table 3.

Table 3. Consumer Perceptions of Warranty Obligations Related to Collateral Damage

Item	Scenario	Mean	SD	Are the differences in the means statistically significant?
Company is morally obliged to pay for extra damage	Signed Writing	8.11	1.95	No (p < .47)
	Clickwrap Terms	7.63	2.56	
	Shrinkwrap Terms in the Box	7.77	2.59	
	Total	7.83	2.39	
Company is legally obliged to pay for extra damage	Signed Writing	5.63	3.22	No (p < .85)
	Clickwrap Terms	5.36	2.99	
	Shrinkwrap Terms in the Box	5.60	3.03	
	Total	5.53	3.07	
Fair for company to avoid extra damage liability	Signed Writing	4.13	2.81	No (p < .89)
	Clickwrap Terms	4.12	2.89	
	Shrinkwrap Terms in the Box	4.33	3.02	
	Total	4.19	2.90	
You had actually AGREED to the Terms of Sale	Signed Writing	4.17	3.06	No (p < .91)
	Clickwrap Terms	4.38	2.86	
	Shrinkwrap Terms in the Box	4.31	2.81	
	Total	4.29	2.90	
Including the clause in the Terms of Sale you received was a reasonable way for the company to communicate to you the terms about not paying for fire damage.	Signed Writing	3.38	2.59	No (p < .15)
	Clickwrap Terms	3.41	2.53	
	Shrinkwrap Terms in the Box	4.14	2.73	
	Total	3.64	2.63	

Thus, while the current approach to enforceability considers how the particular contract was created,⁵⁶ we again find consumers have a different perspective. Even faced with sizable collateral damage, consumers indicated no statistically significant differences between the signed writing, clickwrap, and shrinkwrap groups with respect to the moral and legal obligations of the company

56. See, e.g., RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. LAW INST., Council Draft No. 5 2018).

to refund the purchase price, nor to the fairness of the company's policy, nor to whether the consumer had actually agreed to the terms, nor to the reasonableness of the company's method of communicating the warranty terms.

Part 4: Do Views about the Commercial and Legal Systems Influence Attitudes about Warranty Presentation Formats?

Near the end of the experiment, we asked respondents about their overall attitudes toward the commercial and legal systems. As summarized in Table 4, our respondents believe businesses routinely attempt to take advantage of consumers by using unfair contract terms ($n = 6.4$ on a 10-point scale anchored by Disagree/Agree) and the legal system should resolve issues for consumer in situations like this ($n = 7.3$). However, there is less agreement that the legal system does a good job in resolving such issues ($n = 5.0$) which explains, presumably, why consumers shop with reputable sellers ($n = 7.6$).

Table 4. Consumer Attitudes Toward the Legal System and Commerce

($n=212$)

	Mean*	Standard Deviation
The legal system <u>should</u> resolve issues for consumers in situations like this	7.26	2.18
The legal system <u>does</u> a good job in resolving issues for consumers such as this one	4.98	2.02
Businesses routinely attempt to take advantage of consumers by using unfair contract terms	6.39	2.46
When I purchase items like laptops, I shop around and try to make sure I am dealing with a seller that will stand behind the products it sells.	7.59	2.58

* 10 point scale anchored by 0=Disagree/10=Agree

Do these general attitudes toward the commercial and legal systems influence the ways our respondents replied? For example, perhaps people who think businesses never craft unfair contracts see little legal obligations on the part of the seller to refund the purchase price or to cover the collateral damage, whereas more skeptical consumers do see a legal obligation. To investigate this hypothesis, we reran our statistical analyses while controlling for underlying commercial and legal attitudes. We found that, indeed, moral outrage was consistently higher for believers in a strong legal system and for skeptics of

business ethical practices. However, even by controlling for commercial and legal attitudes, the way the warranty information was presented had no statistically significant effect on the seller's perceived legal obligations.

We next sought insights into consumers' preferences for relief from onerous terms of sale.

Part 5: Consumer Preferences for Contract Relief

Finally, we asked consumers about what they would do in real life, faced with a similar situation of having sustained defective equipment and collateral loss from the fire. Consumers indicated a likelihood of asking for a refund ($n=8.1$; 10-point scale anchored by Extremely unlikely=0/ Extremely likely=10) and of asking for payment for the collateral losses ($n=7.9$). See Table 5 for details. As expected, responses were not significantly different depending on how the warranty information was presented.

company's fee-based arbitration (n=5.5) or to sue in small claims court (n=5.2). A similar pattern of responses emerged if the company refused to refund the purchase price and to cover the collateral damage expenses.

IV. ANALYSIS

A. The Opportunity to Ignore

Our study involved one of the richest examinations of consumer attitudes toward contracting in the literature. The key takeaway for our purposes (see Table 2) is that we uncovered no statistically significant differences between the signed writing, clickwrap, and shrinkwrap groups with respect to (a) the moral and legal obligations of the company to refund the purchase price, (b) the fairness of the company's policy, (c) the consumers' own views of their perceived assent, (d) the reasonableness of the seller's method of communicating the terms, or (e) the consumer's own responsibility to read and reasonableness in not reading the terms more carefully. It simply does not matter to consumers how or when they get the terms.

