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ABUSE OF CONTRACT: A PROPOSAL FOR A NEW CAUSE OF ACTION

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ABSTRACT

With the growth of online commerce and the platform economy, many companies are including provisions in their online terms and conditions that extend far beyond what reasonable consumers would expect. Some terms and conditions purport to bind customers to separate contracts in future transactions that have little to do with the first contract. Other boilerplate purports to cover family members of the customer who created an account. Some retailers have argued that people shopping in their brick-and-mortar stores are subject to

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terms and conditions because those shoppers had at some point previously created an online account. For example, Disney argued that a claim for wrongful death from food allergies was required to be heard in arbitration because the decedent's husband had downloaded a free trial of the Disney+ streaming service five years prior to his wife's death. Disney only walked back its argument when the news story went viral on social media and created negative publicity for the company.

This Article proposes two approaches to addressing such overreaching contracts, a contractual defense and a related tort claim. The defense is based on fraud in the inception, a contract law doctrine that protects parties from being bound to a contract in circumstances in which a person manifests assent under false pretenses. Then, the Article proposes the creation of a new tort law cause of action for abuse of contract. Related to the tort of abuse of process, the abuse of contract cause of action would create a nonwaivable civil cause of action in circumstances where online retailers have inserted overreaching terms for in terrorem effect. Using this combination of a contract defense and a tort claim will remove the use of overreaching terms.

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INTRODUCTION

On October 5, 2023, a New York physician died shortly after eating dinner at an Irish pub, located in Disney Springs, Florida.¹ In 2024, her husband, Jeffrey Piccolo, filed a wrongful death lawsuit against the restaurant (and the restaurant's corporate owner, Disney) alleging that the restaurant had negligently served his wife food containing allergens.² According to the complaint, both husband and wife had informed the restaurant staff about the severity of her food allergies to nuts and dairy, and were repeatedly assured both before and after her meal was delivered that it would be allergen-free.³ Shortly after eating dinner, Piccolo's wife collapsed and was rushed to the hospital, where she died from anaphylaxis despite a self-administered dose from her EpiPen.⁴ According to the medical examiner's report, there were significant quantities of nuts and dairy in her system, which led to the fatal allergic reaction.⁵

While these events were shocking and tragic in their own right, what happened next in the case, according to the husband's lawyers, "border[ed] on the surreal."⁶ Disney filed a motion to compel

1. Complaint at 2-6, *Piccolo v. Great Irish Pubs Fla., Inc.*, No. 2024-CA-00616-O (Fla. Cir. Ct. Feb. 22, 2024).

2. *Id.* at 1-3. There were potentially disputed questions over ownership of the restaurant and its agency relationship with Disney. See Defendant Amended Answer & Affirmative Defenses at 10-12, *Piccolo*, (No. 2024-CA-001616-0). Despite these questions, Disney defended the case as if it were properly a defendant in the litigation. See Defendant Motion to Compel Arbitration & Stay Case at 1-2, *Piccolo*, (No. 2024-CA-001616-0) [hereinafter Defendant Motion to Compel] (requesting an order compelling arbitration despite the outstanding questions regarding ownership and agency).

3. Complaint, *supra* note 1, at 4-5.

4. See *id.* at 5-7.

5. *Id.* at 7; see also Ed Shanahan, *Disney Sued over Doctor's Allergy Death After Meal at Resort Restaurant*, N.Y. TIMES (Feb. 29, 2024), <https://www.nytimes.com/2024/02/29/nyregion/disney-world-allergy-death-lawsuit.html> [<https://perma.cc/3SDA-85CY>].

6. Imran Rahman-Jones, *Disney+ Terms Prevent Allergy Death Lawsuit, Disney Says*, BBC (Aug. 15, 2024), <https://www.bbc.com/news/articles/c8jl0ekjr0go> [<https://perma.cc/6XR2-63EA>] (noting that Piccolo's lawyers called Disney's arguments "preposterous" and "inane"); see also Minyvonne Burke, *Disney Says Man Can't Sue over Wife's Death Because He Agreed to Disney+ Terms of Service*, NBC NEWS (Aug. 15, 2024, at 12:55 ET) <https://www.nbcnews.com/news/us-news/disney-says-man-cant-sue-wifes-death-agreed-disney-terms-service-rca166594> [<https://perma.cc/3BDV-ZP8A>] (quoting plaintiff's attorneys' remarks that the "notion that terms agreed to by a consumer when creating a Disney+ free trial account would forever bar that consumer's right to a jury trial in any dispute ... is so outrageously

arbitration, citing the terms of service for the Disney+ streaming service as the basis for moving his and the estate's claim into arbitration.⁷ Five years prior to his wife's death, Piccolo had downloaded a free trial of the popular Disney+ streaming service for movies and television shows.⁸ To access Disney+, users needed to create an account and click "Agree & Continue" to the Disney+ terms of service.⁹ The Disney+ terms of service contained a pre-dispute mandatory arbitration clause that purported to cover all future disputes with Disney.¹⁰ As such, in its Motion to Compel Arbitration, Disney argued that the lawsuit concerning the fatal allergic reaction at the Disney Springs restaurant was a matter for arbitration.¹¹

After the Motion to Compel Arbitration was filed, the news media picked up on the story.¹² The story also went viral on social media, where many users blasted Disney for its legal strategy.¹³ On various discussion boards and in the comment sections of news websites, users expressed outrage at the suggestion that a free week of a

unreasonable and unfair." (omission in original)).

7. See Defendant Motion to Compel, *supra* note 2, at 3-4.

8. *Id.* at 3. The Motion to Compel argued that "Piccolo cannot credibly dispute that a valid arbitration agreement exists. Piccolo entered into a 'clickwrap' agreement by selecting both a 'checkbox' and 'agree and continue' to create a Disney account." *Id.* at 6.

9. *Id.* at 3.

10. *Id.* at 3-4.

11. See *id.* at 1-2. The Motion relied on the first page of the Subscriber Agreement, which "state[d], in all capital letters, that 'any dispute between You and Us, Except for Small Claims, is subject to a class action waiver and must be resolved by individual binding arbitration.'" *Id.* at 3.

12. See, e.g., Cora Lewis & Sean Murphy, *Wrongful Death Suit Against Disney Serves as a Warning to Consumers When Clicking 'I Agree,'* AP NEWS (Aug. 15, 2024, at 23:03 ET), <https://apnews.com/article/disney-allergy-death-lawsuit-nyu-doctor-florida-8a6256b58311a01226d167fa80d37aad> [<https://perma.cc/BHR9-ANGC>]; Jodi Goldberg, *Disney+ Clause Prevents NY Man from Suing over Wife's Peanut Allergy Death, Company Says*, FOX 5 N.Y. (Aug. 15, 2024, at 12:19 ET), <https://www.fox5ny.com/news/disney-faces-lawsuit-over-fatal-allergy-incident-after-doctor-dies-disney-springs-amy-tangsuan> [<https://perma.cc/AFE4-JNQ6>]; Carolyn Gusoff & Jesse Zanger, *Disney+ Terms Prevent Disney World Food Allergy Wrongful Death Lawsuit, Attorneys Claim*, CBS NEWS (Aug. 15, 2024, at 16:08 ET), <https://www.cbsnews.com/newyork/news/disney-world-food-allergy-death/> [<https://perma.cc/A6JA-XEYV>].

13. For a sample of the internet comments expressing outrage, a contemporaneous Reddit thread noted many of the comments echoed on social media. See u/StagCodeHoarder, REDDIT (r/disney), *Disney+ Terms Prevent Allergy Death Lawsuit, Disney Says* (Aug. 14, 2024), https://www.reddit.com/r/disney/comments/1es26h5/disney_terms_prevent_allergy_death_lawsuit_disney/ [<https://perma.cc/XWR4-5LQL>].

video streaming service would waive the jury trial rights of their spouse's estate when the death of the spouse was a result of eating at a restaurant.¹⁴ An internet user accused Disney of advancing a "strange and rather terrifying argument," also calling it "cartoonishly evil."¹⁵ On one of the Reddit threads about the lawsuit, users asked questions like, "What does disney+ the streaming service have to do with an allergic reaction at a restaurant ...?"¹⁶ and "How does disney+ cause death?"¹⁷ The anger in many of the social media comments reflected discomfort with the perceived overreaching of the terms in a way that was unfair to customers. As the negative backlash continued online, pressure mounted on Disney to modify its litigation strategy.¹⁸ In response to the outcry, Disney walked back its legal strategy and withdrew its Motion to Compel Arbitration.¹⁹

14. See, e.g., *id.* A number of users contemplated cancelling their Disney+ service or upcoming vacations. See, e.g., *id.* Others speculated that lawyers did not think through the implications of their argument and that as a result there would be negative consequences for Disney's reputation as a company. See, e.g., u/Bug_Zapper69, *Disney+ Terms Prevent Allergy Death Lawsuit*, *supra* note 13 ("As a longtime Disney stockholder, the optics on this are so horrible that it's going to make a negative revenue impact.... This is one of those time[s] somebody in legal didn't think it through."). Another social media user described Disney's argument as "batshit insane." Comment, @keanudreads (Aug. 14, 2024) on @culturecrave, THREADS, <https://www.threads.com/@allisunnyy/post/C-pJ7zXOg92> [<https://perma.cc/MS8W-BBWE>] (commenting on post describing Disney's attempt to get the suit dismissed).

15. John Boitnott, *Disney Faces Backlash over Terms of Service Defense in Wrongful Death Suit*, LINKEDIN PULSE (Oct. 23, 2024), <https://www.linkedin.com/pulse/disney-faces-backlash-over-terms-service-defense-death-john-boitnott-ckorc> [<https://perma.cc/UK7K-3Z8G>].

16. Comment, u/oofergang360 on u/StagCodeHoarder, *supra* note 13.

17. Comment, u/Nino_sanjaya on u/StagCodeHoarder, *supra* note 13.

18. See Rachel Treisman, *Disney Backtracks on Request to Toss Wrongful Death Suit over Disney+ Agreement*, NPR (Aug. 20, 2024, at 13:45 ET), <https://www.npr.org/2024/08/14/nx-s1-5074830/disney-wrongful-death-lawsuit-disney> [<https://perma.cc/426E-4KMR>].

19. See Notice of Withdrawing Motion to Compel Arbitration & Stay Case at 1, *Piccolo v. Great Irish Pubs Fla., Inc.*, No. 2024-CA-0026-O (Fla. Cir. Ct. Aug. 20, 2024); see also Claire Fahy, *Disney Backs Down From Effort to Use Disney+ Agreement to Block Lawsuit*, N.Y. TIMES (Aug. 20, 2024), <https://www.nytimes.com/2024/08/20/nyregion/disney-arbitration-allergy-death-lawsuit.html> [<https://perma.cc/JT3D-QS72>]; Philip Marcelo, *Disney Drops Bid to Have Allergy-Death Lawsuit Tossed Because Plaintiff Signed up for Disney+*, AP NEWS (Aug. 20, 2024, at 16:56 ET), <https://apnews.com/article/disney-allergy-death-lawsuit-b66cd07c6be2497bf5f6bce2d1f2e8d1> [<https://perma.cc/EJ8X-RMTM>] (quoting the chair of Disney's theme park division as stating that "At Disney, we strive to put humanity above all other considerations.... With such unique circumstances as the ones in this case, we believe this situation warrants a sensitive approach to expedite a resolution for the family who have [sic] experienced such a painful loss").

Absent the response from social media, whether Disney's Motion to Compel Arbitration would have prevailed is unclear.²⁰ Courts have a mixed and unpredictable record regarding enforcing boilerplate even when the terms seem to be overreaching.²¹ While most laypeople's notion of fundamental fairness in contracting would encompass the reasonable expectations of consumers, no such standard currently exists in the law.²² Although Disney withdrew its Motion to Compel Arbitration in this particular instance, the arbitration clause the company relied on is still present in the terms of use for the Disney+ streaming service today.²³

It is widely acknowledged that adhesion contracts create hardships for consumers and workers.²⁴ But boilerplate provisions are

20. Although inconsistency can seem frustrating, other commentators have argued that it is part of the legal landscape of contract law. *See, e.g.*, Nicholas Walter, *Unpredictability in Contract Law*, 127 PENN ST. L. REV. 701, 705 (2023) (“[W]e should change our expectations of contract law. It is impossible for the rules of contract law to be as precise as Langdell desired. There will always be some inherent unpredictability in the rules of contract law ... as has been often remarked upon, the only contract cases that arrive in courtrooms are the difficult ones—which by definition are also the unpredictable ones.”).

21. *See* James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 256 (2018) (“The case against boilerplate may be clear, yet enforcement of boilerplate continues unabated. A handful of courts have expressed reservations when the terms arrive late in the transaction, but even then the weight of authority strongly favors enforcement.” (footnotes omitted)); *see also* IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 992-93 (7th Cir. 2008) (“[I]t has been hard to find decisions holding terms invalid on the ground that something is wrong with non-negotiable terms in form contracts.... As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices.”); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006).

22. *See* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 95-98 (2013) (collecting cases that enforced boilerplate as written).

23. *See* *Disney Terms of Use-United States*, THE WALT DISNEY CO. (May 24, 2024), <https://disneytermsofuse.com/english/> [<https://perma.cc/E2AM-DJAF>]; *see also* Fahy, *supra* note 19 (quoting Piccolo's lawyer, Brian Denney, who noted the arbitration clause at issue in the case still exists online and “potentially puts other people injured by Disney's negligence at risk of facing a similar legal challenge”).

24. On consumers, *see* CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers, CONSUMER FIN. PROT. BUREAU (Mar. 10, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/> [<https://perma.cc/RW4S-NQSF>]; Joanne Doroshow, Letter to the Editor, *Forcing Consumers Into Arbitration*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/04/opinion/forcing-consumers-into-arbitration.html> [<https://perma.cc/FQ7B-6VUC>]. On workers, *see* ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 4-6 (2017), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/2FWC-GGXU>]. Rideshare drivers alleged in a complaint against Uber filed in a California state court that

too time-consuming for most people to read,²⁵ and even if read, most people find the prolix language used too difficult to comprehend.²⁶ Even if read and understood, it may make no difference as many boilerplate contracts are offered only on a take-it-or-leave-it basis.²⁷ As a result, studies have proven that only a tiny number of users take the time to actually read the terms and conditions omnipresent on websites.²⁸ For example, a recent study showed that consumers accessed end-user license agreements (EULAs) only 0.08 percent of the time.²⁹ Most people view online terms and conditions as little more than an obstacle to making a purchase.

From a theoretical perspective, many commentators have lamented that adhesion contracts vitiate consent.³⁰ Some commenters have contended that terms and conditions may not be true contracts at

misclassification of employee status through online terms may save Uber \$500 million a year. See First Amended Class Action Complaint for Violation of the California Unfair Competition Law & the California Unfair Practices Act at 2-3, *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074 (N.D. Cal. 2019) (No. 18-cv-05546); see also *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT 1 (Oct. 2020), <https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf> [<https://perma.cc/5UDX-RS9W>].

25. See, e.g., David Lazarus, *Want to Read a Tech Company's User Agreements? Got 90 Minutes to Spare?*, L.A. TIMES (Aug. 24, 2021, at 06:00 PT), <https://www.latimes.com/business/story/2021-08-24/column-consumer-contracts> [<https://perma.cc/9QZU-FEBH>].

26. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 242 (1995); see also Avery W. Katz, *Contract Theory—Who Needs It?*, 81 U. CHI. L. REV. 2043, 2053-60 (2014) (discussing Eisenberg's ideas around bounded rationality).

27. See Cheryl B. Preston, "Please Note: You Have Waived Everything": *Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 553-54 (2015).

28. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 19 (2014); see also Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002) (noting that given literacy rates, few American adults could understand and use contract disclosures even if they tried); cf. Shmuel I. Becher & Uri Benoliel, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2258 (2019) ("[U]nder U.S. law, the duty to read is unilateral: although consumers are presumed to read contracts, there is no general duty on suppliers to provide consumers with readable contracts.").

29. Bakos et al., *supra* note 28, at 19, 20 tbl. 3; see also Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 547-48 (2014); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 204 (2010) (noting that most consumers are not likely to read terms and conditions).

30. See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 3-18 (2013).

all,³¹ but are more akin to status-based provisions that are foisted on unwilling subjects.³² Moreover, the literature has empirically documented how widespread overreaching contracts have become in commercial markets.³³ If anything, technology has exacerbated the problems of fine print terms.³⁴ In our digital age, websites are not bound by limitations on printing and filing hard copy versions of the terms.³⁵ As a result, the terms can grow indefinitely in length and complexity. Terms and conditions on many online platforms today also govern more aspects of life than they used to.³⁶ Apart from questions of warranties and damages, digital platform conditions may ask users to waive fundamental individual rights issues, such as speech and privacy.³⁷

31. See Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 154 (2021) (“We respect freedom of contract so people are free to arrange things as they wish; free to create and delete rights; and free, generally, of governmental interference. If they want to litigate in Reykjavík, so be it. If they wish their transaction to be subject to Belgium’s laws, buy a pig in the poke for a million dollars, make payment in Bitcoin, or have an arbiter in Aruba decide their dispute, they generally have the right to do so.... So it is that courts almost invariably invoke the hoary rhetoric of ‘consent’ and ‘manifestation of mutual intent’ just before they impose some obligation or award damages against a party, as if to say, ‘You brought this upon yourself, don’t look at us.’ But we should look at us—the judges. It is judges who call these things ‘contracts’ which, sometimes, eviscerate important default rights. But many of these are not really contracts, that is, to be endorsed as if both sides had actually made an agreement.”); see also *infra* Part I.A.

32. See generally HENRY SUMNER MAINE, ANCIENT LAW (2d ed. 1863) (tracing the journey from status-based relationships to contractual ones).

