Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights

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ABSTRACT: Contract law and the new Restatement of the Law of Consumer Contracts generally treats the entirety of a company's boilerplate as presumptively binding. Entrusting the content of consumer contracts to companies creates a fertile legal habitat for abuse through boilerplate design.

There is no consensus on how widespread or severe abuse of contract is. Some consumer law scholars have warned of dangers inherent in granting companies unrestrained power to sneak waivers into their online terms, but others contend that market forces adequately constrain potential abuse. On the other hand, in the absence of adequate consumer knowledge and power, market competition might instead fuel the spread of abusive boilerplate provisions as companies compete to insulate themselves from costs. The new Restatement and several prominent scholars claim that existing protective judicial doctrines siphon off the worst abuses among adhesive contracts. They are willing to accept those abuses that slip through the cracks as the unavoidable cost of a functioning, modern economy.

The raging debate over how to best constrain contractual abuse relies mainly on speculation regarding the proliferation and extent of sneak-in waivers. This Article provides some necessary missing data by examining the Author's study of one hundred companies' online terms and conditions ("T&C Study"). The T&C Study tracked the extent to which the surveyed companies' boilerplate purported to erase consumer default rights within four different categories, thereby helping to assess the effectiveness of existing market and judicial constraints on company overreach. Evidence from the T&C Study shows that the overwhelming majority of consumer contracts contain multiple categories of abusive terms. The existing uniformity of boilerplate waivers undermines the theory that competition and reputation currently act as effective bulwarks against abuse. After explaining and discussing the T&C Study and its results,

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this Article suggests how such data can assist scholars and advocates in more effectively protecting and empowering consumers.

INTRODUCTION

The most objectionable parts of consumer contract boilerplate are provisions that exist for the sole purpose of changing or deleting the counterparty's default legal rights.[1] Such provisions are unnecessary for the

1. I discuss such provisions more extensively in a recent article. *See generally* Andrea J. Boyack, *The Shape of Consumer Contracts*, 101 DENV. L. REV. 1 (2023) (setting out theoretical justifications for altering the legal baseline for consumer contracts empowering consumer-preferred inputs). Two seminal books on consumer contracts published ten years ago zeroed in on the impact of enforcing such clauses: MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) and NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013). And scholars have criticized reflexive enforcement of standard boilerplate terms for over a century. *See, e.g.*, Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 59 (1917); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 635

infrastructure facilitating the parties' transaction.[2] Rather, companies employ these sneak-in waivers to shift transactional risks, costs, and benefits in their favor.[3] Contract law and the new Restatement of the Law of Consumer Contracts (the "New Restatement") generally treats the entirety of the company's boilerplate as presumptively binding.[4] Entrusting the content of consumer contracts to companies creates a fertile legal habitat for abuse through boilerplate design.[5]

There is no consensus on how widespread or severe abuse of contract is. Some consumer law scholars have warned of dangers inherent in granting

(1943). The term "boilerplate" used throughout this Article references the standardized terms and conditions crafted by a company purportedly making up the parties' contract terms. RADIN, *supra*, at 9 (defining and explaining the term). Courts frequently find that consumers are bound to commercial boilerplate based on the consumer's agreement to engage in a transaction with the company. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1188–89 (1983); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 637–45 (2002). *See generally* RADIN, *supra*; KIM, *supra*. The recent Restatement of the Law of Consumer Contracts presumes that—absent proof of unconscionability or a violation of public policy—a company's boilerplate terms and conditions are the contract that governs the company–consumer relationship. *See* RESTATEMENT OF THE L. OF CONSUMER CONTS. § 5 (AM. L. INST., Tentative Draft 2019).

2. Transactional infrastructure provides sufficient terms upon which the contemplated exchange of values can proceed. The introduction to the New Restatement calls transactional infrastructure the "core" terms of the contract, but there is no reason that the noncore terms must be part of the parties' contract at all. RESTATEMENT OF THE L. OF CONSUMER CONTS. § 2 (AM. L. INST., Tentative Draft 2019). The distinction between transactional infrastructure and rights deletions boilerplate is discussed in James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249 (2018); Boyack, *supra* note 1; and RADIN, *supra* note 1.