We do not believe that this finding should be surprising. It is difficult to imagine that an ordinary consumer would think that the terms of the contract he was entering into would differ significantly based on whether he bought it online or in a store.⁵⁷ We doubt that even a lawyer, without having previously been immersed in the niceties of common-law contracts and the UCC, would suspect that there might be a significant difference.

Clearly, it is in the interest of mass sellers that all of their contracts be formed on the same set of terms, regardless of the particular channel in which the particular good or service passed. Uncertainty is expensive. It might nevertheless be reasonable to impose different rules, if we concluded that it was important to consumers to do so. But our study suggests that it is entirely unimportant to them. On the other hand, it is clearly in the interest of consumers to have contract terms that provide reasonable remedies and avoid unfairness. It seems to us that unobjectionable terms should routinely be enforced, and objectionable ones should be stricken.

If so, then current law and the *RCC* approach to formation, are misguided.⁵⁸ Consumers do not appear to value the opportunity to see the terms before they buy. Our study suggests that consumers are much more interested in what the terms are rather than how they were delivered or when they were received. It seems odd to tell a consumer who objects to an apparently unfair term that, "You

57. See Gan, *supra* note 4, at 648-49, *see also* Oman, *supra* note 4, at 236-242.

58. See generally RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. LAW INST., Council Draft No. 5 2018). This is not to say that the *RCC* is not a potentially valuable contribution. Although we critique its focus on the time of term delivery, its provisions do offer a clear roadmap to sellers on how to minimize uncertainty by more plainly spelling out what kinds of things will or will not be viewed as adequate disclosure.

should have bought it over the telephone, not online.” A better approach from a consumer protection perspective might be greater policing of standard terms for unfairness—something that the *RCC* itself takes pains to emphasize.⁵⁹

As to the surge in scholarship emphasizing the importance of “assent,” it suffers from a similar problem. The language of the scholarship focuses on increasing disclosure, but that is unlikely to have much effect. Much of it seems rooted in antipathy to standard contract terms imposed by business.⁶⁰ But if these standard terms are unfair or unreasonable, requiring more disclosure and adding greater requirements for finding “assent” seems an awkward way to go about dealing with the problem. Much of the opposition building to the *RCC*, for example, is based on the argument that it does not go far enough in requiring some kind of voluntary assent to terms.⁶¹ But adding more layers of disclosure and requiring extra buttons to click would seem to make transactions more cumbersome without solving the root problems.

B. Other Findings

In addition to our primary finding, our study raised several interesting issues that could certainly use further exploration.

First, there is the question of whether consumers, when they entered into contracts, thought that they had actually agreed (*i.e.*, expressed assent) to all the standard terms? On the whole, they were not sure ($n = 5.3$), but there was unusually high variability. Some rated this very high (they clearly felt they had agreed) and others very low (they did not believe they had at all). We did not explore this in any detail, and we do not know what caused the variation.⁶²

Second, we found—not too surprisingly—that consumers did differentiate between sellers’ moral and legal obligations. The moral obligation to refund was rated considerably higher ($n = 6.99$) than the legal obligation ($n = 5.25$). Consumers plainly think sellers *ought* to refund their money but are equivocal over sellers’ *legal obligation* to do so.⁶³ This may reflect general distrust of the legal system’s protection of consumers, but more research would be necessary to determine that.

Third, we noted an interesting correlation between moral and legal obligation. Consumers who were told the applicable legal rule tended to change their view of moral obligation to align more closely with the legal standard. This is not

59. *Id.*

60. Oman, *supra* note 4, at 239-242.

61. *Id.*, *see also* RADIN, *supra* note 4, at 82.

62. It may be due to the vagueness of the word “agree,” which we did not define. Some respondents thus may have thought we were asking “did you subjectively agree?” while others thought we were asking “are you bound to the terms?”

63. We do not know why they think this. They might simply be ignorant of legal rules and opt for a median position, neither yes nor no. They might be cynical about the law, believing that it will favor businesses over them. They might even be knowledgeable about the legal rules and understand that a monetary refund is *not* a remedy that is ordinarily available in contract litigation.

surprising, but the effect was plainly significant here ($n = 6.99$ to $n = 5.67$).

Fourth, we saw that consumers plainly think they *ought* to read contract terms, even though they never do. They believe themselves irresponsible ($n = 2.25$) and unreasonable ($n = 3.81$) in failing to do so. How and why they feel this way—whether it is, for example, rooted in their notions of personal responsibility or in the idea that everyone is supposed to know the law—we cannot say.

V. CONCLUSION

There are few more vexing questions in contract law than that of how we should deal with standard boilerplate terms imposed on consumer buyers. We have shown here that much of the current law, and proposals for clarifying it, may be misguided. We believe that a superior approach will focus less on the *form* the contract process takes—ensuring that consumers have what we have called a right to ignore—and more on the substantive utility and fairness of the terms.