33. Cf. Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 627 (2009) (“Very few of our participants (students at the De Paul University) read the contract/consent form that they were asked to sign and that the vast majority (95.6%) signed it, even though it contained terms that were outrageous or which conflicted in important ways from what they were promised by the person seeking their consent.”).

34. See *infra* Part V.A; see also Alberto R. Salazar V., *Unconscionability, Smart Contracts, and Blockchain Technology: Are Consumers Really Protected Against Power Abuses in the Digital Economy?*, 9 INT’L J. CONSUMER L. & PRAC. 73, 94 (2021) (“Companies’ apparent unwillingness to encode fair terms and conditions in smart contracts and consumers’ inability to detect unfair terms and bring an action in response in conjunction with the limitations of regulators and courts to enforce fairness standards in the digital economy may render the doctrine of unconscionability ineffective.”).

35. Andrea J. Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights*, 110 IOWA L. REV. 497, 529 (2025).

36. See generally Jonathan F. Harris, *Consumer Law as Work Law*, 112 CAL. L. REV. 1 (2024) (describing how the fine print governs working relationships as well as consumptive relationships).

37. Andrew Keane Woods, *The New Social Contracts*, 77 VAND. L. REV. 1831, 1834 (2024)

The Disney+ allergy case is part of a disturbing trend in online contracts.³⁸ Nowadays, a shopper may find themselves bound to a set of terms governing their relationship with a brick-and-mortar store for the sole reason that they had previously opened an online account with the same retailer.³⁹ Sometimes the corporate structure or ownership of the retailer is not obvious to the consumer or employee, but a corporation may try to argue that the customer is bound to a contract with all of their related corporate entities.⁴⁰ And some corporations have argued that a terms and conditions statement will bind the person who clicked on it for a future, completely different transaction or even type of claim.⁴¹ In other instances, the company will try to hold someone to the terms of service that a different person, such as a family member, clicked on.⁴² These are contracts far beyond the “normal” advantage that a large corporate drafter would have over consumers.⁴³ This is abuse of contract.⁴⁴

(noting that the scale of online contracts are massive and that over half of adults in the world have a contract with Facebook).

38. See David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 638 (2020) (collecting cases and cuttingly stating that “[f]orced arbitration is a hallmark of the modern American civil justice system”). For a discussion of Professor Horton’s work on “infinite arbitration”, see *infra* Part I.B.1.

39. See *infra* Part II.B.

40. See *infra* Part II.D.

41. See *infra* Part II.C.

42. See *infra* Part II.A.

43. Of course, we have become so accustomed to terms and conditions that most people’s expectations of what is reasonable have changed because of years of having harsh terms foisted upon the public. Cf. Peter Linzer, *Contract as Evil*, 66 HASTINGS L.J. 971, 1009 (2015) (“[C]ontract is in many ways a matter of public law, often overwhelmingly so. And when we ignore that intertwining of public and private law and instead fall in love with contract and deify it as the product of individual free will, we forfeit the public’s rights, as well as those of individuals, and hand them over to people and companies and their lawyers who can manipulate the contract process.”).

44. I label this phenomenon “abuse of contract” to parallel the new tort that I am proposing later in the Article. Note that other commentators have also used the term “abuse” or “abuse of contract,” but they are speaking more generally about a description of the harshness of overreaching terms, rather than the creation of a new tort. See Boyack, *supra* note 35. Professor Boyack’s work examines one hundred sets of terms and conditions to analyze them for problematic legal impacts and will be discussed in this Article. *Infra* note 162.

Beyond “abuse,” there is also various other terminology that is applied to boilerplate, including overreaching contracts, and even “toxic promises,” which are defined as “inaccurate, dishonest, misleading or manipulative promises” that consumers might discover only after they have clicked through the contract terms. Shmuel I. Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. REV. 753, 756 (2022). David Horton uses the term

This Article proposes new approaches toward these types of overreaching contracts in a way that advocates and courts can implement straight away. The solution includes both a contract defense—fraud in the inception⁴⁵—and a tort law cause of action—abuse of contract.⁴⁶ The defense of fraud in the inception has traditionally applied to instances in which parties are misled about the nature of what they are signing, or that what they are signing modifies their legal rights.⁴⁷ Once the fraud in the inception defense is established, the next step would be to have the party that has been taken advantage of bring a case for a new tort—abuse of contract.⁴⁸ Drawing from the elements of the existing tort of abuse of process, a new tort law cause of action would change the incentives that encourage overdrafting for an *in terrorem* effect.⁴⁹ These reforms are needed to prevent abuse of contract.

I. SURVEYING THE LEGAL ISSUES

According to their court pleadings, on April 23, 2022, the Smiths, an African American family, alleged that they were subject to racial profiling when they went shopping at their local Walmart.⁵⁰ The Smiths chose their items, paid for their groceries, and were leaving the store when an employee yelled at them, accusing them of stealing.⁵¹ The Smiths responded by offering to show their receipt.⁵² The employee, however, called over a colleague and together they blocked the family from leaving the store.⁵³ The incident happened in front of the Smiths' two small children as well as the children's classmates.⁵⁴ Eventually the police were called, and a manager

“infinite arbitration clauses,” a promising terminology. *See Horton, supra* note 38, at 639. The problem of abusive adhesion contracts, however, is that they mandate arbitration for disputes beyond the original contract. *See id.* at 638.

45. *See infra* Part III.B.

46. *See infra* Part IV.

47. *See infra* Part III.A.

48. *See infra* Part IV.

49. *See infra* Part IV.

50. *Smith v. Walmart, Inc.*, No. 22-CV-00568, 2023 WL 5215376, at *1-2 (W.D. Va. Aug. 14, 2023).

51. *Id.* at *1.

52. *Id.*

53. *Id.*

54. *Id.*

arrived, who recognized the Smiths and said the incident was a misunderstanding.⁵⁵ The manager noted that the employee who had initiated the confrontation had previously had difficult interactions with Black customers.⁵⁶

In the aftermath of these events, the Smiths hired an attorney and filed a lawsuit against Walmart for race discrimination in public accommodations, defamation, and false imprisonment.⁵⁷ In response to the complaint, Walmart asserted an affirmative defense based on an arbitration provision.⁵⁸ It noted that Ms. Smith had previously clicked an agreement to an arbitration clause when she had worked as a driver for the Spark Driver platform.⁵⁹ Spark Driver is an on-demand delivery mobile application owned by Walmart.⁶⁰ The Spark Driver website notes on its landing page that the drivers are running their own businesses.⁶¹

The court enforced the arbitration provision against Ms. Smith in her personal capacity and ruled in such a way that extended the holding to her family's claims as well.⁶² The court began by discussing the Federal Arbitration Act's (FAA) policy encouraging arbitration and also noted that the Spark Driver clickwrap covered "all disputes between the [p]arties."⁶³ The court then reasoned that Ms. Smith's claims regarding her civil rights within the store should be included because of the broadness of the clause.⁶⁴ The court noted that Mr. Smith's claims would also be stayed, because they were "essentially identical" to those in Ms. Smith's case.⁶⁵ The court noted that collateral estoppel or res judicata might apply to Mr. Smith's claims and bar his lawsuit, even though he never clicked on or otherwise agreed to an arbitration provision.⁶⁶

55. *Id.* at *1-2.

56. *See id.* at *2.

57. *Id.* at *1.

58. *Id.* at *3.

59. *Id.* at *2-3.

60. *Id.* at *2.

61. SPARK DRIVER, https://www.sparkdriverapp.com/en_us.html [<https://perma.cc/7G98-CWUV>] ("The Spark Driver app is an excellent way to run your own business compared to traditional delivery driver jobs, seasonal employment, or part-time jobs.").

62. *Smith*, 2023 WL 5215376, at *4, *6.

63. *Id.* at *3-4.

64. *Id.* at *4.

65. *Id.* at *6.

66. *Id.*

The Smiths were done wrong in the first instance by Walmart and in the second by the court's decision. Most reasonable consumers would not think that the terms of working as a delivery driver would later prevent them from challenging racial profiling in a retail store. But the law here, as we see from this decision, is unpredictable and often mismatched with what reasonable consumers believe. While the Disney+ lawsuit succeeded in going viral,⁶⁷ this case did not have that luck, and the Smiths were stuck in arbitration.⁶⁸

Both *Smith v. Walmart* and the Disney+ allergy case have taken place at the intersection of several market and consumer trends that have become increasingly concerning in the last decade.⁶⁹ Boilerplate contracts have continued to proliferate alongside the increase of e-commerce and digital labor platforms.⁷⁰ These trends are occurring at the same time that many large corporations have been consolidating market power.⁷¹ Although touted as creating efficiencies through economies of scale, widespread mergers and acquisitions reduce competition, which has empirically been shown to make consumers worse off.⁷² To see how these trends have interacted and compounded these problems, the following sections of this Part briefly review the literature on adhesion contracts, the rise of ubiquitous mandatory arbitration clauses, and the existing proposals for reform. This Part ends with an analysis and rebuttal of law and economic theories around boilerplate.

67. See *supra* text accompanying note 13.

68. See *Smith*, 2023 WL 5215376, at *4.

69. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in the Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808, 2811-12, 2814-15 (2015).

70. See *infra* Part V.A; see also Drew Desilver, *Online Shopping Has Grown Rapidly in U.S., but Most Sales are Still in Stores*, PEW RSCH. CTR. (Nov. 22, 2023), <https://www.pewresearch.org/short-reads/2023/11/22/online-shopping-has-grown-rapidly-in-u-s-but-most-sales-are-still-in-stores/> [<https://perma.cc/J99L-H2JC>] (noting that in 2022, online sales accounted for 16.3 percent of all sales in the United States).

71. David Wessel, *Is Lack of Competition Strangling the U.S. Economy?*, HARV. BUS. REV., Mar.-Apr. 2018, at 107, 107-08.

72. Thomas Philippon, *The Economics and Politics of Market Concentration*, NAT'L BUREAU OF ECON. RSCH.: THE REP. (Dec. 1, 2019), <https://www.nber.org/reporter/2019-number4/economics-and-politics-market-concentration> [<https://perma.cc/UX8Y-HX6S>].

A. *Contracts of Adhesion*

The literature on adhesion contracts and suggestions for their reform is vast.⁷³ Beginning with Nathan Isaacs's classic 1917 article, *The Standardizing of Contracts*⁷⁴ and continuing with Friedrich Kessler's 1943 article on adhesion contracts,⁷⁵ the critique of form contracts extends over one-hundred years.⁷⁶ In recent times, Margaret Jane Radin's 2012 book *Boilerplate* propelled the dialogue in the field forward.⁷⁷ Radin's account divides the field of contracts into two components, which she terms "World A" for agreement and "World B" for boilerplate.⁷⁸ Her critique largely focuses on the lack of assent or other contractual elements in boilerplate.⁷⁹

Having explored the background of adhesion contracts, we now turn specifically to predispute mandatory arbitration clauses. To be clear, online terms and conditions may contain other harsh provisions: reductions in the statute of limitations, limits on damages, and forum selection clauses.⁸⁰ But mandatory arbitration is the vanguard. From a process standpoint, arbitrability is the threshold issue, so it is the one that parties argue vigorously before any other

73. The term "adhesion" to describe a take-it-or-leave-it contract comes from a law review article. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). Other commentators have surveyed the history and development of the field in more depth. See, e.g., Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 133-38, 143-53 (2012); Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 129-45 (2012).

74. Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 38-39, 45, 47 (1917).

75. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631-33 (1943).

76. Other notable articles include Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 140-44 (1970) and W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530-32 (1971).

77. RADIN, *supra* note 30.

78. *Id.* at 3, 8-9.

79. *Id.* at 30.

80. See Boyack, *supra* note 35, at 504-05; Michael L. Rustad, Richard Buckingham, Diane D'Angelo & Katherine Durlacher, *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 644, 662, 670 (2012) (collecting locations of forum selection clauses from various social networking sites, including CafeMom, MyYearbook, Mouthshut.com, and Habbo and noting that disputes are sent to New York City, Mumbai, Los Angeles, and New Hope, Pennsylvania).

question.⁸¹ And if a motion to compel arbitration succeeds, no one will hear about the other legal issues. Arbitration is a silencer.

B. Arbitration Clauses

1. Development

Since the late 1990s, the U.S. Supreme Court has had a love affair with mandatory arbitration.⁸² For at least three decades, courts have been privileging the system of arbitration over the individual and collective rights of workers and consumers.⁸³ Whether because of overloaded court dockets, deference to private ordering, a desire to insulate businesses from nuisance lawsuits, or perhaps other reasons, the U.S. Supreme Court has written several landmark opinions in the past fifteen years endorsing arbitration for worker and consumer disputes.⁸⁴

In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court examined the enforceability of arbitration provisions covering consumer class actions.⁸⁵ There, the U.S. Supreme Court decided that the FAA required arbitration of putative class claims.⁸⁶ That was so, the Court held, even if it meant preempting state rulings holding

81. A similar dynamic is present in many of the workers' rights claims in the digital economy. Because many of the employment statutes cover only "employees," workers have been litigating this threshold issue to have their cases heard. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 995 (2011). There are many more interesting questions beyond status, but so far courts have not gotten to that point—we are stuck at the threshold. See, e.g., *id.* at 961-62, 995-96.

82. I attribute this saying to NYU Law Professor Samuel Estreicher, but its origins are likely apocryphal. See David Sherwyn, *Arbitration of Employment-Discrimination Lawsuits: Legalities, Practicalities, and Realities*, CORN. HOTEL & REST. ADMIN. Q., at 71 & n.58 (2002).

83. Horton, *supra* note 38, at 638-39; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 711 (1996) ("The Court should abandon its unjustified preference for arbitration and replace it with a policy of acceptance of arbitration voluntarily agreed to by contracting parties."); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 250-51 (2012); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3076-81 (2015).

84. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 344-45 (2011); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 236, 238 (2013); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631-32 (2018); see also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 660 (2012).

85. 563 U.S. at 347-51.

86. See *id.* at 344, 352.

those arbitration clauses unconscionable.⁸⁷ In doing so, critics noted that the U.S. Supreme Court had weakened consumer protections and prevented workers from joining their claims for important, yet low dollar, claims.⁸⁸ For example, wage theft lawsuits are often viable only as class actions.⁸⁹ Essentially those cases would no longer be economically viable for legal representation.⁹⁰

In 2020 Professor David Horton coined the term “infinite arbitration” to describe the proliferation of ultrabroad arbitration clauses in consumer and employment contracts.⁹¹ Infinite arbitration clauses “attempt to govern conduct that has nothing to do with the original transaction.”⁹² Horton noted that because of various mitigating defenses and canons of interpretation “courts disagree about whether to compel arbitration of claims” in cases with infinite clauses.⁹³ Since the publication of Horton’s article, there have been others that have used the “infinite arbitration” language,⁹⁴ calling attention to this growing problem.⁹⁵

2. Reform of Arbitration

Even in the face of the proarbitration direction from the U.S. Supreme Court, there has been pushback in two major ways. First, plaintiffs’ employment lawyers filed mass arbitrations or “arbitration swarms,” which were thousands of individual arbitration claims for low dollar amounts.⁹⁶ Arbitration has a cost associated with it,

87. *Id.* at 341-43.

88. Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 770-71, 771 n.28 (2012).

89. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1287 (2022).

90. *Id.* at 1307.

91. Horton, *supra* note 38, at 639.

92. *Id.*

93. *Id.* at 641.

94. *See, e.g.*, Victoria Warkins, *Revictimization Through Arbitration: Keeping Outrageous and Unforeseeable Torts in Court*, 56 ARIZ. ST. L.J. 1605, 1614-15 (2025).

95. *See, e.g.*, Anita Bernstein, *Privity 2.0 May Be Even Better for Tort Defendants*, 49 FLA. ST. U. L. REV. 765, 770 (2022) (“[T]oday’s courts reach the same end as pre-*MacPherson* privity by different means when they say with a straight face that plaintiffs lack tort redress because they volunteered to give it away.”).

96. *See, e.g.*, Glover, *supra* note 89, at 1288-89, 1322-23. For an example of this litigation strategy, see *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783, 2020 WL 1908302, at *2 (C.D. Cal. Apr. 15, 2020) (“Postmates responded that in its view no arbitration proceedings had begun because the arbitration demands were improper.”).

and, in some states, the business or employer pays (or pays a higher percentage) of the arbitration fees by statute.⁹⁷ When thousands of individual claims are filed, arbitration fees add up quickly.⁹⁸

In some instances, this led to serious disputes between the companies drafting mandatory arbitration policies and their arbitration providers.⁹⁹ For example, DoorDash's arbitration clauses backfired when thousands of delivery couriers requested individual arbitrations around employee misclassification.¹⁰⁰ Facing arbitration fees of over \$10 million dollars to start presiding over the arbitration swarm, DoorDash balked and turned to the courts.¹⁰¹ In what was an uncharacteristic move, the workers moved to compel arbitration.¹⁰² The court ultimately agreed with the workers, noting that employers had "forced arbitration clauses upon workers.... Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers.... This hypocrisy will not be blessed, at least by this order."¹⁰³ The high fees are a potential risk that make arbitration perhaps less palatable.

The second pushback came from the U.S. Congress, which exempted various worker-rights claims from predispute mandatory arbitration. Under the Sarbanes-Oxley Act, whistleblower claims were often arbitrated, and whistleblowers rarely won their cases.¹⁰⁴ Many wondered if stronger support for watchdogs and whistleblowers could have prevented the near collapse of the U.S. financial system in 2008.¹⁰⁵ To increase the impact of enforcement and prevent

97. Glover, *supra* note 89, at 1288 n.10.

98. For an example of this strategy within the employment misclassification context, see *id.* at 1345-46 (noting arbitration fees and costs in the millions for the individual claims).

99. See, e.g., *Uber Techs., Inc. v. Am. Arb. Ass'n, Inc.*, 167 N.Y.S.3d 66, 70 (App. Div. 2022) ("The balance of the equities weighs in favor of AAA. While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision.").