3. *See* Daniel D. Barnhizer, *Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215, 216 (2014) (proposing that "contract law responses to wrap contracts must address power imbalances before, at, and after contract formation and enforcement"). Defenders of boilerplate enforcement have claimed that if that the company's standard form is not the parties' contract, then the transaction will be ineffective due to lack of infrastructure. *See generally* Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014) (assuming there is something offensive about binding people to terms that they did not know about but conceding that receiving fine print is annoying, alienating, and even degrading). Terms that do not impact the infrastructure, however, can be excluded from the parties' contract without impacting the relationship's transactional efficacy. *See* Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)* 1–12 (Univ. Mich. Pub. L., Working Paper No. 392, 2014).

4. *See* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (stating that "every court to consider [clickwrap]" to date has found it enforceable). Such contracts are often called "contracts of adhesion" because the non-drafting party lacks the ability to bargain regarding the substance of the contract and has the choice only to accept the terms or refuse to enter into the relationship. Courts usually find that adhesion contracts are binding, although a court can avoid or reform an adhesion contract based on shockingly unfair terms based on the doctrine of unconscionability. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

5. The New Restatement project generated a series of vigorous debates among contract scholars and consumer advocates. *See* Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 30–34 (2017); Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contracts*, 32 LOY. CONSUMER L. REV. 456, 457 (2020).

companies unrestrained power to sneak waivers into their online terms,[6] but others contend that market forces adequately constrain potential abuse.[7] Alternatively, in the absence of adequate consumer knowledge and power, market competition might instead fuel the propagation of abusive boilerplate provisions as companies compete to insulate themselves from costs.[8] The New Restatement and several prominent scholars claim that existing protective judicial doctrines such as unconscionability siphon off the worst abuses among adhesive contracts.[9] They are willing to accept those abuses that slip through the cracks as the unavoidable cost of a functioning, modern economy.[10]

The raging debate over how to best constrain contractual abuse relies mainly on speculation regarding the proliferation and extent of sneak-in waivers.[11] This Article provides some necessary missing data by examining the Author's study of one hundred companies' online terms and conditions (the "T&C Study" or "Study"). The T&C Study tracked the extent to which the surveyed companies' boilerplate purported to erase consumer default rights within four different categories, thereby helping to assess the effectiveness of existing market and judicial constraints on company overreach. Evidence from the T&C Study

6. *See, e.g.*, Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 GA. L. REV. 656, 666–70 (2021) (discussing the problems associated with the ubiquitous provisions in standard forms that permit the company to make unilateral modifications).

7. *See, e.g.*, Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215, 215 (2017) [hereinafter Oman, *Reconsidering*] (positing that assent is not a necessary gatekeeper for abuse because competition and adverse market consequences will punish abusive boilerplate provisions); *see also* Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 79 (2009) [hereinafter Oman, *Pragmatic*] ("[T]he abstraction of contract law serves important practical purposes in its own right. In particular, it guards against the capture of the law by special interests that seek to manipulate legal rules for their own benefit, and it allows contracts to serve as 'laboratories of democracy' . . . ."); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28 (2006) (arguing that empowered consumers choose to constrain contractual abuse through market behavior).

8. RESTATEMENT OF THE L. OF CONSUMER CONTS. § 5 (AM. L. INST., Tentative Draft 2019); *see, e.g.*, Abraham L. Wickelgren, *Standardization as a Solution to the Reading Costs of Form Contracts*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 30, 41–42 (2011); Florencia Marotta-Wurgler, *Some Realities of Online Contracting*, 19 SUP. CT. ECON. REV. 11, 12 (2011).

9. *See, e.g.*, Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 749–54 (2008); Jeffrey M. Lipshaw, *Duty and Consequence: A Non-Conflating Theory of Promise and Contract*, 36 CUMB. L. REV. 321, 321–22 (2006).

10. *See generally* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Omri Ben-Shahar ed., 2007) (collecting articles about boilerplate written by various scholars).

11. RADIN, *supra* note 1, at 99–109. Courts can avoid contracts and particular portions of contracts found to be substantively unfair (shocking the judicial conscience) and/or if the contract was entered into pursuant to an unfair process, and many (but not all) courts presume procedural unconscionability exists for contracts of adhesion. Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982); Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 826–27 (2020). Unconscionability (and similar judicial checks on drafting party power) can provide some limit to company overreach but, in practice, may have a limited effect. A study of North Carolina cases published in 2014, for example, found that an unconscionability claim was successful only 3.37% of the time. Brett M. Becker & John R. Sechrist II, Note, *Claims of Unconscionability: An Empirical Study of the Prevailing Analysis in North Carolina*, 49 WAKE FOREST L. REV. 633, 639 (2014).

shows that the overwhelming majority of consumer contracts contain multiple categories of abusive terms. The existing uniformity of boilerplate waivers undermines the theory that competition and reputation currently act as effective bulwarks against abuse. After explaining and discussing the T&C Study and its results, this Article suggests how such data can assist scholars and advocates in more effectively protecting and empowering consumers.

The T&C Study examines the prevalence of problematic boilerplate provisions that fall within four categories: (i) modification of dispute resolution legal defaults, (ii) limitations of company liability through disclaimers, waivers, and other sorts of exculpatory clauses, (iii) limitations on the remedies available to a successful consumer plaintiff in a claim against the company, and (iv) pre-authorization for unilateral modifications to contract terms. The T&C Study focuses only on boilerplate content, not on consumer knowledge and comprehension of terms (a topic that has been previously surveyed).[12] Research uncovered no other study that focuses simultaneously on multiple categories of rights deletion provisions in boilerplate and communicates results both quantitatively and qualitatively.[13]

After a brief overview of the modern consumer contract conundrum and the values and theories used to justify boilerplate enforceability, Part I of this Article explains the goals and mechanics of the T&C Study. Part II of the Article then discusses findings with respect to each of the tracked types and categories of provisions, considering the data for all one hundred companies in the aggregate as well as looking at variations among the six different, broadly defined industry sectors.[14] Part III describes a sample scoring methodology

12. *See, e.g.*, 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, 3 (2014) (tracking internet browsing of more than 48,000 users and finding that only 0.2% of users access linked terms and conditions and those that do spend very little time reviewing the content of such pages); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 108 (2015) (surveying 688 adults and finding that less than 9% of them recognized that they would be bound to arbitrate rather than litigate in court disputes arising under a contract they had just reviewed).

13. Some recent studies have quantified the prevalence of specific rights deletion provisions, including mandatory arbitration provisions. *See, e.g.*, Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 238 (2019); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–93 (2008) (finding that although seventy-five percent of surveyed consumer contracts contained mandatory arbitration clauses, only ten percent of the same companies' contracts with commercial counterparties contained mandatory arbitration clauses, theorizing that the use of arbitration clauses in consumer contracts is an attempt to foreclose aggregate consumer actions rather than any true commitment to arbitration as a method of dispute resolution). Another recent study quantified the proliferation of the unilateral right to modify terms among online boilerplate terms. Becher & Benoliel, *supra* note 6, at 681.

14. The T&C Study examined companies within six different sectors of the economy (loosely defined), with a minimum of sixteen representative companies in each sector which increases the likelihood that the results of the study can be generalized to various sorts of company counterparties that contract with consumers. The six broad sectors are: Retail, Computer/Browsing, Streaming/Entertainment, Financial Services, Social Media, and Transportation/Travel. *See infra* Appendix A.

that creates a simple qualitative basis for comparison among companies based on how extensively their boilerplate purports to modify consumer default rights. These quantitative and qualitative analyses help answer two questions: (A) How prevalent are boilerplate provisions that limit consumers' legal rights, and (B) To what extent do particular companies use such boilerplate limitations? Data regarding the proliferation and extent of boilerplate waivers inform claims that the threat of reputational impacts and avoidance doctrines adequately addresses the risk of contractual abuse. The conclusion of the Article places the findings from the T&C Study into the context of possible changes to consumer law and policy that may provide more fair and effective consumer contract law.