100. See Susan Antilla, *Arbitration Storm at DoorDash*, AM. PROSPECT (Feb. 27, 2020), <https://prospect.org/labor/doordash-company-arbitration-storm-workers/> [<https://perma.cc/7J4Z-CB56>].

101. See *id.*

102. See *id.*

103. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1067-68 (N.D. Cal. 2020).

104. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 94-95 (2007).

105. See, e.g., Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 130-31 (2014); Miriam A. Cherry, *Whistling in the Dark?*

retaliation, the Dodd-Frank Act invalidated predispute mandatory arbitration for claims of retaliation by financial fraud whistleblowers.¹⁰⁶

Then, in 2017, the #MeToo movement raised the salience around sexual harassment.¹⁰⁷ State legislatures contemplated reform, particularly of forced arbitration and confidentiality provisions.¹⁰⁸ In some instances, alternative dispute resolution prevented survivors from speaking out about sexual harassment, as they were not free to warn others.¹⁰⁹ Concerned that federal policies might prevent state legislatures from taking action, Congress acted to amend the FAA under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.¹¹⁰ The Ending Forced Arbitration Act voids predispute mandatory arbitration contracts of sexual abuse or harassment claims.¹¹¹ Although legislation has been introduced for a more comprehensive ban of forced arbitration of consumer, employment, and civil rights claims, the FAIR Act has yet to be passed.¹¹² Some of the reasoning against its passage or the passage of other legislation containing accountability measures for terms and conditions is set out in the next Section.

Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law, 79 WASH. L. REV. 1029, 1083-85 (2004).

106. Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, 124 Stat. 1848 (2010) (codified as amended in 15 U.S.C. § 78u-6).

107. See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 193-95 (2019); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167 (2019).

108. See Sternlight, *supra* note 107, at 208. On the genesis of #MeToo, see TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT 8-12 (2021); Jodi Kantor, *The Surprising Origins of #MeToo*, N.Y. TIMES (Sep. 10, 2021), <https://www.nytimes.com/2021/09/10/books/tarana-burke-unbound-metoo.html> [<https://perma.cc/ZY2G-K6F6>].

109. For discussion of the silence and shaming of survivors, see Amanda Becker, *#MeToo Exposed How Forced Arbitration Protects Harassers. A Bipartisan Group of Lawmakers Wants to Ban It.*, 19TH NEWS (July 14, 2012, at 05:00 ET), <https://19thnews.org/2021/07/forced-arbitration-congress-gretchen-carlson> [<https://perma.cc/9ZA5-2MJE>].

110. See Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended at 9 U.S.C. §§ 401-402).

111. See *id.*; see also David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. (Jun. 23, 2022) (arguing that Congress should not have amended the FAA directly, but instead should have enacted a stand-alone exemption); Speak Out Act, 42 U.S.C. §§ 19401-19404 (banning predispute nondisclosure agreements and nondisparagement clauses that implicated sexual abuse or harassment).

112. See Forced Arbitration Injustice Repeal Act of 2022 (FAIR Act), H.R. 963, 117th Cong. (2022).

C. Counterarguments

Over the years, many have written that adhesion contracts and mandatory arbitration are something of a necessary evil.¹¹³ Mandatory arbitration may not be exactly fair, but it may at least be efficient. Without the comfort of form contracts, businesses might hesitate to market certain services or products.¹¹⁴ In some instances, boilerplate may function as a signal to show that these are the terms, take-it or leave-it, without negotiation.¹¹⁵ Another common argument is the concern that the economy—even for consumers—would be worse off without boilerplate.¹¹⁶ For example, in *Carnival Cruise Lines, Inc. v. Shute*, the U.S. Supreme Court upheld a rolling contract (a forum selection clause on the back of a passenger's ticket) that arrived only after the nonrefundable fare had been paid.¹¹⁷ In part, *Carnival Cruise* rested upon the logic that cost containment would ultimately benefit customers through pass-through

113. See, e.g., Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 630-31 (2002); Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 *GEO. L.J.* 77, 90-106 (2009).

114. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 *N.Y.U. L. REV.* 429, 432 (2002) ("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.").

115. See David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 *MICH. L. REV.* 983, 987 (2006); Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 *MICH. L. REV.* 883, 885-87 (2014).

116. See Gibson, *supra* note 21, at 251 ("Boilerplate is present in a vast range of everyday transactions, from purchasing a computer to renting a car to ordering just about anything online. Surely, getting rid of boilerplate would cause those worthy transactions to disappear, and thus grind the consumer economy to a halt."); Leff, *supra* note 76, at 144.

117. See 499 U.S. 585, 587-90 (1991). After the *Carnival Cruise* decision, courts began to decide cases about the enforcement of shrinkwrap agreements. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (The Seventh Circuit concluded that when a purchaser of software ignored license terms inside the software box, "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike"); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-49 (7th Cir. 1997) (extending holding of *ProCD* to consumer transactions and approving of rolling contracts). For further discussion of courts' movement to accept these types of agreements in light of *ProCD*, see Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 *U. CIN. L. REV.* 1327, 1336-37 (2011).

savings and lower prices for goods and services like a trip on a cruise ship.¹¹⁸

In addition, the law and economics movement has argued that market competition will discipline overreaching adhesion contracts. Overly harsh provisions in boilerplate, the logic goes, would result in reputational damage to the firm, and the defection of customers to competitors.¹¹⁹ In discussing adhesion contracts, law and economics scholars have painted a picture of firms that compete freely for customers, knowing that harsh terms and conditions might well drive away customers.¹²⁰ Presumably, competition in the market means that the very worst types of terms and conditions and abusive contracts would be driven out as inefficient and overly burdensome on customers.

1. *Rebuttal*

Both of these presumptions rest on shaky ground. If costs are contained from boilerplate, will that result in lower prices or will that extra profit be retained for shareholders?¹²¹ Unfortunately, competition has failed to provide the market discipline that law and economics scholars predicted. A later part of this Article points to ongoing mergers and consolidations in many areas of the U.S. economy.¹²² Without adequate market competition, the basis for the law and economics argument unravels. Regardless of efficiency, fairness is also an important countervailing value. Too often contract law permits those who are adept and knowledgeable to win against those who are weak and do not know the rules. In the next Section, we will explore the characteristics of contract terms that

118. See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) (“[W]hatever lowers costs to businesses tends over time to lower prices to consumers.”).

119. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006) (“When firms are influenced by reputational considerations, contracts that appear on paper to be one-sided against the consumer may in reality be implemented in a balanced way.”).

120. See *id.* at 833.

121. Cf. Tom Cummins, Shute: *The Math Is Off*, 8 J.L. ECON. & POL’Y 1, 4-5 (2011) (contending that forum selection clauses constitute a negative externality).

122. See *infra* Part II.D.

have crossed the line between ordinary commercial practice and abuse of contract.

D. Proposals for Reform

Over the last one hundred years, there have been many calls for change, but no one approach has taken hold. One group of reform proposals has focused on greater transparency and putting terms into plain English so that they are more easily understood.¹²³ Others have proposed charts or graphics akin to the nutritional breakdowns on food products to explain the legal content in a way that is familiar to consumers.¹²⁴ Relatedly, others propose that experts evaluate and assign letter grades to website contracts.¹²⁵ Other proposals have focused on the idea of market testing assent by allowing customers to choose between sets of terms, with consumers paying an additional amount to omit the harsh terms.¹²⁶ Still others have proposed digital pop-up boxes¹²⁷ or urgent notices warning consumers about boilerplate content.¹²⁸

Implicit in these proposals is the normative suggestion that consumers *should be* reading terms and conditions. Indeed, these proposals exhort online users to read, understand, and be wary of the content of clickwraps.¹²⁹ But transparency can do only so much.

123. See Michael L. Rustad, *Why a New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521, 527-28 (2022).

124. Preston, *supra* note 27, at 581.

125. See Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 185 (2011); Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead*, 2017 U. ILL. L. REV. 65, 105 (2017).

126. See Kelli Alces Williams, *Market Testing Boilerplate*, 74 SYRACUSE L. REV. 229, 260-61 (2024).

127. See Ayres & Schwartz, *supra* note 29, at 580.

128. See Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 135-36 (2022).

129. See Vanessa G. Perry & Pamela M. Blumenthal, *Understanding the Fine Print: The Need for Effective Testing of Mandatory Mortgage Loan Disclosures*, 31 J. PUB. POL'Y & MKTG. 305, 307 (2012). For a popular press article that contains an exhortation to read the contracts even if they are long and boring, see Rebecca Shrestha, *Why You Should NOT Ignore Terms & Conditions*, MEDIUM (July 19, 2024), <https://medium.com/@rebeccashrestha/unlocking-trust-the-hidden-power-of-terms-and-conditions-5e571ba7f6d1> [<https://perma.cc/25TW-M5Q9>]. *But see* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) (describing how terms were not available to read until after consumer opened the box containing the product).

Behavioral economists have proven the paradox of choice—that too much disclosure can, in some instances, become overwhelming to consumers.¹³⁰ In addition, when competitive products (or contract terms) are not available, these proposals calling for transparency do not address the problem.¹³¹

Rather than relying on the diligence of shoppers to identify and pass over harsh terms, other commentators have urged stronger action.¹³² One of the most well-known proposals was Professor Todd Rakoff's suggestion to differentiate between the “visible” and “invisible” terms in form contracts.¹³³ The visible terms are those such as price, quantity, and delivery that matter to a reasonable consumer.¹³⁴ The invisible terms are the unreadable boilerplate.¹³⁵ Rakoff proposed enforcing only the visible terms and then knocking out the invisible terms.¹³⁶ Without boilerplate, the deal terms would consist of the visible terms on which the parties agreed, and then, any that are missing would be substituted with the default terms (gap fillers) from the Uniform Commercial Code (UCC).¹³⁷

Others have advocated for changing the default rules, making boilerplate unenforceable unless the drafter is able to prove that customers actually understood the boilerplate.¹³⁸ Another proposal involves flipping the statute of frauds: making low-stakes written contracts (under five hundred dollars) oral only.¹³⁹ Subtracting the

130. Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCH. 995, 996 (2000).

131. See Williams, *supra* note 126, at 263.

132. See Peter Linzer, “Implied,” “Inferred,” and “Imposed”: *Default Rules and Adhesion Contracts—the Need for Radical Surgery*, 28 PACE L. REV. 195, 210-11 (2008).

133. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1251 (1983).

134. See *id.*

135. See *id.*

136. See *id.* at 1258.

137. See *id.* at 1258-59.

138. See Eric A. Zacks, *The Moral Hazard of Contract Drafting*, 42 FLA. ST. U. L. REV. 991, 995 (2015) (“As an example, the presumption of enforceability with respect to contract terms in standard form contracts could and should be reversed. Under such a regime, drafting parties would be forced to demonstrate that the disclosure in standard form contracts is effective.”).

139. David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1372 (2023) (“Individual states could, and perhaps should, pass something like a *reverse statute of frauds*. The statute of frauds, as you may recall from your first-year contracts course, conditions enforceability on writing for deals of certain gravity of purpose—land, expensive goods,

written component from small transactions would avoid boilerplate and the anti-class-action effect of arbitration clauses.¹⁴⁰ Still, other commenters argue that statutory regulation may be the best or only way forward.¹⁴¹ These proposals often focus on the law of other nations.¹⁴² Since 1993, the European Union has removed the boilerplate terms that give drafters an unfair advantage over workers or consumers.¹⁴³

Still others have suggested reviving the defense of unconscionability.¹⁴⁴ The modern formulation of the defense is traced to UCC section 2-302 and landmark cases like *Campbell Soup Co. v. Wentz* and Judge Skelly Wright's opinion in *Williams v. Walker-Thomas Furniture Co.*¹⁴⁵ In most jurisdictions, "[t]he procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract."¹⁴⁶

In the 1980s, however, unconscionability fell out of favor. As Professor Cheryl B. Preston has noted, the law and economics movement gained momentum and was not sympathetic to

long-term service contracts, etc. I propose the converse: states should *deny* enforcement of a certain set of (mostly cheap) written contracts.”)

140. *Id.* at 1413-14.

141. See Wayne R. Barnes, *Shifting Towards Boilerplate Regulation*, 79 U. MIAMI L. REV. 1, 11 (2024).

142. See James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003) (focusing on the EU but also noting provisions protecting consumers in Japan and South Korea as well).

143. See Council Directive, 93/13, arts. 1-5, 1993 O.J. (L 95) 29, 31 (EC).

144. See, e.g., Geoffrey A. Mort, *The Courts and Contracts: Losing Patience with Unconscionable Agreements*, NYSBA (May 19, 2022), <https://nysba.org/the-courts-and-contracts-losing-patience-with-unconscionable-agreements/> [<https://perma.cc/9LWK-R668>] (suggesting instances in which onboarding of employees and pressuring them to sign many agreements without the chance to read them could be seen as unconscionable).

145. See 172 F.2d 80, 83-84 (3d Cir. 1948); 350 F.2d 445, 449-50 (D.C. Cir. 1965).

146. *Suqin Zhu v. Hakkasan NYC LLC*, 291 F. Supp. 3d 378, 387-88 (S.D.N.Y. 2017) (quoting *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (App. Div. 1983)); see Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 539 (1967) (“To summarize, there are two separate social policies which are embodied in the equity unconscionability doctrine. The first is that bargaining naughtiness, once it reaches a certain level, ought to avail the practitioner naught. The second is directed not against bargaining conduct (except insofar as certain results often are strong evidence of certain conduct otherwise unproved) but against results, and embodies the doctrine (also present in *laesio enormis* statutes) that the infliction of serious hardship demands special justification.” (footnote omitted)).

unconscionability.¹⁴⁷ Courts will deploy the defense when there are language and education barriers,¹⁴⁸ lack of notice, unfair surprise, power imbalances, or harsh terms.¹⁴⁹ These factors¹⁵⁰ are considered in a totality of the circumstances test.¹⁵¹ Deciding where to draw the line is difficult, and one commentator has described unconscionability doctrine as a maelstrom of confusion.¹⁵²

Whether the doctrine of unconscionability is moribund today is the subject of considerable controversy.¹⁵³ Professor Preston's study of reported cases in the early 2000s was far from encouraging. The study found only a single-digit number of cases using unconscionability that were successful across the entire United States.¹⁵⁴ Other commenters have noted that systemic practices, such as price gouging in impoverished communities, would be difficult to remedy

147. See Preston, *supra* note 27, at 541-43, 578.

148. See *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), *rev'd* 281 N.Y.S.2d 964, 964 (Sup. Ct. 1967).

149. See *Gulfeo of La., Inc. v. Brantley*, 430 S.W.3d 7, 13 (Ark. 2013).

150. See Henry Amoroso, Paula Alexander Becker & Evan Weiss, *A Social Contract: The Doctrine of Unconscionability and Its Relation to Social Progress*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 51, 68 (2021) (“[T]he primary barrier to the common application of unconscionability is our commitment to the freedom of contract.”).

151. See *id.* at 65-67.

152. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 564 (1971).

153. Contrast Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 965-67 (2019) (“[I]n stark contrast to the conventional wisdom, the doctrine has quietly flourished in courts in recent years.”), and Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 757-58 (2021) (“[U]nconscionability is alive and well in the courts.”), with Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 756-57 (2014) (“[S]ome state courts have rarely, if ever, used the unconscionability doctrine to invalidate contract provisions, whether or not the challenged provisions are associated with arbitration.”), and *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 920 (N.J. Super. Ct. Ch. Div. 2002) (holding contract unconscionable, but observing that unconscionability review, “which began in earnest in the mid-1960s, slowed soon thereafter”), and Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor.”* 102 GEO. L.J. 1383, 1436 (2014) (noting that unconscionability eventually became unmoored from poverty law). Note that contracts scholars are notorious for passing judgment on the vitality of various doctrines, or indeed, the entire field itself. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). Note also that other countries have used the unconscionability defense more broadly, with the Supreme Court of Canada invalidating an online arbitration clause between Uber and one of its rideshare drivers that required the driver to arbitrate in the Netherlands as well as pay for costs. *Uber Techs. v. Heller*, [2020] S.C.R. 119, 122-23 (Can.).

154. Preston, *supra* note 27, at 541-43.

under the unconscionability doctrine as it is currently understood.¹⁵⁵ More recently, however, a study showed that during the 2008 financial crisis, courts were more willing to invalidate payday loans, excessive mortgage fees, and checking-account penalties.¹⁵⁶

A minority of courts have found provisions of online boilerplate to be unconscionable,¹⁵⁷ and a number of commentators have argued in favor of a stronger statutory codification of unconscionability that would apply to digital platforms.¹⁵⁸ In 2024, the Consumer Financial Protection Bureau (CFPB) banned certain unenforceable contract terms, noting they could constitute deceptive acts or practices under their enabling statute.¹⁵⁹ However, the CFPB used a narrow definition, focusing on previous rules and enforcement from the agency.¹⁶⁰ With the CFPB the target of recent funding cuts, however, the future of such activity is uncertain.¹⁶¹

With so many options, why have none of these proposals gained traction in the United States? There are both practical as well as political reasons for this failure to launch. One explanation is that many of the proposals require significant start-up costs or major

155. Mark Kelman, *Unconscionability and Poverty*, 77 SMU L. REV. F. 1, 24 (2024) (“Even if we are deeply concerned with combating poverty and believe it is significantly exacerbated by price gouging, it is unlikely that the expansive use of common law unconscionability doctrine will prove to be an important anti-poverty tool. The doctrinal and administrative fit is weak.”).

156. See Russell, *supra* note 153, at 967.

157. See, e.g., *Stanfield v. Tawkify, Inc.*, 517 F. Supp. 3d 1002, 1006 (N.D. Cal. 2021) (refusing to enforce clickwrap arbitration clause based on unconscionability because the “provision was a needle in a haystack, with the word arbitration appearing only twice in the ten-page document and referenced in a single sentence only, never bolded”).