I. BURIED IN BLANKETS OF DEEMED ASSENT

The law of contracts is premised upon a voluntary commitment. Freedom to contract distinguishes liberalized, modern law from traditional, status-based systems.[15] The two primary theories justifying contract enforcement—economic efficiency and autonomy—lose force without all parties' voluntary commitment to terms.[16] Whereas contract law holds that "I am bound because I *did* something," property, torts, and other status-based laws hold that "I am bound because I *am* something."[17] Contract obligation is theoretically sourced in one's voluntary assent rather than one's societal role. Contract terms are made against the backdrop of legal defaults, but parties can opt to deviate from these defaults through their deliberate choice to vary such default rights.[18] But treating non-negotiable boilerplate as the product of consumer choice perverts freedom of contract and, instead, grants companies the sole power to author the private law governing consumer relationships.[19] Recognizing the divergence of modern boilerplate from traditional, assent-based contracting, scholars for over a century have sought alternate enforcement justifications.[20]

The assent deficiencies of non-negotiable standard form contracting are allegedly mitigated by reputation and consumer choice in the context of a competitive market.[21] Harms caused by a limited ability to negotiate terms

15. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 51–53 (1985).

16. *Id.* at 57.

17. Tort obligations arise from membership in society or from another relationship status, such as being a fiduciary. Property rights and obligations arise from being an owner, tenant, holder of a future interest, etc. Modernly, these status-based legal defaults typically apply unless they are changed (and are changeable) by party election through contract.

18. *See* Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 760–63 (2016).

19. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–32 (1971); RADIN, *supra* note 1, at 33–34.

20. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003) ("Contract law should facilitate the efforts of contracting parties to maximize the joint gains . . . from transactions."); Oman, *Reconsidering*, *supra* note 7, at 217 (arguing that contract law "find[s] solutions to problems of social organization in markets"). *See generally* Kar, *supra* note 18 (advocating a positive argument coined "contract as empowerment").

21. Almost all scholars considering this point have reached the same conclusion, even those who have concluded that contracts should continue to bind consumers as much as, or more than,

are supposedly offset by the robust benefits of a well-functioning system of commerce.[22] According to Nathan B. Oman, contract law presents the ideal way to solve complex organizational problems in markets because the private, decentralized "legislative process" of private contracting generates a variety of solutions to market problems.[23] Those solutions that best approximate party preferences will enjoy a market advantage and therefore flourish in a sort of natural selection evolution, explains Oman.[24] Market forces can only reward consumer-friendly contract terms if there are a variety of boilerplate options. If most companies have substantively identical boilerplate provisions, market choices cannot possibly reflect a choice of boilerplate content. And as long as companies can craft terms without adverse consequences, boilerplate content, which is controlled by companies and their legal advisors, will likely be tailored primarily for their benefit. Even if reputation could provide a disincentive to boilerplate waivers in the abstract, as standard terms increasingly mimic one another in the marketplace, waivers of consumer legal rights become normalized and accepted as an unavoidable reality. The ubiquity of waivers in non-negotiable boilerplate thus suggests contractual abuse rather than true freedom of contract.[25]

Scholarship considering the modern consumer contract conundrum is primarily centered on systemic inputs: bargaining power disparity, standard form non-negotiability, market competition adequacy, and the obscurity and unintelligibility of company terms and provisions. A missing piece is a review of systemic outputs: the content of standard terms, particularly the extent to which companies use boilerplate waivers to erase consumer default rights in ways not necessitated by the transaction. Well-functioning commerce does not justify, let alone require, a contractual provision defining how to resolve disputes, determine liability, and calculate damages. There is no transactional efficacy in varying the weaker party's legal defaults. Nor can granting the commercial party the sole and unlimited right to amend terms be justified by transactional pragmatics. Although blanket assent might stretch to cover the business terms of a given transaction, it need not be tucked in around such rights deletion provisions.[26]

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they currently do. *See, e.g.*, Oman, *Reconsidering*, *supra* note 7, at 217 (arguing that in the context of boilerplate agreements, "there is a disconnect between our theories of contractual consent and the legal doctrine of contractual consent"). Some scholarship draws a distinction between consent to contract as a "promise" juxtaposed with commitment and consent to contract being a consensual transfer of rights. *See generally* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). Others point out that it is a false dichotomy to claim that if boilerplate provisions are not deemed enforceable terms, then society will plunge into transactional chaos. Gibson, *supra* note 2, at 249; Boyack, *supra* note 1, at 27; Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT 251, 252 (Franklin G. Miller & Alan Wertheimer eds., 2010) (asserting that more robust oversight of boilerplate content—rather than treating boilerplate as is presumptively enforceable—"undermine the predictability of enforcement").

22. Oman, *Reconsidering*, *supra* note 7, at 223–24.

23. *Id.*

24. *Id.*

25. RADIN, *supra* note 1, at 30–31, 36, 39–43.

26. *See* Gibson, *supra* note 2, at 249; Boyack, *supra* note 1, at 36.

A. GOALS OF THE TERMS & CONDITIONS STUDY

The T&C Study examined the boilerplate content of one hundred representative companies and tracked the prevalence of certain *destructive terms*—those terms that are unnecessary to the transactional infrastructure and serve only as a tool to modify consumer default legal rights.[27] The T&C Study tracked the presence of provisions within four broad categories of destructive terms: (i) dispute resolution mandates, (ii) liability waivers, (iii) limitations on damages, and (iv) pre-authorization of unilateral modifications.[28] The T&C Study focused only on the presence or absence of such terms in a company's boilerplate, not on consumer knowledge and comprehension of such terms nor on what indicia of consent would be deemed legally sufficient (both topics which have been previously surveyed).[29] This Study is novel in that it both quantified the presence of categories of destructive terms and examined the extent of such types of terms among industry sectors and within given companies' boilerplate. The results of the T&C Study are consistent with other recent studies that have measured the prevalence of mandatory arbitration provisions[30] and the unilateral right to modify terms.[31]

The T&C Study differs from past studies of consumer contracts in its more holistic examination of boilerplate, assessing not only the prevalence of a variety of destructive terms but also patterns of boilerplate content across companies and market sectors.[32] The T&C Study examines these quantitative results by individual company, as a percentage of the entire sample set, and within groupings based loosely on six different sectors of the economy.[33] Analysis

27. The concept and definition of "destructive terms" is discussed more extensively in Boyack, *supra* note 1, at 2, 7, 43, 48, 51–54, 56, 60, 63. Radin describes the concept as "rights deletion" provisions. RADIN, *supra* note 1, at 8, 39–40.

28. A report of the data derived from this Study is included as Appendix A. Selected consumer contract agreements were uploaded into Excel software for narrative coding. An initial review of the contract terms assisted researchers in identifying a priori codes, or broad trends within each specific provision. Researchers then developed a codebook to assist in applying codes consistently across readings. It should be noted that the analysis is interpretive by nature. Similarly, the court is often called upon to interpret the law, and multiple interpretations are common. Coding in this Study is likewise subjective to the reader. To mitigate this, researchers applied codes with a goal of making the most literal and least ambitious interpretation. To facilitate the Study's transparency, sample provisions of those coded within each subcategory are included as Appendix B.

29. *See* sources cited *supra* note 12.

30. *See* sources cited *supra* note 13.

31. *See generally* Becher & Benoliel, *supra* note 6 (discussing the authors' recent study examining the prevalence of clauses allowing drafting parties unilateral power to modify contract terms).

32. Content analysis is an acceptable method of analysis for legal scholars, historically employed to examine judicial opinions as statutory content. *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64–67 (2008). Content analysis is also used extensively in the social sciences as "a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns." Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RSCH. 1277, 1278 (2005).

33. The six sectors are: Retail, Computer/Browsing, Streaming/Entertainment, Financial Services, Social Media, and Transportation/Travel. The T&C Study included a minimum of sixteen representative companies in each such sector.

within such groupings allows for an assessment of whether companies in different areas of the market include similar limitations on consumer legal rights in their standard terms.

The T&C Study examined one hundred companies' online terms and conditions that purported to govern their consumer relationships. To ensure accurate reporting, the online terms and conditions were examined twice by two different researchers, once during the six-month period from July to December 2021 and once again prior to June 2022. Researchers recorded findings with respect to eleven different types of destructive terms within the four categories.[34] The types of provisions examined and tracked are some of the most common boilerplate provisions that eliminate or modify consumer default rights.[35] The T&C Study was not designed to provide a comprehensive examination of all standard terms in companies' online boilerplate, nor did it track changes to those examined terms over time.[36] Instead, the Study provides a snapshot of terms and conditions used by a representative set of one hundred companies in their dealings with consumers during 2021 and 2022.[37]

The T&C Study tracked the following eleven specific sorts of destructive terms in company boilerplate:

(1) mandatory arbitration,
(2) waiver of a jury trial,
(3) waiver of the ability to participate in a class action,
(4) forum selection,
(5) time limitations on bringing a claim,
(6) disclaimer of representations,
(7) waiver of implied warranties,
(8) privacy waivers,
(9) limitations on types of damages,
(10) caps on the amount of damages, and
(11) pre-authorization for unilateral modifications of terms.