158. See, e.g., Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 99 (2021).

159. CONSUMER FINANCIAL PROTECTION CIRCULAR 2024-03: UNLAWFUL AND UNENFORCEABLE CONTRACT TERMS AND CONDITIONS, CONSUMER FIN. PROT. BUREAU (2024), https://files.consumerfinance.gov/f/documents/cfpb_circular-2024-03.pdf [<https://perma.cc/6D9A-PY87>].

160. *Id.* The Circular specifically referenced only the terms that the CFPB had acted to prevent in the past, such as an action that stopped businesses from punishing customers who published negative reviews. *Id.* at 4.

161. See Evan Weinberger, *Musk’s DOGE Descends on CFPB with Eyes on Shutting It Down*, BLOOMBERG (Feb. 7, 2025, at 17:26 ET), <https://www.bloomberg.com/news/articles/2025-02-07/musk-s-doge-descends-on-cfpb-with-eyes-on-shutting-it-down?embedded-checkout=true> [<https://perma.cc/3S4S-8ML2>]; Tony Romm, *DOGE Targets Consumer Financial Protection Bureau as Musk Tweets ‘RIP’*, WASH. POST (Feb. 7, 2025), <https://www.washingtonpost.com/business/2025/02/07/cfpb-doge-trump-musk-chopra/> [<https://perma.cc/HZ65-3TMS>]. While the Trump administration cannot unilaterally eliminate the CFPB, it can appoint the director of the agency, who may choose a less active role. See *id.*

paradigm shifts. For example, having an expert read, grade, and explain various sets of terms and conditions would involve a significant investment of time and money. Others would require a level of regulatory oversight that does not presently exist in the United States. Inertia is a powerful force, and one that benefits commercial interests.

II. TYPES OF ABUSIVE CONTRACTS

The Disney+ allergy case and the Smith family's Walmart ordeal show that, in some instances, online boilerplate has become unmoored from any notion—as fictitious as it might be—that there is any connection to bargained-for assent. There are many ways that a company could overdraft its terms and conditions, and scholars have already documented some of the harsh terms that crop up repeatedly.¹⁶² Unbelievably, the new wave of overreaching contracts clauses is worse.

Some contracts contain survival clauses that purport to bind the customer to a particular dispute resolution system even years after their contract ended. Sometimes companies will argue that individuals who never clicked “I agree,” particularly family members, should be bound to the terms. Some websites now attempt to bind the customer to website terms even when the customer is shopping in a brick-and-mortar store. Other times, the customer is bound not only to one company, but to other companies within their corporate structure. Each Part of this Section highlights a particular example of a type of abusive contract.¹⁶³ The end of this Section links these contract terms to economic concentration in the U.S. economy.

162. In her recent empirical study of terms and conditions, Professor Andrea Boyack identified a number of these practices, including mandatory arbitration (which also implicates waiver of a jury trial and waiver of a class action); forum selection; limiting the statute of limitations or time to bring a claim; eliminating warranties; limiting privacy rights; limiting or capping damages; and the ability to modify the terms unilaterally. Boyack, *supra* note 35, at 505.

163. Cases are collected in the footnotes for purposes of readability.

A. Application of Contract to Nonsignatories

A recent litigation strategy is to draw in additional persons to the contract beyond the individual who signed. This situation occurred in the Disney+ allergy case, in which Disney argued that the wife's estate was bound by the husband's previous clickwrap, and in the *Smith* case, in which Walmart argued the entire family would be bound by Ms. Smith's clickwrap.¹⁶⁴ Most reasonable consumers would not believe that someone should be bound to a contract if they never clicked "I agree." That sense of unfairness is borne out by classical contract theory, which centers on enforcing contracts on the basis of assent and voluntariness.¹⁶⁵ The venerable doctrine of privity, for all of the erosions to it over the years,¹⁶⁶ should still function to prevent the contract from reaching individuals who never actually agreed to be bound.¹⁶⁷ Nonsignatories should not be drawn into a contract without an outward objective manifestation of assent.¹⁶⁸ Yet even on a point as basic and fundamental to contract as this, the siren song of mandatory arbitration beckons to courts and litigators, and the cases are inconsistent.

The on-demand economy and short-term rental properties are one context for the nonsignatory coverage.¹⁶⁹ An individual booking an Airbnb for a short-term vacation may bring along authorized guests and, with the permission of the host, may hold an event at the

164. See *infra* Part II.E.

165. See, e.g., Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 42 LOY. U. CHI. L. REV. 175, 189 (2009).

166. A great deal of third-party beneficiary law is essentially an incursion into traditional notions of privity. *Lawrence v. Fox*, 20 N.Y. 268, 271-75 (1859) (considering and rejecting privity argument to recognize third-party beneficiary of promise). See generally Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992).

167. See Bernstein, *supra* note 95, at 767.

168. In contract law, silence is generally not considered acceptance because there is the idea that some objective and affirmative manifestation of assent is required. Staying silent—or taking the actions that one had planned regardless—would not generally be seen as accepting a contract. See RESTATEMENT (SECOND) OF CONTRACTS § 69 (A.L.I. 1979).

169. See Whizy Kim, *What Happened to Airbnb?*, VOX (Nov. 8, 2023, at 12:52 ET), <https://www.vox.com/money/23941827/airbnb-complaints-guests-cleaning-fee-new-york-regulation> [<https://perma.cc/Y8AJ-4B42>] (noting that Airbnb is profitable despite challenges of local regulation, rising prices, and consumer complaints about hidden cameras).

property.¹⁷⁰ However, the guests do not sign a contract with Airbnb.¹⁷¹ This situation has led to a number of cases in which guests have sued Airbnb for injuries sustained as a result of a defect or danger at a property.¹⁷² For example, in *Airbnb, Inc. v. Rice*, a party guest and another party guest's estate sued the online service when an unknown individual opened fire on the crowd.¹⁷³ Airbnb's motion to compel arbitration was premised on both party guests having previously created an Airbnb account.¹⁷⁴ While Airbnb did not appeal the determination that one of the guests was underage (and thus could not consent legally), the company did appeal the claims from the other party guest's father and estate.¹⁷⁵ On these remaining claims, the Nevada Supreme Court ruled that the matter of arbitrability of the dispute should be decided in the first instance by the arbitrator.¹⁷⁶

However, in *Peterson v. Devita*, the Illinois Appellate Court denied the motion to compel arbitration in similar circumstances.¹⁷⁷ There the plaintiff was permanently injured and part of his leg was amputated because of a faulty railing on an elevated porch at a short-term rental property.¹⁷⁸ The plaintiff was a guest of the person who made the reservation.¹⁷⁹ Nonetheless, Airbnb's lawyers argued that the arbitration clause should apply to the plaintiff because he had created an Airbnb account several years earlier (the plaintiff had never used the site to make a booking).¹⁸⁰ The court reasoned that the arbitration clause only applied when the claims arose from

170. *Airbnb Guest Limits*, AIRBNB, <https://www.airbnb.com/help/article/3512> [<https://perma.cc/Q8CL-Q25R>]; *Ground Rules for Home Guests*, AIRBNB, <https://www.airbnb.com/help/article/2894> [<https://perma.cc/YX8T-EE7B>]; *Community Disturbance Policy*, AIRBNB, <https://www.airbnb.com/help/article/3345> [<https://perma.cc/R5YZ-TFJP>]. Note, however, that all “[d]isruptive gatherings,” regardless of host permission, are prohibited. *Id.*

171. See Cecilia G. Vazquez, Comment, *The Sharing Revolution: Changing Times Call for Clarifying Tort Liability*, 80 LA. L. REV. 623, 631-34 (2020).

172. See, e.g., *Airbnb, Inc. v. Rice*, 518 P.3d 88, 89 (Nev. 2022).

173. *Id.*

174. *Id.*

175. *Id.* at 90.

176. See *id.* at 91. Such “delegation” clauses create a circular loop—even the question of arbitrability must be returned to the arbitrator. See David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 375 (2018).

177. 237 N.E.3d 1010, 1013 (Ill. App. Ct. 2023).

178. *Id.*

179. *Id.*

180. *Id.*

a plaintiff's use of the Airbnb platform, not based on the previous creation of an Airbnb account.¹⁸¹ To do otherwise would lead to absurd results, in which:

a member of a hotel chain's Internet site with an arbitration clause like Airbnb's could attend a wedding at one of its hotels years later, sustain an injury from a falling chandelier, and have to arbitrate, even if the wedding host had an account too.... [E]very wedding guest, whether or not they belonged to the hotel chain's Internet site, would have to arbitrate either because they had an account or the host had an account.¹⁸²

In addition, the court ruled the principles of agency and equitable estoppel did not apply to bind Peterson to arbitrate.¹⁸³

In another case from 2024, the New Jersey Superior Court enforced Uber's arbitration provision against Georgia McGinty, who, along with her husband, was injured in a car accident during their ride.¹⁸⁴ McGinty argued that her underage daughter had in fact clicked on the terms when ordering Uber Eats, and so the terms were unenforceable on the grounds of minority.¹⁸⁵ The court disagreed, reasoning that because McGinty told her daughter to order the food, her daughter was "capable" and acted as her agent.¹⁸⁶ The court also sided with Uber on the issue of whether McGinty's husband was bound to arbitration.¹⁸⁷ While the account was in Georgia's name, the clickwrap stated that "spouses" would be considered third-party beneficiaries of the agreement.¹⁸⁸ Proximity and/or familial status was apparently enough for the court to extend the terms to a nonsignatory. The court thus decided that the matter of arbitrability should be decided by the arbitrator, not the court.¹⁸⁹

181. *Id.*

182. *Id.* at 1018.

183. *Id.* at 1018-19.

184. McGinty v. Zheng, No. A-1368-23, 2024 WL 4248446, at *1, *3-4 (N.J. Super. Ct. App. Div. Sep. 20, 2024).

185. *Id.* at *2.

186. *Id.* at *9.

187. *Id.*

188. *Id.*

189. *Id.* at *10.

In another context, a group of children sued Ancestry.com for invasion of privacy and alleged revelation of genetic information.¹⁹⁰ While their guardians had signed up with the website and clicked through the terms, the children had never made Ancestry.com accounts.¹⁹¹ As such, the court reasoned that the children were not bound to the website's mandatory arbitration provisions.¹⁹² In another case, a son alleged he received text message solicitations from LowerMyBills.com in violation of the Telephone Consumer Protection Act (TCPA).¹⁹³ The messages were directed to his mother, who had recently passed away.¹⁹⁴ Still, LowerMyBills.com persisted in arguing that the son had vicariously agreed to be bound to their website's mandatory arbitration provisions.¹⁹⁵ Ultimately, the court held that there were questions of fact still to be determined about whether the son had in fact visited the LowerMyBills.com website.¹⁹⁶ If he had not, the court reasoned, the son could not be bound to his mother's agreement to arbitrate.¹⁹⁷

Some cases arise out of assisted-living situations. Since the arbitration explosion in the early 2000s, many skilled nursing facilities have included arbitration provisions in their admittance documents.¹⁹⁸ Some number of assisted-living residents are not competent to sign a contract, and, in fact, those are likely the people who most need the round-the-clock care provided.¹⁹⁹ Due to age and disability, it is fairly common to have relatives sign on behalf of the infirm person for admittance.²⁰⁰ Florida courts have repeatedly held that a nursing home resident's estate will not be bound by an

190. *Coatney v. Ancestry.com DNA, LLC*, 93 F.4th 1014, 1017 (7th Cir. 2024).

191. *Id.* at 1017-18.

192. *Id.*

193. *See Hansen v. Rock Holdings, Inc.*, 434 F. Supp. 3d 818, 822 (E.D. Cal. 2020), *vacated and remanded sub nom.*, *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667 (9th Cir. 2021).

194. *See id.* at 822-23.

195. *Id.* at 825.

196. *Id.* at 826-27.

197. *Id.* at 826.

198. *See* Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 263-64, 267 (2004) (noting increasing desire of nursing homes to include arbitration provisions in contracts with residents and families).

199. *See id.* at 276.

200. *Id.*

arbitration agreement signed by a spouse or other family member in their individual capacity.²⁰¹

While some of these cases, like the assisted-living agreements, trace privity and limit enforcement, others have disregarded the fundamental principles of contract formation. It is one matter to say that terms and conditions will bind an account holder. There, we can at least hold on to the formalist idea that the individual made an affirmative act to enter a contract.²⁰² The same cannot be said for other individuals who are essentially bootstrapped into the contracts unwittingly. To bind individuals who are essentially contractual bystanders is to vitiate voluntary agreement—the very core of contract law.

In recent years, contract law theorists have begun talking about a concept known as freedom *from* contract.²⁰³ Although not yet fully fleshed out, this newer theory has focused on the negotiating party's ability to change their mind before contract acceptance.²⁰⁴ But the

201. See, e.g., *Sovereign Healthcare of Tampa, LLC v. Est. of Yarawsky ex rel. Yarawsky*, 150 So. 3d 873, 878 (Fla. Dist. Ct. App. 2014) (resident's estate was not bound by an arbitration provision in a nursing home residency agreement which had been signed by resident's wife in her individual capacity as the responsible party); *Est. of McKibbin v. Alterra Health Care Corp.*, 977 So. 2d 612, 613 (Fla. Dist. Ct. App. 2008) (holding that the resident's estate was "not bound to arbitrate because [the resident] did not sign the residency agreement that contained the arbitration agreement and her son, who signed the residency agreement, did not have the authority to bind [the resident] to arbitrate"); *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 300-01 (Fla. Dist. Ct. App. 2005) (en banc) (holding that the resident's estate was not bound by the arbitration clause within the admissions agreement because the agreement was signed by resident's son; resident's son was at best a health care proxy who could make only decisions related to healthcare and was not authorized to waive his mother's "right to trial by jury, to waive common law remedies, or to agree to modify statutory duties").

202. Of course, assigning this type of responsibility to workers or consumers who we know are powerless to change the terms may not be the best arrangement. Nonetheless, there is at least some element of choice. One theorist has discussed how the notion of choice, no matter how illusory, can lead to blame of those who are unable to change anything. Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 172 (2012) ("We thus blame the signer of a contract with respect to all contracting decisions, even though the signer may be contracting under a number of powerful situational influences. We have a tendency to blame the victim in retrospect, and the contract preparers 'assist' us in doing so by presenting contracts that reinforce the other party's blameworthiness.").

203. This fundamental principle is explored by Samuel Williston in *Freedom of Contract*, 6 CORN. L.Q. 365, 368-69 (1921). The classic view has also been more recently critiqued in light of what we know about market failures. See Richard Craswell, *Freedom of Contract*, in CHICAGO LECTURES IN LAW AND ECONOMICS 81, 84 (Eric A. Posner ed., 2000).

204. See, e.g., Omri Ben-Shahar, *Foreword: Freedom from Contract Symposium*, 2004 WIS.

concept of freedom from contract could also stretch to cover those situations in which individuals who were not parties to the original deal were hijacked into the contract. Without consent or agreement, there can be no contract.

B. Website Terms in Physical Stores

Shoppers do not sign a copy of terms and conditions to enter brick-and-mortar stores. At least, not yet.²⁰⁵ However, if a shopper who enters a brick-and-mortar store already has an online account with the store owners, they may have unwittingly bound themselves to those terms and conditions for their in-person visit.²⁰⁶ Even

L. REV. 261, 263 (describing first type of freedom from contract, the right to change one's mind about negotiations, or as the author puts it, "[s]hould the law accommodate regret?").

205. In cashless or other experimental high tech stores, it would make sense for customers to assent to the terms and conditions online or through mobile apps. For example, Amazon's stores feature "Just Walk Out" technology that rings up items automatically. See Parmy Olson, *Amazon's AI Stores Seemed Too Magical. They Were*, BLOOMBERG (Apr. 3, 2024, at 14:21 ET), <https://www.bloomberglaw.com/bloomberglawnews/artificial-intelligence/XFLKK40C000000> [<https://perma.cc/3VGZ-7SHV>]. However, many transactions have to be reviewed, and they are often done so by using offshore workers. *Id.* But see Emma Roth, *Amazon Insists Just Walk Out Isn't Secretly Run by Workers Watching You Shop*, THE VERGE (Apr. 17, 2024, at 12:38 ET), <https://www.theverge.com/2024/4/17/24133029/amazon-just-walk-out-cashier-less-ai-india> [perma.cc/8CLQ-K95J].