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34. It should be noted that contractual analysis is interpretive by nature, and the examination and coding done for the T&C Study are, likewise, subjective to the examiner. To mitigate this, two different researchers independently categorized provisions with the goal of making the most literal and least ambitious interpretation, and if the researchers' interpretations diverged, Professor Boyack and both research assistants closely examined the relevant provision to determine its likely interpretation.

35. RADIN, *supra* note 1, at 8.

36. As noted *infra* Section II.D, nearly all terms and conditions reviewed authorize unilateral modifications at the company's discretion. A simultaneous study that tracked the prevalence of unilateral modification provisions in online boilerplate similarly found that ninety-eight percent of the five-hundred surveyed companies included such a provision. Becher & Benoliel, *supra* note 6, at 681. Because every company in the T&S Study reserved the unilateral ability to modify terms, these companies may have changed the content of their online boilerplate in the time since being recorded for the purposes of this Study.

37. Not only would it be unduly onerous to study the standard forms used by thousands of companies that contract with consumers, but a particular version of a company's terms and conditions may quickly become outdated because companies modify their standard terms from time to time.

These eleven sorts of provisions were identified and tracked in the online boilerplate of one hundred sample companies. The sample set includes at least sixteen companies in each of six broadly-defined sectors of the market, including: (a) retail (all types), (b) computer and browsing services, (c) streaming and entertainment, (d) financial services, (e) social media, and (f) transportation and travel.[38] Companies were chosen within each sector based on metrics designed to ensure that the sample set was diverse and, therefore, likely more representative of consumers' various contract counterparties within that sector. The set of representative companies includes both private and public companies of varying sizes and market share, from mega-cap national companies to smaller, localized ones. Ensuring a degree of diversity of type and size of companies within the sample set increases the justifiability of generalizing from the data.[39] Categorizing companies by size, type, and sector allows patterns and differences within and among sectors and sizes to be noted and considered. The Study aimed to answer broad questions about the ubiquity of destructive terms in online boilerplate and to establish a foundation for future studies. Further additional studies could use different sample sets or focus on comparing the content of these same companies' standard terms at different points in time to provide additional helpful data.

The qualitative data produced by the T&C Study are informed by other studies that have measured how common certain specific sorts of clauses are in consumer contracts. For example, in a nearly contemporaneous study, Shmuel I. Becher and Uri Benoliel examined the online boilerplate of 500 companies to track the presence of a provision granting the company unilateral power to modify contract terms (which is also the last category of provisions tracked by the T&C Study).[40] Becher and Benoliel found that ninety-eight percent of the reviewed companies (490 out of 500) included such a clause in their boilerplate.[41] The results of the T&C Study with respect to unilateral modification clauses are fairly consistent: finding that one hundred out of one hundred companies had boilerplate containing a unilateral modification clause. An earlier 2008 study of the prevalence of mandatory arbitration clauses in consumer contracts found that seventy-seven percent of the examined standard forms contained such a provision.[42] A 2013 study found that between 2009 and 2010, the percentage of credit card companies including mandatory arbitration provisions in their boilerplate decreased from ninety-five percent to forty-eight percent in response to increased regulatory agency expressions of concern regarding such provisions.[43] The T&C Study similarly found that among

38. The list of each company and the category to which it was assigned appears in Appendix A.

39. But, of course, the size of the sample precludes a definitive conclusion about all companies or all sectors.

40. Becher & Benoliel, *supra* note 6, at 657–58.

41. *Id.* at 681–82.

42. Eisenberg et al., *supra* note 13, at 883 tbl.2.

43. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 18–20; Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 558 (2012).

the six examined sectors of the economy, mandatory arbitration boilerplate provisions were least prevalent among financial services providers.

The T&C Study provides valuable data to help assess the prevalence of destructive terms in companies' boilerplate. It also provides information regarding the degree of variation among companies with respect to how their boilerplate provisions purport to delete or modify consumer counterparties' default legal rights. This data informs the theory of market discipline-based constraints on abusive contracting. The T&C Study also assesses whether boilerplate terms reflect consumer preferences and to what extent the content companies' terms vary among market competitors. Variability of options is a prerequisite to consumers' ability to elect their preferred sets of terms and conditions through their market choices. The naked assertion that consumer preferences must be reflected in online terms drafted and imposed by companies is both abstract and unconvincing, and data collected in the T&C Study provides some evidence regarding the truth of such assertions. Accordingly, the Study informs the debate regarding whether the current legal treatment of non-negotiable boilerplate in consumer contracts adequately protects non-drafting counterparty interests. The data also provides a snapshot showing the extent to which boilerplate destructive terms have become endemic in consumer contract relations and how significantly such terms have impacted consumers' otherwise applicable legal rights.[44]

B. Selection of Substantive Topics and Sample Companies

1. Dispute Resolution Changes

In her seminal book on consumer contracts, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, Margaret Jane Radin focuses on particular sorts of boilerplate terms that change consumer rights in ways that she identified as most troubling. Barriers to and limitations on consumer redress for company breaches are among such worrisome provisions because they withdraw the company-consumer relationship from court oversight and preclude collective litigation from pushing back against company overreach.[45] Consumers in the 1950s had a robust right to litigate their contract disputes in court, before a jury, and as a class action. By the 2020s, however, an increasing number of consumer contracts of all types—from sales of goods to software licensing to employment agreements—have added to their standard form arbitration

44. *See* RADIN, *supra* note 1, at 105–06, 233 (discussing boilerplate "deletion schemes" and their proliferation and indicating a need for more empirical work in this area).

45. "Arbitration clauses, choice of forum/choice of law clauses, and exculpatory clauses . . . are common components of the alternative legal universe created by firms. Most readers, I expect, are subject to one or more of them." *Id.* at 8. The T&C Study confirms Radin's intuition: A significant majority of online boilerplate terms include provisions that purport to modify the dispute resolution defaults for consumer counterparties.

clauses, bans on class actions and trial by jury, and other sorts of constraints on the consumers' ability to litigate their claims in court.[46]

Of the various ways that company boilerplate limits consumer rights of redress, mandatory arbitration clauses are perhaps the most impactful because such provisions essentially remove all judicial oversight with respect to the company-consumer relationship.[47] A typical mandatory arbitration clause provides that "all disputes and claims" between the parties, including "claims arising out of or relating to any aspect of the relationship . . . whether based in contract tort, statute, fraud, misrepresentation or any other legal theory" arising at any time will be resolved through binding arbitration.[48] According to most U.S. courts and the New Restatement,[49] assent to arbitrate all disputes simply arises from entering into a transactional relationship with a company that includes a relevant clause in its boilerplate.[50]

Most consumer advocates believe that consumers are systematically disadvantaged by mandatory arbitration.[51] First, arbitration mandates are frequently coupled with class action waivers, and a consumer's inability to pursue collective actions creates a significant practical barrier to redress.[52] Consumer

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46. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE 4–9, 12 (2013), https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [https://perma.cc/8XYV-JSSC] (examining mandatory arbitration clauses generally and specifically their prevalence in consumer financing standard terms).

47. Szalai, *supra* note 13, at 235 ("The ability to access the courthouse is disappearing for American consumers because of the proliferation of arbitration agreements among the majority of America's leading companies.").

48. Language taken from AT&T's cellular phone contract form, as reproduced in RADIN, *supra* note 1, at 116.

49. RESTATEMENT OF THE L. OF CONSUMER CONTS. § 2 (AM. L. INST., Tentative Draft 2019). Courts increasingly rely on the Federal Arbitration Act ("FAA") (9 U.S.C. § 2 (2018)) to compel arbitration in nearly every circumstance involving boilerplate containing an arbitration clause.

50. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 336; *see also* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern [https://perma.cc/7SNL-GNCK] ("Multiple courts have now ruled that even contracts one party did not see or have any choice but to sign are enforceable . . . ."); Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic* 17 (Econ. Pol'y Inst., Briefing Paper No. 414, 2015), https://www.epi.org/publication/the-arbitration-epidemic [https://perma.cc/8RLE-HF9H] ("[T]he worker or consumer will have no choice but to assent if they want to enter into an employment or consumer transaction.").