206. It is difficult to find online retailers that admit to subjecting online customers to more terms than those who are in-person shoppers only. Perhaps that is because it would strike customers poorly. Such a policy means that the repeat customer who shops both online and in-store, and who cares enough about brand loyalty to set up an online account, is actually being treated worse than the casual shopper who on occasion enters a physical store. For examples of these kinds of expansive contracts, I visited the websites of some of the largest corporate retailers in the United States. Walmart's online terms and conditions purport to extend to in-person transactions. *Terms of Use*, WALMART, <https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0> [<https://perma.cc/4ENT-6356>]. The CVS website claims to not only bind the customer to arbitration to "any claims or controversies between you and CVS that are related in any way to [the Terms of Use Agreement]" but also to bind the customer to arbitration with CVS's "suppliers or vendors." *Terms of Use*, CVS (Mar. 17, 2025), https://www.cvs.com/retail/help/terms_of_use [<https://perma.cc/P5KE-QDVB>]. Best Buy's terms note that their arbitration clause will be interpreted broadly and will "cover any claim or controversy arising out of or relating in any way whatsoever to your relationship or interaction with Best Buy, its agents, and its present and future subsidiaries, affiliates, and designees." *Terms and Conditions*, BEST BUY, <https://www.bestbuy.com/site/help-topics/terms-and-conditions/pcmcat204400050067.c> [<https://perma.cc/QE7H-KDYT>]. However, Kroger's terms and conditions do not seem to apply to shopping in person, although many of its loyalty programs contain additional terms. *Terms & Conditions of Use*, KROGER (June 18, 2025), <https://www.kroger.com/i/terms/website-and-app> [<https://perma.cc/ZD21-QYRE>]. The terms say that "[a]ny claim or dispute between you

companies well-known for customer service may have website terms that purport to apply to in-person retail transactions. For example, the department store Nordstrom is well-known for its generous return policy.²⁰⁷ As such, many customers would not believe that when they signed up for an account on Nordstrom.com, they also signed up to arbitrate any dispute arising from their in-person visit to their local Nordstrom in the mall.²⁰⁸

Whether retailers' arguments about extending online terms to in-person transactions will succeed is a matter of some contention. A Ninth Circuit case, *Johnson v. Walmart, Inc.*, recently addressed the issue.²⁰⁹ In 2018, Plaintiff Kevin Johnson purchased a new set of tires from Walmart's online site, and in the process, he agreed to the website's terms.²¹⁰ Those website terms included an arbitration clause.²¹¹ Johnson then went in person to a Walmart Auto Center to have the tires installed.²¹² While present in the store, Johnson bought a lifetime tire rotation package.²¹³ Later, Johnson alleged that he was denied the benefit of the tire rotation service he had purchased.²¹⁴ Walmart responded to Johnson's ensuing class action lawsuit with a motion to compel individual arbitration, based on the terms of the Walmart.com website.²¹⁵

and Kroger arising out of or relating in any way to your use of the Sites or the Terms must be resolved through final, binding arbitration." *Id.* But "Sites" is defined as "websites and mobile applications." *Id.* Costco's terms and conditions were not available online, but presumably are provided to members. Home Depot's website does not contain an arbitration clause, instead opting for a forum selection clause in Georgia. *See Customer Support: Terms of Use*, THE HOME DEPOT, https://www.homedepot.com/c/Terms_of_Use [<https://perma.cc/8ACX-KQFT>].

207. *See* Maryalene LaPonsie, *12 Stores With the Best and Worst Return Policies*, U.S. NEWS & WORLD REP. (Nov. 27, 2024), <https://money.usnews.com/money/personal-finance/spending/articles/stores-with-the-best-return-policies-and-worst-return-policies> [<https://perma.cc/PU24-DGTH>] (listing Nordstrom as having the second-best return policy in the United States, behind Costco).

208. *Terms & Conditions*, NORDSTROM.COM (July 1, 2025), <https://www.nordstrom.com/browse/customer-service/policy/terms-conditions> [<https://perma.cc/4Y98-N9SS>].

209. 57 F.4th 677, 680 (9th Cir. 2023).

210. *Id.* at 679.

211. *Id.*

212. *Id.* at 680.

213. *Id.*

214. *Id.*

215. *Id.*

The Ninth Circuit affirmed the lower court's denial of Walmart's motion to compel arbitration.²¹⁶ The court held that the terms of use from the Walmart.com purchase did not apply to in-store purchases.²¹⁷ The express language of the arbitration covered "Walmart Sites," a defined term on the website that was defined to mean the website, mobile site, and apps.²¹⁸ The physical Walmart Auto Care Center where Johnson purchased the pertinent service, the court reasoned, was not a "Walmart Site" because it was not a website, mobile site, or an app.²¹⁹ The court noted that the purchase of the tires and the contract for an extended warranty were "separate, independent agreements."²²⁰

Other cases on this topic are still developing.²²¹ For example, the Illinois Appellate Court held that an attendee at a baseball game did not agree to arbitrate injuries based on a ticket QR code that they scanned to get into the stadium.²²²

Another recent case involves which sets of terms governed an invasion of privacy claim against a healthcare organization. Was it the evidence of coverage in the actual plan documents that gave the insured the ability to receive medical care?²²³ Or was it the terms and conditions of the website and mobile apps?²²⁴ In that case, the two terms and conditions conflicted, presenting the court with a

216. *Id.* at 679.

217. *Id.* at 681-82.

218. *Id.* at 682.

219. *Id.*

220. *Id.* at 683.

221. *See, e.g., Veribi, LLC v. Compass Mining, Inc.*, No. 22-CV-04537, 2023 WL 375680, at *10 (C.D. Cal. Jan. 20, 2023).

222. *Zuniga v. Major League Baseball*, 196 N.E.3d 12, 23-24 (Ill. App. Ct. 2021) ("We agree with the conclusion reached by the trial court and hold that the arbitration provision at issue is procedurally unconscionable. As with the cases discussed above, factors exist in this case that make the arbitration provision difficult or onerous to find or obtain at the time of using the ticket, such that we cannot fairly say that the plaintiff was aware of what she was agreeing to. Principal among these factors is the fact that the paper ticket possessed by the plaintiff did not contain the actual terms and conditions of the contract, but merely contained a summary of the terms and conditions and informed ticket holders that they had to either access a website or visit the Cubs' administrative offices to obtain and read the full terms and conditions they were purportedly agreeing to, including the 8-paragraph arbitration provision.").

223. *Doe v. Kaiser Found. Health Plan, Inc.*, 725 F. Supp. 3d 1033, 1038-39 (N.D. Cal. 2024).

224. *Id.* at 1042.

difficult interpretation problem.²²⁵ In our fast-paced era of online contracting, more cases like these are sure to arise. We will now turn from website terms applying to in-person transactions to another problematic contracting practice—survival clauses.

C. Survival Clauses

How long does a clickwrap last? Zombie contracts may soldier on long after the initial contract was completed. For example, in 2016, Michael Hearn contracted with Comcast for home cable service.²²⁶ After the installation process, Hearn signed a work order acknowledging his receipt of a Comcast welcome kit, which contained a service agreement, which in turn contained an arbitration clause.²²⁷ The agreement contained a survival clause that stated that the arbitration clause applied to any claims relating to Comcast “arising before, during, or after” the agreement.²²⁸

In 2017, Hearn cancelled his Comcast cable and internet service, but in 2019, he changed his mind and thought about reconnecting.²²⁹ During a phone call to Comcast to discuss reinstatement of the service, Comcast allegedly damaged Hearn’s credit by checking his credit score without obtaining his assent.²³⁰ Hearn then filed a lawsuit alleging violations of the Fair Credit Reporting Act (FCRA).²³¹ Comcast filed a motion to compel arbitration based on the survival clause in the 2016 contract.²³² Hearn noted in his filings that at the time that the alleged running of the credit report happened, he was not a customer of Comcast’s, and that the “survival” clause unfairly bound him to terms that only seemed to apply to the earlier contract for cable service, not to all future contracts.²³³ The district court agreed with Hearn’s arguments, but

225. *See id.* at 1038.

226. *Hearn v. Comcast Cable Commc’ns, LLC*, 415 F. Supp. 3d 1155, 1157 (N.D. Ga. 2019).

227. *Id.* at 1157-58.

228. *Id.* at 1162.

229. *Id.* at 1157.

230. *Id.* *See generally How Many Hard Credit Inquiries Are Too Many?*, CHASE, <https://www.chase.com/personal/credit-cards/education/credit-score/how-many-hard-credit-inquires-are-too-many> [<https://perma.cc/YNX4-7E6C>] (noting that repeated “hard pull” inquiries of credit can damage an individual’s credit score).

231. *Hearn*, 415 F. Supp. 3d at 1157.

232. *Id.* at 1161.

233. *Id.* at 1160.

the Eleventh Circuit reversed.²³⁴ Although the court stated that its ruling was “narrow,” they stated that Hearn’s FCRA claim related back to his original subscriber agreement.²³⁵

D. Ownership of Corporate Entities

In the *Smith* case, Walmart argued that Ms. Smith was bound to arbitrate her civil rights case from shopping in the store because she had signed up to work for Spark Driver, an on-demand delivery platform.²³⁶ Would a reasonable customer think that the account that they created to do platform work would also bind them when shopping in a store? To take some hypothetical examples, would an Amazon warehouse worker who created an Amazon account be bound if they were hit by an Amazon truck or a product they ordered from Amazon exploded in their home?

Because large retailers also act as employers—and in many instances have an ownership stake in suppliers through vertical integration—the type of argument that Walmart made in *Smith* will become more common. Under this argument, common corporate ownership—even of unrelated types of things—could again result in the customer being unknowingly bound. In this Section we will begin with two examples and then discuss the increasing market concentration responsible for much of this problem.

1. Common Corporate Ownership

In 2012, Diana Mey added her name to her husband’s AT&T Mobility wireless account.²³⁷ She signed a “Customer Agreement,” which included a broad arbitration clause encompassing AT&T’s “respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns.”²³⁸ In 2015, AT&T, Inc., the parent company of AT&T Mobility, acquired the holding company

234. Hearn v. Comcast Cable Commc’ns, 992 F.3d 1209, 1211 (11th Cir. 2021).

235. *Id.* at 1215-16.

236. Smith v. Walmart, Inc., No. 7:22-CV-00568, 2023 WL 5215376, at *4 (W.D. Va. Aug. 14, 2023); *see supra* Part I.

237. Mey v. DIRECTV, LLC, 971 F.3d 284, 286 (4th Cir. 2020).

238. *Id.* at 287, 289.

that was the corporate parent of DIRECTV.²³⁹ This meant that AT&T Mobility and DIRECTV were essentially corporate cousins in the complex ownership structure behind the scenes.²⁴⁰

In 2017, Mey filed suit against DIRECTV for violating the TCPA.²⁴¹ She alleged that she had received repeated telemarketing calls despite the fact her telephone number was listed on the national “Do Not Call” registry.²⁴² DIRECTV moved to compel arbitration under the AT&T Customer Agreement, arguing that it was an “affiliate” of AT&T Mobility.²⁴³ The District Court for the Northern District of West Virginia refused to enforce the agreement, noting that the arbitration clause related solely “to disputes arising under or relating to the provision of cellular telephone service.”²⁴⁴

The Fourth Circuit Court of Appeals, however, vacated and remanded the case.²⁴⁵ The court of appeals found that arbitration clause’s referral to “affiliates” of AT&T included DIRECTV.²⁴⁶ The court concluded that while DIRECTV was not an affiliate of AT&T at the time the 2012 agreement was signed, DIRECTV was an affiliate of AT&T at the time of the telemarketing calls in 2017.²⁴⁷ The calls, they reasoned, were the events underlying the suit, and the clause specifically included the language of “successors.”²⁴⁸ Additionally, the court held that the dispute was covered under the arbitration clause because the clause included “all disputes and claims.”²⁴⁹

Under similar facts, and with the same corporate cast of characters, in *Revitch v. DIRECTV, LLC.*, the Ninth Circuit determined that there was no agreement to arbitrate between an AT&T

239. Brief of Appellee at 4, *Mey*, 971 F.3d 284 (No. 18-1534).

240. *Id.* at 9.

241. *Mey*, 971 F.3d at 287.

242. *Id.*

243. *Id.*

244. *Id.* at 292.

245. *Id.* at 295.

246. *Id.* at 289-90.

247. *Id.* at 290-91.

248. *Id.* at 292-94.

249. *Id.* at 293.

Mobility customer and later-acquired DIRECTV.²⁵⁰ Examining the wireless contract, the court noted that:

when Revitch signed his wireless services agreement with AT&T Mobility so that he could obtain cell phone services, he could not reasonably have expected that he would be forced to arbitrate an unrelated dispute with DIRECTV, a satellite television provider that would not become affiliated with AT&T until years later.²⁵¹

The Ninth Circuit provided various hypotheticals, asking whether the customer would be required to arbitrate if he were hit by a DIRECTV van, if he tripped in a DIRECTV store, or if he became a shareholder in DIRECTV and brought a securities fraud claim.²⁵² The outcomes in *Mey* and *Revitch* create a circuit court split.²⁵³

As we wrap up our tour of these overreaching terms, it is important to note that a contract could be abusive in multiple ways. For example, the family in *Smith* dealt with a common corporate owner as well as the argument that a nonsignatory must be bound.²⁵⁴ Regardless of which form of problematic term we have, it is likely that increasing market concentration plays a role in its establishment. The next Part explores this connection.

E. Market Concentration

At the same time that online boilerplate contracts have proliferated, there has been increasing consolidation and market concentration of large corporations.²⁵⁵ AT&T, which has been mentioned many times in this Article, has been a player in the

250. 977 F.3d 713, 717-18 (9th Cir. 2020); *Contract Law - Federal Arbitration Act - Ninth Circuit Refuses to Enforce Infinite Arbitration Agreement*. - Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020), 134 HARV. L. REV. 2871, 2872 (2021).

251. *Revitch*, 977 F.3d at 718.

252. *Id.* at 720-21.

253. See also Thomas v. Cricket Wireless, LLC, 506 F. Supp. 3d 891, 902 (N.D. Cal. 2020).

254. See *supra* Part I.

255. See, e.g., David Autor, Christina Patterson & John Van Reenen, *Local and National Concentration Trends in Jobs and Sales: The Role of Structural Transformation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31130, 2023), https://www.nber.org/system/files/working_papers/w31130/w31130.pdf [perma.cc/3XPJ-6GZY] ("There is broad consensus that national industrial concentration rates have risen substantially in the US since 1980[.]" (citation omitted)).

entertainment sector with its purchase of Time Warner in 2018 (the division has now been spun off into a partially-owned subsidiary, as has DIRECTV).²⁵⁶ At this point, only a handful of companies dominate internet searches and social media.²⁵⁷ The same is true of mergers in the pharmaceutical space,²⁵⁸ not to mention the sale of a host of a diverse number of products as diverse as meat,²⁵⁹ cosmetics,²⁶⁰ and luxury goods.²⁶¹ Luxottica owns the leading

256. See Chris Mills, *AT&T Basically Now Owns Everything Except Your Soul*, N.Y. POST (July 25, 2018, at 10:42 ET), <https://nypost.com/2018/06/18/att-basically-now-owns-everything-except-your-soul/> [<https://perma.cc/TME7-XAUY>]; Catie Keck, *AT&T Has Officially Spun Off DirectTV Which is Now Its Own Business*, THE VERGE (Aug. 3, 2021, at 19:46 ET), <https://www.theverge.com/2021/8/3/22608577/att-directv-tpg-deal-u-verse-att-tv-new-company> [<https://perma.cc/9P46-W3RR>].

257. See Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism*, 130 YALE L.J.F. 588, 588 (2021) (noting that “American competition policy ... has four big problems: Amazon, Apple, Facebook, and Google”); Elaine McArdle, *(Anti)Trust Issues*, HARV. L. BULL. (Oct. 1, 2024), <https://hls.harvard.edu/today/antitrust-issues/> [<https://perma.cc/CZB4-4MV8>] (quoting Elettra Bietti and noting that one way to see the renewed antitrust enforcement against big tech “is to see it as a check on the power of private companies to control our economy ... and, more broadly, life in the 21st century”). See generally Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 712 (2017).

258. The problems related to concentration of market power in the pharmaceutical industry were apparent in the 1990s. “Horizontal mergers at the retail and wholesale levels, in unprecedented number and of unprecedented size, have significantly increased concentration in both markets, raising official and public concern about the spectre of market power, collusion, and reduced competition in important segments of the industry.” Michael S. Jacobs, *Lessons from the Pharmaceutical Antitrust Litigation: Indirect Purchasers, Antitrust Standing, and Antitrust Federalism*, 42 ST. LOUIS U. L.J. 59, 59 (1998).

259. See Nina Lakhani, Aliya Uteuova & Alvin Chang, *Revealed: The True Extent of America's Food Monopolies, and Who Pays the Price*, GUARDIAN (July 14, 2021, at 06:00 ET), <https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation> [<https://perma.cc/Q7QZ-WTCB>]; Darwin Bentlage, *Hyper Concentration in Food Markets is Harmful to Consumers and Producers Alike*, MO. INDEP. (Jan. 22, 2024, at 05:50 ET), <https://missouriindependent.com/2024/01/22/hyper-concentration-in-food-markets-is-harmful-to-consumers-and-producers-alike/> [<https://perma.cc/BD3Y-3TT6>] (noting that in 2017, the top four meatpackers—JBS, Tyson, Cargill, and Marfrig—controlled 85 percent of U.S. beef production).

260. See Megan Willett-Wei & Skye Gould, *These 7 Companies Control Almost Every Single Beauty Product You Buy*, BUS. INSIDER (July 29, 2017, at 09:25 ET), <https://www.businessinsider.com/companies-beauty-brands-connected-2017-7> [<https://perma.cc/W26X-PD98>] (noting concentration in the cosmetics industry).

261. French conglomerate LVMH owns approximately seventy-five luxury fashion labels. See Whizy Kim, *The Surprising Reason Luxury Goods are Booming*, VOX (May 23, 2023, at 07:30 ET), <https://www.vox.com/money/23728283/luxury-designer-boom-nike-lvmh-pandemic-le-creuset> [<https://perma.cc/3RTW-9NTS>]. With a market capitalization of over half a trillion dollars, LVMH owns not only its flagship Louis Vuitton brand, but also its labels Christian Dior, Givenchy, and Tiffany. *Id.*

eyewear brands (Ray-Ban, Prada, Chanel), the retail channels (Pearle Vision, Lens Crafters, Sunglass Hut), and even owns a major insurance-managed care plan to administer vision plan benefits.²⁶² Economic research has shown that this type of market concentration leads firms to raise prices, thus reducing the average person's purchasing power.²⁶³ The concentration of market power can also negatively impact the average person's employment prospects.²⁶⁴ As one commentator noted, antitrust laws "were intended to be, and are best viewed as, a type of consumer protection statute."²⁶⁵

Aside from vertical integration of suppliers, in which the consumers might have a guess about ownership, other companies are organized as conglomerates. Such conglomerates own several different, and often unrelated, subsidiary businesses.²⁶⁶ The term's origin is in a Latin verb that means "to roll together," and is also a geological term for disparate stone fragments that have fused into one.²⁶⁷ The term has negative connotations, raising the image of "behemoth corporations operating in a mishmash of unrelated industries."²⁶⁸

262. See Halah Touryalai, *Ray-Ban, Oakley, Chanel, or Prada Sunglasses? They're All Made by This Obscure \$9B Company*, FORBES (Apr. 14, 2022, at 14:05 ET), <https://www.forbes.com/sites/halahouryalai/2013/07/02/ray-ban-oakley-chanel-or-prada-sunglasses-theyre-all-made-by-this-obscure-9b-company/> [<https://perma.cc/LU5X-YYEM>]; *About EyeMed*, EYEMED, <https://coveredca.eyemed.com/about-eyemed/> [<https://perma.cc/S7PX-6JTS>].

263. See Xavier Vives, *Rise of the Superstar Firms: Taking Oligopoly Seriously in Macroeconomics*, VOX EU (Jan. 20, 2021), <https://cepr.org/voxeu/columns/rise-superstar-firms-taking-oligopoly-seriously-macroeconomics> [<https://perma.cc/27TF-5YUQ>].

264. See Gina Potthoff Kacic, *What the Growth of Big Business Means for Jobs*, CHI. BOOTH REV. (Jan. 11, 2024), <https://www.chicagobooth.edu/review/what-growth-big-business-means-jobs> [<https://perma.cc/T23D-8NP2>].

265. Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 961 (1999).

266. *Conglomerate*, CAMBRIDGE DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/conglomerate> [<https://perma.cc/8WCY-ZARR>] (defining conglomerate as a "company that owns several smaller business whose products or services are usually very different").

267. *Business: The Conglomerates' War to Reshape Industry*, TIME MAG. (Mar. 7, 1969, at 00:00 ET), <https://time.com/archive/6633895/business-the-conglomerates-war-to-reshape-industry/> [<https://perma.cc/TKW6-8RCC>].

268. Greg Rosalsky, *The Conglomerate Paradox: As GE Splinters, Facebook Becomes Meta*, NPR (Nov. 23, 2021, at 06:30 ET), <https://www.npr.org/selections/money/2021/11/23/1057446470/the-conglomerate-paradox-as-ge-splinters-facebook-becomes-meta> [<https://perma.cc/VV3S-SR2P>].

Economists are doubtful about the value of conglomerates, noting that the separate businesses may be worth more individually than the sum of their parts.²⁶⁹ Mergers of large companies often give rise to concern over an increase in corporate political influence and power.²⁷⁰ Despite these concerns, antitrust regulators only block these mergers when it is “likely they will have substantial detrimental economic effects within clearly defined product and geographic markets.”²⁷¹ As noted by a commentator, “even the very largest corporations can merge if they compete in unrelated markets.”²⁷² These so-called conglomerate mergers mean that U.S. antitrust laws provide only a limited check on corporate consolidations.²⁷³

For the consumer or worker, the corporate ownership or financial structure may be wholly invisible. As such, the consumer would have no idea that the agreement they clicked on would bind them to an agreement with a completely unrelated business. Given that we now understand how we are in the current predicament, we can now turn to solutions.

III. FRAUD IN THE INCEPTION

Even if courts desire to equalize the power differential and bring some reasonableness back to contract law, they may struggle with the doctrine to enable them to do so. As noted earlier, the unconscionability defense has been a mixed or losing proposition in many

269. *See id.*

270. *See* Joseph E. Stiglitz, *America Has a Monopoly Problem—and It’s Huge*, THE NATION (Oct. 23, 2017), <https://www.thenation.com/article/archive/america-has-a-monopoly-problem-and-its-huge/> [<https://perma.cc/M25Y-EBQB>]; Paul Krugman, *Challenging the Oligarchy*, N.Y. REV. BOOKS (Dec. 17, 2015), <https://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy/> [<https://perma.cc/5Z33-Y2K2>].

271. Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75, 82 (2020).

272. Robert H. Lande, *Antitrust Ideas That Progressives Should Resurrect: Conglomerate Merger Legislation, No-Fault Monopolization, and Merger Incipency*, 53 U. BALT. L. REV. 481, 488 (2024).

273. *See* Andrew F. Tuch, *Financial Conglomerates and Information Barriers*, 39 J. CORP. L. 563, 570 (2014) (describing financial conglomerates as “diversified financial institutions ... engag[ing] in a broad and diverse range of financial activities, often including banking, securities, and asset management”).

courts.²⁷⁴ As such, identifying a fitting and acceptable defense is important. One such defense is fraud in the inception.

Fraud in the inception occurs when a party is tricked into signing something other than what was represented to them. California and other state courts have started to read fraud in the inception more broadly, particularly in the context of online boilerplate. In this Part we will explore the origins of the fraud in the inception defense, how the defense developed over time, and explore the types of fraud. Then, we will examine how state courts have recently been applying the doctrine to the current problem of overreaching online terms and conditions.

A. *Development and Definitions*

During the Middle Ages and Renaissance, the developing common law in England was not sympathetic to contractual excuses or defenses. In the landmark case of *Paradine v. Jane*, the court ruled that despite the fact that an army headed by the alien Prince Rupert had invaded a tenant's land, the tenant was still liable to his landlord.²⁷⁵ The quotation of note from that venerable case is, “[y]et, he ought to pay his rent.”²⁷⁶ The law at that time did not take into account the legitimate reasons for nonpayment—despite the rather obvious fact that the land was fallow because it was occupied by hostile military forces.²⁷⁷ Instead, the court ruled that contractual liability was *absolute*.²⁷⁸ This strict view was solidified in the Latin brocard *pacta sunt servanda*, “agreements must be kept.”²⁷⁹

Coupled with other legal maxims such as *caveat emptor*, the law provided few reasons for contractual excuse.²⁸⁰ Once a deal was

274. See *supra* notes 143-62 and accompanying text.

275. (1647) 82 Eng. Rep. 897, 897.

276. *Id.*

277. This account is part of a larger extended discussion included in my casebook. See MIRIAM A. CHERRY, *CONTRACTS: A REAL WORLD CASEBOOK* 398 (W. Acad. 2d ed. 2021).

278. See *id.*

279. Today, the maxim is also a term of art within public international law in reference to the obligation to keep treaties. See Hans Wehrerg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 775 (1959) (“Few rules for the ordering of Society have such a deep moral and religious influence as the principle of sanctity of contracts: *Pacta sunt servanda*.... The juridical sense of the Romans recognized that a well-regulated trade was possible only if contracts were kept.”).

280. The brocard *caveat emptor* is part of a longer Latin maxim, “*Caveat emptor, quia*

complete, the risk of loss was put squarely on the buyer.²⁸¹ There was a type of internal logic to this. As contracts were difficult to enter because of many formalities that were required as expressions of intent, such as the seal, writings, or witnesses to signatures, contracts were also difficult to escape.²⁸² Before the English Industrial Revolution, many of the modern contract defenses—mistake, duress, fraud, changed circumstances—either did not exist or were quite narrowly construed.²⁸³ As such, the contract defenses developed only later, forming the doctrines that we know and understand today.²⁸⁴

Despite the common law's hostility toward defenses, fraud in the inception was one of those to be recognized. *Thoroughgood Case*,²⁸⁵ decided in 1582, first described the fraud in the inception defense, which was then known as *non est factum*.²⁸⁶ The facts of the case were memorable. A landlord, Thoroughgood, intended to waive the rent arrearage of his tenant, William Chicken.²⁸⁷ As such, a contract

ignore non debuit quod jus alienum emit," meaning, "let the buyer beware, for they should not be ignorant of what they are buying from someone else." Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1113, 1166 (1931). Despite its Latin provenance, the concept does not appear in Roman law, or even the Law Merchant of the Middle Ages. *See id.* at 1136, 1156-57. As noted by a leading commentator:

How the trick of phrase was turned, and *caveat emptor* came into being, we do not know. The wisdom seems to be the afterthought of the good man who has bargained, perhaps in a horse trade, once too often; the manner suggests the lawyer regretfully stating that the grievance seems to be without redress.

Id. at 1163.

281. *Chandelor v. Lopus* (1603) 79 Eng. Rep. 3-4, concerning the sale of a false bezoar stone, is often noted as the genesis of the doctrine of *caveat emptor*. The case, however, also contains an exception for the doctrine of express warranty. *See* JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 138 (1913).

282. *See generally* HENRY S. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (1861) (explaining the formality and solemnity of contracting in Ancient Rome).

283. *See* Daniel P. O'Gorman, "Sign or Die!": *The Threat of Imminent Physical Harm and the Doctrine of Duress in Contract Law*, 85 TENN. L. REV. 423, 425 (2018) (providing an overview of the duress defense and its expansion over the centuries).

284. *See, e.g., Raffles v. Wichelhaus* (1864) 159 Eng. Rep. 375 (developing defense of mutual mistake by discussion of mix-up between two ships named "Peerless"); O'Gorman, *supra* note 283, at 425 (providing overview of duress defense and its expansion over the centuries).

285. *See* *Thoroughgood v. Cole* (1582) 76 Eng. Rep. 408-09.

286. *Non est factum* translates to "not my deed." *See Non Est Factum*, MERRIAM DICTIONARY, <https://www.merriam-webster.com/legal/non%20est%20factum> [<https://perma.cc/GH2K-EG36>].

287. *Thoroughgood*, 76 Eng. Rep. at 408. Perhaps proving the point that there has been

was drawn up to memorialize that understanding.²⁸⁸ Thoroughgood, however, was illiterate, so he relied on the assistance of a bystander to confirm the contents of the document he signed.²⁸⁹ However, the bystander made an error—the document that Thoroughgood in fact signed mistakenly said that Chicken owned the property.²⁹⁰ Perhaps illustrating the maxim of “no good deed goes unpunished,”²⁹¹ Chicken then sold the property—representing that he owned it—to an innocent third party.²⁹² Litigation ensued and the court held in favor of Thoroughgood.²⁹³

As the doctrine of fraud in the inception developed over hundreds of years, it came to be known as a contract defense in which a party is deceived about the nature of a contract or transaction.²⁹⁴ The defense has gone by various names based on the jurisdiction and time period in which it is used, and is also called fraud in the execution and fraud in the factum.

In modern times, we could think of examples of fraud in the inception when a family member tricks an elderly person into signing a document that they say is without legal force or effect, but in reality, their signature authorizes a change in their will.²⁹⁵ While this type of family drama might seem more like a telenovela, there are other more mundane examples.²⁹⁶ In a recent case, a debtor pled fraud in the inception, contending that the bank snuck

much law created around the term “chicken,” see *Frigalment Importing Co. v. BNS Int’l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (“The issue is, what is chicken?”).

288. *Thoroughgood*, 76 Eng. Rep. at 408.

289. *Id.* at 408-09.

290. *Id.* at 408.

291. Apologies for the double pun.

292. *Thoroughgood*, 76 Eng. Rep. at 408.

293. *Id.*

294. See *Foster v. MacKinnon*, (1869) 4 LRCP 704, 705 (Eng.) (“[I]f the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, ... and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict.”).

295. See, e.g., *Rumfield v. Rumfield*, 324 S.W.2d 304, 307 (Tex. Civ. App. 1959).

296. See, e.g., RESTATEMENT (SECOND) OF CONTS. § 163, illus. 2 (A.L.I. 1981) (“A and B reach an understanding that they will execute a written contract containing terms on which they have agreed. It is properly prepared and is read by B, but A substitutes a writing containing essential terms that are different from those agreed upon and thereby induces B to sign it in the belief that it is the one he has read. B’s apparent manifestation of assent is not effective.”).

authorization for a line of credit amongst a large volume of required paperwork.²⁹⁷ Or, imagine that a fan presents a paper to a celebrity and asks for their autograph. Believing the fan's request to be innocent, the celebrity signs, but they have signed a loan document.²⁹⁸ In these examples, there are no valid contracts because the deceived party "neither knows nor has reason to know of the character of the proposed agreement."²⁹⁹ Such situations make a party "believe that the act which he does is something other than it actually is."³⁰⁰

Another example of fraud in the inception occurs if a party surreptitiously substitutes one set of papers for another that is signed. For instance, an employer alleged such substitution during collective bargaining negotiations.³⁰¹ He claimed that a union member set up a diversion by standing up and discussing how he might leave the negotiations, while a confederate snuck in a different draft of a collective bargaining agreement in that six- or seven-second gap of time.³⁰² The defense also arises when one party has a limitation to understanding the nature of the document that was presented to them.³⁰³ This could be "blindness, illness, or illiteracy" that prevents the individual from reading and understanding the contract that is about to be signed.³⁰⁴

297. *See Settlers' Hous. Serv., Inc. v. Schaumburg Bank & Tr. Co.*, 568 B.R. 40, 56 (Bankr. N.D. Ill. 2017).

298. *See Operating Eng'rs Pension Tr. v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir. 1984) ("[O]ne who signs a promissory note reasonably believing he only gave his autograph is not liable on the note.").

299. E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 4.10 (4th ed. 2025).

300. SAMUEL WILLISTON, 12 A TREATISE ON THE LAW OF CONTRACTS § 1488 (Walter H.E. Jaeger 3d. ed. 1970).

301. *See Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 30 (2d Cir. 1997). Oddly, this is a fact pattern mentioned in earlier cases as well. *See, e.g., Connors v. Fawn Mining Corp.*, 30 F.3d 483, 486-87 (3d Cir. 1994).

302. *Hetchkop*, 116 F.3d at 30.

303. *See Rosenthal v. Great W. Fin. Secs. Corp.*, 926 P.2d 1061, 1066 (Cal. 1996).

304. *Munoz v. PL Hotel Grp., LLC*, 288 Cal. Rptr. 3d 644, 651 (2022); *see also Erickson v. Bohne*, 279 P.2d 619, 619 (Cal. Dist. Ct. App. 1955) (noting that plaintiff's daughter tricked her into signing a deed and took advantage of her physical and mental illnesses); *Jones v. Adams Fin. Servs.*, 84 Cal. Rptr. 2d 151, 153 (Ct. App. 1999) (concerning defendants that tricked an elderly legally blind woman by telling her she was signing a document to receive a payoff amount on a mortgage, but actually having her sign a reverse mortgage).

Notably, fraud in the inception may also be present when one party may understand that they are signing a contract, but the agreed upon terms are not what was written in the contract.³⁰⁵ Imagine that the parties to a commercial transaction have negotiated terms for several weeks, and that various drafts of the contract have been exchanged. Then one party is presented with the final draft of the contract, with the ostensibly agreed-upon terms. But the terms have been substituted with an earlier draft that contained a version of the deal on far less favorable terms.³⁰⁶ In *Hotels Nevada v. L.A. Pacific Center, Inc.*, the owner of a property agreed to sell for a price paid over two installments.³⁰⁷ The seller alleged that the buyers had substituted a term that entitled them to keep the second installment of \$5 million for another five years.³⁰⁸

The name of the defense, “inception,” references that the defense arises at the very beginning of contract formation. As with other contract defenses—such as mutual mistake—the gravamen of the defense rests on a lack of mutual assent, a key element in the prima facie case for a contract.³⁰⁹ If a party does not know or understand what they are signing, that party cannot voluntarily undertake the purported obligation.³¹⁰ In *Hartshorn v. Day*, an 1856 case, the U.S. Supreme Court discussed the defense of fraud in the inception as part of a complicated assignment of a patent.³¹¹ Reviewing the

305. See, e.g., *Drinkard v. Embalmers Supply Co.*, 14 So. 2d 585, 586 (Ala. 1943) (noting incorrect number of vials of embalming fluid was recorded in contract).

306. See, e.g., *Munoz*, 288 Cal. Rptr. 3d at 647 (noting that the defense “goes by various names—fraud in the factum, fraud in the execution, fraud in the inception—but they all describe the same genre of deceit. It occurs where, after parties have agreed upon certain contract terms, one of them surreptitiously substitutes a document for signature that looks the same as the earlier draft but contains materially different terms. Fraud in the execution is distinct from promissory fraud, which involves false representations that induce one to enter into a contract containing agreed-upon terms”).

307. 50 Cal. Rptr. 3d 700, 702 (Ct. App. 2006).

308. *Id.* at 703.

309. Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 199 (2017) (“To use the language of consent construction, fraud in the execution means that the condition of intentional manifestation of consent is absent because the act was not intentional and does not manifest assent to the terms.”).

310. *Strotz v. Dean Witter Reynolds, Inc.*, 272 Cal. Rptr. 680, 687 (Ct. App. 1990) (“We agree that if a party is unaware he is signing any contract, obviously he also is unaware he is agreeing to arbitration. Accordingly an allegation of fraud in the inception or execution of the contract is necessarily directed at both the principal contract and the arbitration agreement contained therein.”).

311. See 60 U.S. 211, 222-23 (1856).

defenses proffered, the court made a remarkable statement by noting that:

Fraud in the execution of the instrument has *always* been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practised upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.³¹²

To put it another way, the Alabama Supreme Court colorfully noted that “[i]f the instrument sued on was void for fraud in its execution ... it was of no more binding efficacy on the defendant than if it had no existence, or were a piece of waste paper.”³¹³ Older cases noted that fraud in the inception would trump other forms of fraud, as well as delivery of a deed.³¹⁴

Fraud in the inception is often contrasted with its more common counterpart, fraud in the inducement. Fraud in the inducement, or fraudulent misrepresentation, occurs when one party makes a material statement that is not in accord with the true nature of the facts, and does so knowing the statement is false.³¹⁵ To count as fraudulent, the statement must be material; that is, it would be important enough to induce someone to manifest their assent to the contract.³¹⁶ The state of mind requirement, known as *scienter*, encompasses a knowing falsehood as well as a reckless disregard for the truth.³¹⁷ Fraud in the inducement can also give rise to an independent tort, and if aggravated, can also be prosecuted as a crime. Although fraud in the inception is considered the rarer type of fraud, it has also been widely discussed. To illustrate, consider an 1881 U.S. Supreme Court case, *George v. Tate*, which noted that it

312. *Id.* at 223 (emphasis added).

313. *Drinkard v. Embalmers Supply Co.*, 14 So. 2d 585, 586 (Ala. 1943).

314. *See, e.g., Osterhout v. Shoemaker*, 3 Hill 513, 516 (N.Y. Sup. Ct. 1842) (“The plaintiff finally rested his case on the single ground that his deed to Frederick was procured by fraud. The evidence tended to make out a fraud in relation to the consideration, and it is well settled that a deed cannot be avoided on that ground. The fraud must go to the execution of the deed, as by showing a misreading, or the substitution of one instrument for another.”).

315. *See* RESTATEMENT (SECOND) OF CONTRACTS § 159 (A.L.I. 1981).

316. *See id.*

317. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976) (noting that *scienter* “refers to a mental state embracing intent to deceive, manipulate, or defraud”).

is well settled that the *only fraud* permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give.³¹⁸

The financial crisis of 2008 revived the fraud in the inception doctrine. With so many homeowners facing foreclosure, some fell victim to what is known as mortgage rescue fraud.³¹⁹ This particular type of fraud presented a “white knight” who promised to provide relief to desperate homeowners in the form of a loan that would provide breathing room before eviction.³²⁰ But in a situation eerily reminiscent of *Thoroughgood*, the legal documents themselves in a mortgage rescue fraud would state that the homeowner was selling the home, then renting in a sale-leaseback transaction.³²¹ The ultimate impact was that as a tenant, the former homeowner could be more easily evicted and lost the statutory right of redemption available to mortgagees.³²²

Other recent cases concern releases to appear on camera under false circumstances. In a series of cases related to the movie *Borat*, the plaintiffs argued that they were unwittingly the “stooges” in an elaborate prank.³²³ One plaintiff stated that she was told she would be filmed hosting a dinner party for a foreign reporter and that the footage would only be shown in Belarus.³²⁴ In reality, they became part of a major studio comedy production with their humiliation on camera as the main part of the humor.³²⁵ In another video production case, the plaintiff was a former gang member who

318. 102 U.S. 564, 570 (1880) (emphasis added).

319. See Stark & Choplin, *supra* note 33, at 633-34.

320. *Id.* at 633; see, e.g., *Nowosleska v. Steele*, 946 A.2d 1097, 1099 (N.J. Super. Ct. App. Div. 2008) (noting the homeowner’s contention that “they signed the documents understanding that they were obtaining a loan and that only later did they discover that they had signed a deed transferring title to the house”).

321. See, e.g., *Brown v. Carlson*, No. 07-1624, 2009 WL 2914191, at *3 (Mass. Super. Ct. Sep. 1, 2009) (noting that homeowner argued that she was deceived into thinking she signed a mortgage refinancing document rather than a deed).

322. See Stark & Choplin, *supra* note 33, at 634.

323. Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 53, 55 (2013).

324. *Id.* at 55.

325. *Id.* at 54.

alleged that he only appeared because he was promised that his face would be obscured on camera.³²⁶ The producers used the footage in a documentary, *Gangland*, but failed to obscure the plaintiff's face.³²⁷ The producers relied on a release that the plaintiff signed prior to filming.³²⁸ The court, however, noted that the plaintiff claimed that he had “dyslexi[a], is illiterate, and told [the producers that he had] ‘extreme difficulty reading.’”³²⁹ Instead of a release, the plaintiff claimed that he was told it was “just a receipt” for the \$300 payment for the interview.³³⁰ On those facts, the court excused the plaintiff from the contract.³³¹

The duty to read is one major hitch in courts recognizing the fraud in the inception defense.³³² Courts, however, have acknowledged the fact that if one party misrepresents the content of a written contract, it may deter the other party from reading the contract because of the lie that they were told.³³³ The Supreme Court of California noted that in such a situation a “party to an instrument who by fraud leads the other party to sign without reading it is in no position to urge the latter’s negligence.”³³⁴ The matter was put more colorfully in a 1990 Illinois bankruptcy case, in which the Seventh Circuit noted that just because a more cautious person “might have smelled a rat, does not defeat liability.”³³⁵

326. *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 950 (9th Cir. 2013).

327. *Id.*

328. *Id.* at 951-52.

329. *Id.* at 952.

330. *Id.*

331. *Id.* at 958 (“Because of these representations, Plaintiff did not ask his girlfriend to read out loud the document before he signed it. At this stage in the proceedings, Plaintiff has made a sufficient showing of fraud in the execution of the release, which, if true, would render the release void.”).

332. See Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1051-52 (1966); see also Charles L. Knapp, *Is There a “Duty to Read”?*, 66 HASTINGS L.J. 1083, 1085-86 (2015).

333. See, e.g., *Burroughs v. Pacific Guano Co.*, 1 So. 212, 213 (1887) (“[W]here [the contract’s] execution is obtained by a misrepresentation of its contents,—the party signing a paper which he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect of the case, that the party signing had an opportunity to read the paper; for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing.”). For another early case, see *Dubois v. Loper*, 1 N.J.L. 382, 383-84 (1795).

334. *Cal. Tr. Co. v. Cohn*, 7 P.2d 297, 300 (Cal. 1932).

335. *AMPAT/MIDWEST, Inc. v. Ill. Tool Works Inc.*, 896 F.2d 1035, 1041 (7th Cir. 1990).

Another hitch is the so-called “double liar” situation implicated by the parol evidence rule.³³⁶ There, one party—let’s say the buyer—signs a contract that includes a statement that buyer will take on any risk of the seller’s fraud. The contract also contains an integration clause, which would bar the introduction of any parol evidence. The buyer’s later allegation would be the first fraud, and the buyer’s statement that they had read the contract and accepted the risk of fraud would be the second lie. As one commentator has noted, there is “something significant” about fraud, and for such reason, “even in transactions where parties have negotiated for limited representations and fraud claims, judges can be reluctant to opine that fraud claims can be disclaimed.”³³⁷

B. Fraud in the Inception and Online Terms and Conditions

While fraud in the inception is a relatively unusual doctrine in some states, California courts have been willing to recognize the defense more broadly. As such, the fraud in the inception defense could trump a contract term, even an agreement to arbitrate.³³⁸ An intriguing newer case, *Duick v. Toyota Motor Sales, U.S.A., Inc.*, involved a disguised online arbitration clause and contained a discussion of the fraud in the inception defense.³³⁹

In the first decade of the 2000s, viral marketing was a mantra. Companies paid advertising agencies to come up with memorable and interactive marketing campaigns. As part of one such viral ad campaign, Amber Duick received an email invitation to play a game called “Your Other You.”³⁴⁰ The link in the email she received purported to be a “[p]ersonality [e]valuation” but was in reality a series of prank emails sent by Toyota to promote its Matrix automobile.³⁴¹ Another Internet user (Player #1), who knew Duick,

336. Eric A. Zacks, *Contract and Fraud*, 62 U. PENN. J. BUS. L. 571, 589-90 (2024).

337. *Id.* at 579-80.

338. See *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 136 Cal. Rptr. 378, 385-86 (Ct. App.) (disallowing investment firm’s arbitration clause when plaintiff alleged sufficient facts to make out a defense of fraud in the inception and undue influence based on the idea that she did not know or understand what she was signing).

339. 198 Cal. Ct. App. 1316, 1318-20 (2011).

340. *Id.* at 1318-19.

341. *Id.* at 1318-20.

provided Duick's personal information to Toyota, including her email address, phone number, and home address.³⁴²

At some point, Duick received an unsolicited email that purported to be a "personality evaluation," which she apparently clicked her agreement to. With the information received from Player #1, Duick began receiving strange and frightening emails from an imaginary character, Sebastian Bowler, a self-proclaimed rabid British soccer fan.³⁴³ Bowler confessed that he was on the lam to escape the "coppers"—presumably driving a Toyota Matrix—along with his bulldog, Trigger.³⁴⁴ Bowler sent an email saying that he would plan to lay low from the police at Duick's house—and he listed her address correctly and stated that he would be showing up soon.³⁴⁵ Later, someone posing as a hotel manager contacted Duick, asking her to pay for damage to a hotel room that Bowler had trashed.³⁴⁶ The series of disturbing and frightening emails was finally capped off with an email link notifying Duick that Bowler was not a real person and that all of the messages had been part of an elaborate prank.³⁴⁷

In the aftermath of these events, Duick sued Toyota for emotional distress, negligence, and false advertising.³⁴⁸ Toyota countered by noting that Duick had clicked "agree" on screen, and that the screen she had clicked on contained an arbitration provision.³⁴⁹ As such, Toyota moved to compel arbitration.³⁵⁰ In response, Duick noted that the first screen she had filled out and then clicked "agree" was disguised as a "personality evaluation."³⁵¹ She claimed that she was not put on notice that the personality evaluation was a contract, nor that by clicking, she would be agreeing to arbitrate her claims.³⁵²

The court held that the arbitration clause was void.³⁵³ The court distinguished between the two types of fraud, noting that this case

342. *See id.* at 1318-19.

343. *Id.* at 1319-20.

344. *Id.*

345. *Id.*

346. *Id.* at 1320.

347. *Id.*

348. *Id.*

349. *Id.* at 1320, 1322.

350. *Id.* at 1320.

351. *Id.* at 1321.

352. *Id.*

353. *Id.* at 1320.

involved fraud in the inception.³⁵⁴ Fraud in the inception is present when “the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking.”³⁵⁵ Here, because Duick did not understand the contractual nature of what she had clicked, the court refused to enforce the arbitration provision.³⁵⁶ The agreement did reference an “interactive experience” and a “digital experience,” which the court noted were vague terms.³⁵⁷ Perhaps the use of such opaque terms was to be expected, given that pranks, by their nature, must be surprising to be funny. Regardless, the court held that no reasonable person would have understood the screen Duick clicked on as either permission to receive harassing and bizarre emails or to arbitrate any claims.³⁵⁸

In 2017, the Ninth Circuit Court of Appeals decided *DKS, Inc. v. Corp. Business Solutions*, and applied the fraud in the inception doctrine to a commercial dispute.³⁵⁹ The *DKS* court described a scheme in which Corporate Business Solutions (CBS) proffered a consulting agreement to DKS, including an arbitration clause.³⁶⁰ When DKS sued and CBS sought to invoke that clause, DKS successfully argued that the contract was void by pleading the following alleged scheme:

[f]unneling funds from DKS to CBS; forging financial documents to secure additional funding that could be funneled to DKS’s projects to pay the hourly bills run up by CBS employees; securing additional loans to pay those hourly bills; destroying DKS’s relationship with clients and creditors; and fraudulently representing to DKS’s payroll company that a CBS employee

354. *Id.* at 1320-22.

355. *Id.* at 1320.

356. *Id.* at 1323.

357. *Id.* at 1321-22.

358. *Id.* at 1322 (“For all of the foregoing reasons, we conclude that defendants deprived Duick of a reasonable opportunity to know the character of the proposed contract. The contract is consequently void because of fraud in the inception, and every part of it is therefore unenforceable, including the arbitration provision.”).

359. *See* 675 F. App’x 738, 739 (9th Cir. 2017).

360. *Id.* at 739.

had been hired as an executive and subsequently receiving paychecks for that phantom position.³⁶¹

The court declared the contract—including the arbitration clause—void: “Nothing in the boilerplate contract signed by the parties could have put DKS on reasonable notice that it was subjecting itself to such activity; therefore, the contract was void at its inception.”³⁶² A dissenting judge, while agreeing that California’s “fraud in the inception” doctrine can render contracts *void ab initio*, did not think it applied to the facts of the case.³⁶³

Providing plaintiffs with a viable defense that could be used to invalidate the most outlandish of boilerplate terms is a step forward. However, nonenforcement of such terms does not correct the incentives that led to the overdrafting problem in the first place. In the next Section, we will examine a tort law alternative that could disrupt the ongoing pattern of unenforceable terms.

IV. A NEW TORT: ABUSE OF CONTRACT

The fraud in the inception defense outlined in the last Section—as well as other defenses that have been used, like unconscionability—has generally focused on nonenforcement of offensive terms.³⁶⁴ Nonenforcement by itself, however, may not be enough. If a court strikes down an overreaching clause in a contract, the party proposing the offensive terms is no worse off. Nonenforcement merely means that the drafter will be returned to the position they began with at the outset, minus the offensive term. With virtually no downside to including nonenforceable, harsh, or even outrageous terms,³⁶⁵ the incentive will be overdrafting.

361. *Id.*

362. *Id.*

363. *See id.* at 739-40 (Hawkins, J., dissenting).

364. *See supra* Part III.

365. The law and economics scholarship might quibble with this characterization because overly harsh or crafty terms might result in reputational damage to the firm using them. However, as we have seen, the overly harsh terms are often part of the invisible terms, and as such are not salient enough to cause reputational damage. *See Rakoff, supra* note 133, at 1250-52 (discussing invisible terms).

Coupled with inherent moral hazard, the drafting incentives are not properly aligned.³⁶⁶ If there was an understanding that certain terms were widely acknowledged as creating a fraud in the inducement or an unconscionability defense, ethical lawyers would stop drafting those provisions into contracts.³⁶⁷ But if voluntary self-regulation is not possible to achieve, tort law is another promising avenue. Additional accountability would be helpful, and tort law provides a template for a market-correcting incentive.³⁶⁸ This Section discusses the abuse of process tort, a template for an abuse of contracts tort. A key piece of this proposed tort would be the *in terrorem* effects that often scare the unrepresented and are the animating purpose behind overdrafting. These elements provide some general contours for the development of a tort called abuse of contract.

The *Restatement (Second) of Torts* defines abuse of process as being an instance where a party uses a civil or criminal process “against another primarily to accomplish a purpose for which [the process] is not designed.”³⁶⁹ A leading case defined the elements of the abuse of process tort as consisting of “1) an ulterior purpose and 2) an act in the use of process which is improper in the regular prosecution of the proceeding.”³⁷⁰ An example of abuse of process “is

366. Moral hazard refers to the increased risk that parties take on when they face no direct consequences, and the cost of that risk will be borne by others. *See generally* Zacks, *supra* note 138.

367. *See* Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 388 (2002) (proposing ethical rules limiting an attorney’s ability to draft unconscionable terms in a contract, knowing the other parties will be unrepresented). Such rules were proposed in a draft of the Model Rules of Professional Conduct, and would have prohibited a lawyer’s assistance in helping a client draft a contract that contained unconscionable terms. *Id.* at 380. However, these rules were deleted in the final draft of the Model Rules for being too indeterminate. *Id.* Carrington’s suggestion that “[c]lass suits against law firms might correct wrongs by lawyers who draft unconscionable form contracts and thus engage themselves in the wrongs of their clients” might be a suggestion worth revisiting. *Id.* at 390; *see generally* Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989 (2010).

368. Contract law focuses on compensation for loss, but not deterrence, and as such, punitive damages are generally not available under contract law. *See* RESTATEMENT (SECOND) OF CONTS., ch. 16 intro. note (A.L.I. 1981) (“The goal of the law of contract remedies has not been compulsion ... but compensation.”); *see also* Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 207 (1977); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 631 (1999) (“The original reasons for the rule against punitive damages in contracts are obscure.”).

369. RESTATEMENT (SECOND) OF TORTS § 682 (A.L.I. 1976).

370. *Schohl v. Lodge & Shipley Co.*, No. 180137, 1197 WL 33347897, at *4 (Mich. Ct. App.

where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure.”³⁷¹ Another court explained that “in addition to ulterior motive, one must ... prove that there has been a perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge.”³⁷² Abuse of process often focuses on litigants who use legal actions to take advantage of the other party, including having them give up rights or money.

The 1838 landmark case *Grainger v. Hill* developed the tort of abuse of process in England.³⁷³ There, the plaintiff took out a mortgage on his ship, but still retained possession of the vessel.³⁷⁴ The defendants, however, demanded that the plaintiff turn over the vessel’s registration.³⁷⁵ Without the registration, the plaintiff could not sail, so he refused, protesting that it was not part of the agreement.³⁷⁶ To gain leverage, the defendants obtained a writ from a court and had the plaintiff imprisoned.³⁷⁷ Reviewing the facts, the court held that the process “was enforced for an ulterior purpose; to obtain property by duress to which the Defendants had no right.”³⁷⁸ The duress could also be causing someone mental anguish. Others have described the abuse of process tort as encompassing a situation in which a party is to exercise a right to go to court, lawful and valuable in itself, for a purpose other than that for which it was designed.³⁷⁹

In more modern application, scholars pointed out that abuse of process was happening in the context of lawsuits that were being

June 13, 1997).

371. *Id.*

372. *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980). Other courts use similar language. *See, e.g., Younger v. Solomon*, 113 Cal. Rptr. 113, 118 (Ct. App. 1974) (finding an abuse of process for “an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose” (citation omitted)).

373. *See* (1838) 132 Eng. Rep. 769.

374. *Id.* at 770.

375. *Id.*

376. *Id.*

377. *Id.* at 213-14.

378. *Id.* at 774 (Bosanquet, J.).

379. *See Aztec Sound Corp. v. W. States Leasing Co.*, 510 P.2d 897, 898 (Colo. App. 1973); *see also* Matthew Spohn, *Combating Bad-Faith Litigation Tactics with Claims for Abuse of Process*, 38 COLO. LAW. 31, 37 (2009).

filed against ordinary citizens who were engaging in public advocacy. Such lawsuits—however baseless—are filed by businesses or elected officials and intended to prevent citizens from expressing opinions or engaging in political advocacy.³⁸⁰ Such strategic lawsuits against public participation, or SLAPPs, rose to prominence during the 1980s.³⁸¹ Before the advent of widespread state adoption of anti-SLAPP statutes, many courts dealt with such filings through a counterclaim or separate countersuit in response to the SLAPP for abuse of process or malicious prosecution.³⁸²

The abuse of contract tort would draw upon the elements of the abuse of process tort outlined above. If a term that was clearly unenforceable was included in boilerplate, we would need to question whether there was an improper ulterior motive behind its usage. Many consumers believe that contracts are enforceable as written.³⁸³ This is the *in terrorem* effect of adhesion contracts.³⁸⁴ In 2020, researchers Meirav Furth-Matzkin and Roseanna Sommers published a study that investigated consumer beliefs about fraud.³⁸⁵ After performing four studies, they reached the following conclusion:

Few consumers will notice at the time of signing that they have been misled about the terms of a transaction; many will realize this only after the fact when they are hit with a nasty surprise. At that point, they may revisit the contract and discover a fine-print clause that contradicts what they were told. Previous commentary has assumed that consumers will complain at this point because they were deceived about a material aspect of the transaction.... [We] show [], on the contrary, that the inclusion

380. George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. QUINNIPIAC COLL. 937, 941-42 (1992); see also John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993) ("SLAPPs[] are meritless suits aimed at silencing a plaintiff's opponents.").

381. See Pring & Canan, *supra* note 380, at 938-39.

382. See, e.g., Sklar v. Beth Isr. Deaconess Med. Ctr., 797 N.E.2d 381, 388 (Mass. App. Ct. 2003); see also Richard J. Yurko & Shannon C. Choy, *Reconciling the Anti-SLAPP Statute with Abuse of Process and Other Litigation-Based Torts*, BOS. BAR J., Mar./Apr. 2007, at 15, 16.

383. See Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 516 (2020).

384. See *id.*

385. *Id.* at 508.

of fraudulent fine print leads laypeople to assume that they are stuck with what they signed.³⁸⁶

Lawyers, law professors, and judges blame the average person for not reading contracts of adhesion.³⁸⁷ Perhaps worse, though, the average person blames themselves for failing to read or understand terms and conditions.³⁸⁸ Rather than seek redress, some consumers internalize the blame and often ultimately shoulder the cost.³⁸⁹

A study by Professors Tess Wilkinson-Ryan and David A. Hoffman confirms that consumers place their stock in written terms and believe that contracts are proven through formalities, even when no one has read the contracts or even when the contract seems fundamentally unfair.³⁹⁰ Because of these types of beliefs, laypeople feel bound by the contract they signed, whether or not they were lied to, and whether or not they believe the contract to be unfair.³⁹¹ Using this knowledge to scare consumers and workers from their rights is analogous to the ulterior motive used in the abuse of process tort.³⁹² The next Part examines how these concepts are interrelated with the growth of technology.

V. TECHNOLOGY AND ABUSE OF CONTRACT

On April 1, 2010, an online game retailer in the United Kingdom decided to play a prank on its customers for April Fool's Day.³⁹³

386. *Id.*

387. *See id.* at 510.

388. *Id.*

389. *See id.*

390. Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1296-97 (2015); *see also* Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. PA. L. REV. 193, 195-96 (2020).

391. Furth-Matzkin & Sommers, *supra* note 383, at 508.

392. *See* Francis J. Mootz, III, *Holding Liability Insurers Accountable for Bad Faith Litigation Tactics with the Tort of Abuse of Process*, 9 CONN. INS. L.J. 467, 488 (2003) (noting that abuse of process provides “a viable cause of action only for some of the extreme cases of insurer bad faith in the settlement of claims, and will not reach all instances” in the proposed extension of the tort to insurance law).

393. Catharine Smith, *7,500 Online Shoppers Accidentally Sold Their Souls to Gamestation*, HUFFPOST (June 17, 2010, at 05:12 ET), https://www.huffpost.com/entry/gamestation-grabs-souls-o_n_541549 [<https://perma.cc/D2ZD-WNU4>]; *see also* Matthew S. Schwartz, *When Not Reading the Fine Print Can Cost Your Soul*, NPR (Mar. 8, 2019, at 09:55 ET), <https://www.npr.org/2019/03/08/701417140/when-not-reading-the-fine-print-can-cost->

Buried in its website's terms and conditions was an obscure clause.³⁹⁴ In exchange for fulfilling the customer's order, the retailer could "claim, for now and for ever more, [the customer's] immortal soul."³⁹⁵ Few online purchasers read the clause, with the result that 7,500 people agreed to forfeit their souls.³⁹⁶ In 2017, 22,000 Internet users agreed to volunteer to clean up sewer blockages in exchange for receiving free Wi-Fi.³⁹⁷ The drafters of the clause said this was just a joke "to illustrate the lack of consumer awareness of what they are signing up to when they access free wifi."³⁹⁸ These two examples may seem outlandish, but the shocking terms were clearly facilitated by technology. There seems to be a relationship between technology and ever harsher contract terms in the last decade. Why is that so?

A. *Platforms and Power*

The fact that many overreaching contracts involve technology and the developing landscape of the platform economy is not a coincidence. Digital labor platforms have grown in popularity and into hypercommoditized spaces.³⁹⁹ At the same time, platforms have engaged in well-publicized lobbying campaigns to skirt regulations.⁴⁰⁰ Matters like licensure, occupancy ordinances, employment laws, and taxation are among those laws to be avoided.⁴⁰¹ Platforms have instead maintained that their relationships with workers and customers should be governed by private ordering—meaning online terms of service.⁴⁰² The fast-paced approach of the on-demand

your-soul [<https://perma.cc/X9SM-8P8J>].

394. See Smith, *supra* note 393.

395. *Id.* (quoting from the Gamestation terms and conditions).

396. *Id.*

397. Alex Hern, *Thousands Sign Up to Clean Sewage Because They Didn't Read the Small Print*, THE GUARDIAN (July 14, 2017, at 06:07 ET), <https://www.theguardian.com/technology/2017/jul/14/wifi-terms-and-conditions-thousands-sign-up-clean-sewage-did-not-read-small-print> [<https://perma.cc/6U6N-6NM7>].

398. *Id.*

399. See Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 445-46 (2013).

400. See, e.g., Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1640 (2017).

401. *Id.* at 1642, 1646.

402. See Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 587 (2016).

economy fundamentally rests on the idea that technology outpaces outdated regulation.⁴⁰³ Platforms instead urge that code will provide the rules of the road.⁴⁰⁴

Over the past decade, this antiregulatory position has resulted in an explosion of court cases challenging the practices of digital platforms. Among these cases are many in which workers have argued that they were misclassified as independent contractors rather than employees.⁴⁰⁵ Workers have noted that they have an imbalance of bargaining power and are paid little for their time; thus, they need the protections of employment law.⁴⁰⁶ Platforms, however, have maintained that their workers are independent contractors in part because of the terms of service that they have placed into clickwraps.⁴⁰⁷ Courts have tended to disregard such labels and instead have examined the substance of the relationship. In the European Union, the focus on substance is called the “primacy of fact[s].”⁴⁰⁸ That means that the label used by a hiring entity to describe the working relationship is not determinative of employment status.⁴⁰⁹

Technology has, in fact, made the problems of adhesion contracts worse. Apart from platforms relying on them to misclassify workers, they have had other detrimental effects. Online, forms can become longer and more prolix.⁴¹⁰ Because so many terms are searchable, an

403. The quote “move fast and break things” was attributed to Facebook/Meta founder Mark Zuckerberg in 2014. For additional analysis of the quote, see Enrique Dans, *When Companies Move Fast, They Do More than Break Things*, MEDIUM (Nov. 8, 2023), <https://medium.com/enrique-dans/when-companies-move-fast-they-do-more-than-break-things-770740e248c2> [<https://perma.cc/X97G-D3NC>]; see also Christian Twigg-Flesner, *Disruptive Technology—Disrupted Law? How the Digital Revolution Affects (Contract) Law*, in A. DE FRANCHESCHI, *EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET* 1, 2-3 (Intersentia, 2016), <https://ssrn.com/abstract=3039952> [<https://perma.cc/9WBQ-UFA3>].

404. See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 153 (2016); Valerio De Stefano, *The Rise of the “Just-in-time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig Economy”*, 37 COMP. LAB. L. & POL’Y J. (2016).

405. See Cherry, *supra* note 402, at 578.

406. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1073-74 (N.D. Cal. 2015).

407. De Stefano, *supra* note 404, at 486.

408. *Id.*

409. *Id.* Note that in 2024, the EU passed Directive 2024/2831 on improving working conditions in platform work. 2024 O.J. (L 2831) 1, 5. The Directive established a rebuttable presumption of employment status for digital platform workers. *Id.*

410. Preston & McCann, *supra* note 73, at 134 (“Perhaps unexpectedly, the Internet then became somewhat of a catalyst to the problems caused by adhesion contracting. Drafters of adhesive contracts who placed their take-it-or-leave-it terms online no longer had some of the

overreaching term can be found more easily online and is more easily copied from firm to firm.⁴¹¹ The scope of the terms and conditions has also expanded. Terms on many online platforms today touch on issues such as speech and privacy rights.⁴¹² Perhaps some portion of the expansive strategy of applying online terms and conditions to in-person transactions is a result of retailers having more surveillance data available in the information age⁴¹³ than ever before. One can imagine the litigation strategy. As part of the due diligence about a plaintiff, the retailer will surely check its databases to establish whether the plaintiff has made an account, clicked on any terms, or has had other significant dealings with them that have been recorded. Some advocates are concerned that disputes may not even be heard by a human arbitrator, but instead will be decided by algorithms.⁴¹⁴ With these concerns, we turn now to the idea that public outcry—specifically through social media—may be an effective check on the power of firms to include overreaching terms in online contracts.

B. Social Media Outrage as Regulation

In the Disney+ allergy case, we saw that Disney withdrew its motion to compel arbitration due to internet backlash.⁴¹⁵ Because the matter was ostensibly resolved in that case, many believed that everything had worked out in the end. No harm, no foul. However, Disney's decision to walk back an offensive argument is ultimately only a piecemeal solution to the problems of abusive contract terms.

same boundaries and incentives that provided practical limitations on adhesion contracts in the traditional contracting context.”)

411. See Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 *BYU J. PUB. L.* 1, 32 (2011).

412. See Andrew Keane Woods, *The New Social Contracts*, 77 *VAND. L. REV.* 1831, 1834 (2024) (noting that the scale of online contracts is massive, and that Facebook has a contract with over half of the world).

413. See Kristin Harripaul, *Information Privacy in an Age of Invisible Shopper Tracking: Who Will Pay the Price for Stores of the Future?*, 37 *GA. ST. U. L. REV.* 1077, 1081 (2021).

414. See David Horton, *Forced Robot Arbitration*, 109 *CORN. L. REV.* 679, 683 (2024) (discussing the use of algorithms and artificial intelligence to resolve disputes rather than human arbitrators).

415. See *supra* Introduction.

This is not the first time that a company has withdrawn terms and conditions because of a negative social media response. In 2014, General Mills added language to its website noting that by downloading a coupon for Cheerios, “liking” one of the company’s posts on social media,⁴¹⁶ or entering a sweepstakes contest, customers were agreeing to mandatory arbitration.⁴¹⁷ Arbitration would have applied not only to those coupons or contests, but also to unrelated issues, such as (hypothetically), the presence of glass in food.⁴¹⁸ Commentators questioned whether downloading a coupon was assent.⁴¹⁹ The public outcry led General Mills to remove the offending terms not long after.⁴²⁰

In 2017, the #MeToo movement shifted the conversation when millions of social media users shared their experiences of sexual abuse and harassment at work.⁴²¹ That hashtag campaign has resulted in meaningful changes to the law.⁴²² Not only have state and federal laws around nondisclosure agreements and arbitration changed, there have been international effects as well. The United Nations International Labor Office passed a global standard targeting sexual harassment and abuse at work.⁴²³

416. See Emily Canis, *One “Like” Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U. CIV. RTS. L.J. 127, 128-29 (2015).

417. Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html> [<https://perma.cc/VR9H-YRZV>].

418. This hypothetical was presented in the press contemporaneously with the discussion over the change in General Mills’s terms. Kiel Brennan-Marquez, *Is the General Mills Decision Cause for Celebration?*, NEW YORKER (Apr. 22, 2014), <https://www.newyorker.com/business/currency/is-the-general-mills-decision-cause-for-celebration> [<https://perma.cc/DFT4-VDJB>].

419. See Strom, *supra* note 417.

420. See Ricardo Lopez, *General Mills Abandons Mandatory Arbitration After Consumer Outcry*, L.A. TIMES (Apr. 21, 2014, at 10:44 PT), <https://www.latimes.com/business/la-fi-mo-general-mills-legal-policy-reversal-20140421-story.html> [<https://perma.cc/TEL6-WJTK>]; Peter Kafka, *After Facebook Flap, General Mills Backs Down from Forced Arbitration Policy*, VOX (Apr. 20, 2014, at 09:25 ET), <https://www.vox.com/2014/4/20/11625820/after-facebook-flap-general-mills-backs-down-from-forced-arbitration> [<https://perma.cc/VS7J-JFHB>]. The online change to the terms was perhaps a new iteration of an incident where, in 1994, as part of a sweepstakes, General Mills put an arbitration provision on its box of Honey Nut Cheerios. Pamela Sebastian, *Breakfast of Arbitrators?*, WALL ST. J., June 30, 1994, at A1.

421. See Katie Thomson, *Social Media Activism and the #MeToo Movement*, MEDIUM (June 12, 2018), <https://medium.com/@kmtomson.11/social-media-activism-and-the-metoo-movement-166f452d7fd2> [<https://perma.cc/U4DU-8ZSS>].

422. See *id.*

423. Convention Concerning the Elimination of Violence and Harassment in the World of

While these have been particularly impactful uses of social media, it is important to stress that the public sees only the instances when a hashtag campaign garnered their attention. While we hear about the success of certain worker and consumer social media campaigns, the majority of social media campaigns are failures. This is Sherlock Holmes's famous dog that does not bark.⁴²⁴ Only a small number of hashtags can or have sparked the public's interest, outrage, or compassion. For every Grumpy Cat that goes viral and creates a branding empire, there are thousands of other cats on social media, also cute and odd looking, that never have a chance to shine in the ring light.⁴²⁵

Generally, it is problematic to rely on social media outrage to police serious problems in the market or the legal system. Not every story of injustice that touches consumers or workers is dramatic, shocking, or even particularly interesting. The Disney+ allergy case happened to involve terms so outrageous that it stood a chance of attracting the public's attention. The fact that the couple eating out at Disney were young, attractive, and well educated likely helped the story go viral. Other cases without those factors might receive only a small amount of social media attention—or perhaps no attention at all. Having a story that catches the Internet's notice seems like a strange way to address systemic legal issues around access to justice. A legal issue may be important to many people's civil rights or finances, but not necessarily be dramatic or timely.

Even if a social media campaign is successful, it is unlikely to result in lasting policy change. In the Disney+ case, the offending arbitration clause is still there, hanging like a sword of Damocles above the next claimant.⁴²⁶ The same is true of workers' rights campaigns that seek to modify a specific term or policy by making

Work, pmb., *adopted* June 21, 2019, 3444 U.N.T.S. 1, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 [<https://perma.cc/A2BA-8ACC>].

424. A. Conan Doyle, *The Adventure of Sliver Blaze*, *THE STRAND MAG.* 655, 657 (Dec. 1892), <https://babel.hathitrust.org/cgi/pt?id=njp.32101076380565&seq=651> (lack of a barking dog meant that the culprit was someone whom the dog knew per reasoning of fictional detective Sherlock Holmes).

425. See Sanjana Varghese, *How Grumpy Cat Went from Feline Obscurity to Internet Sensation*, *WIRED* (May 17, 2019, at 11:35 ET), <https://www.wired.com/story/grumpy-cat-dead-history/> [<https://perma.cc/Y38R-U2MW>] (noting that "Grumpy Cat's rise could be partially due to the meme-ability of her face, the internet's perpetual obsession with cats and how she soon became a shorthand for every level of disgruntlement.").

426. See *supra* note 23 and accompanying text.

TikTok videos or by drawing attention to online petitions.⁴²⁷ Even if the workers win a victory on that issue, it is only a single issue. If workers have to generate a viral campaign each time they want change, that is an inefficient way to maintain a consistent voice. Not every situation concerning terms and conditions will keep the attention of the public—in fact, it may be safe to say that few will.⁴²⁸ Virality should not be a precondition of justice.

CONCLUSION

The outrage that the public expressed toward the Disney+ allergy case illustrates the mismatch between consumer expectations and various types of abusive contract terms that have become widespread online. From contracts that purport to bind a worker or customer to an unrelated transaction far in the future, to those that would force a family member who never signed anything into arbitration, these legal strategies offend our sense of justice, and our notion that contract is based on free agreement and assent.

A combination of approaches—a contract defense to act as a shield, and a tort to act as a sword—will address the current lack of oversight and discipline. The defense of fraud in the inception shows promise as a way that courts could first invalidate overreaching boilerplate contracts. Once found to be fraudulent, the new tort of abuse of contract would disincentivize the implementation of overreaching form contracts. The defense and new cause of action would help rein in market actors and curb the worst abuses of contract.

427. See, e.g., Chelsea Ritschel, *Hooters Amends Uniform Policy After Employees Condemn 'Disturbing' New Shorts*, INDEP. (Oct. 17, 2021, at 17:27 ET), <https://www.the-independent.com/life-style/hooters-uniform-shorts-tiktok-policy-b1939890.html> [<https://perma.cc/KG3E-45P3>] (discussing viral TikTok campaign that resulted in restaurant servers receiving more satisfactory uniforms).

428. See *TERMS AND CONDITIONS MAY APPLY* (Cullen Hoback, Nitin Khanna & John Ramos 2013).