51. *E.g.*, Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 676 (2001); Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1307 (2019). On the other hand, some transactional attorneys claim that consumer advocates' near-unanimous objection to mandatory arbitration provisions in consumer contracts is a self-interested move. Alan Kaplinsky claimed that "[t]he plaintiffs' class action bar has its own agenda here. They don't like arbitration because it interferes with the gravy train they've been able to create generating these outlandish legal fees." Jared Shelly, *Philly Lawyer Fires Back at* New York Times, PHILLYMAG.COM (Nov. 2, 2015, 2:16 PM), https://www.phillymag.com/business/2015/11/02/ballard-spahr-arbitartion-new-york-times [https://perma.cc/95FU-4JW5].

52. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 88–89 (2012). And yet the Supreme Court found that the FAA supplanted a state law that attempted to preserve collective dispute resolution in

advocates also criticize mandatory arbitration as a dispute resolution mechanism because of its lack of transparency, arbitrators' ability to freely deviate from legal precedent, and the limited ability to appeal an arbitral decision.[53] "Civil rights and consumer protection laws can become meaningless in arbitration."[54] In addition, repeat player bias may give companies an advantage in arbitration with consumers.[55] Closing off consumers' access to the courts—without consumers' knowledge and consent—undermines contract law's legitimacy. As Professor Radin put it, "[i]n order for the system of contract to function, there must be a viable avenue for redress of grievances in cases where the bargain fails."[56] Per the terms of an increasing number of consumer contracts, however, standard terms significantly limit the consumer's "avenue for redress of grievances."[57]

In recent years, state and federal regulators have explored limiting the enforceability of mandatory arbitration provisions in certain consumer contracts.[58] In order to bolster claims of enforceability, companies have

arbitration by holding that arbitration agreements could preclude class action arbitrations, and the clauses should be enforced per their written terms. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–52 (2011); *see also* David C. Winters, Note, *Third Circuit Buyers Beware: District Court in* Litman *Holds Unconscionability Defense Contravened by Federal Arbitration Act*, 2010 J. DISP. RESOL. 223, 231 ("[A] class action waiver can be enforceable under the FAA notwithstanding the generally applicable state contract law defense of unconscionability.").

53. Szalai, *supra* note 13, at 235 (explaining that the limited review given to arbitral awards is "sometimes referred to as among the narrowest judicial reviews known in the law").

54. *Arbitration Should Be Fair, Not Forced*, FAIR ARB. NOW, https://fairarbitrationnow.org [https://perma.cc/26E9-U6X4]; *see also Fair Arbitration*, PUB. CITIZEN, https://www.citizen.org/article/fair-arbitration [https://perma.cc/KX6Z-U7QH] ("In arbitration, there is no judge, jury or right to an appeal."); *Take Action*, NAT'L CONSUMER L. CTR., https://www.nclc.org/take-action/take-action-arbitration.html [https://perma.cc/C6VE-5WBN] ("[S]tand up for consumer rights and economic justice.").

55. *See, e.g.*, Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, LEGAL IO (Apr. 1, 2015), https://www.legal.io/articles/5170762/12-Reasons-Businesses-Should-Use-Arbitration-Agreements [https://perma.cc/9XFU-MW68].

56. RADIN, *supra* note 1, at 4.

57. *Id.* "Businesses use forms . . . to change the legal infrastructure applicable to us. Businesses use such forms to create their own legal universe." *Id.* at xvi.

58. In 2017, the CFPB passed a rule (the "Arbitration Agreements Rule") that limited arbitration of class actions. Press Release, Consumer Fin. Prot. Bureau, CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court [https://perma.cc/VNQ8-5LDB]. The Arbitration Agreements Rule was quickly quashed by Congress when, on November 1, 2017, President Trump signed a joint resolution by Congress disapproving the Rule pursuant to the Congressional Rule Act. Arbitration Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017) (codified at 12 C.F.R. § 1040). Congress has proposed and passed legislation limiting forced arbitration clauses in certain contexts. H.R. 963, the Forced Arbitration Injustice Repeal ("FAIR") Act, passed by the House of Representatives on March 17, 2022, would have limited the effectiveness of arbitration in a wide variety of consumer contracts, but the bill died in the Senate. FAIR Act of 2022, H.R. 963, 117th Cong. (2022). Also in March 2022, Congress passed, and President Biden signed into law, a more narrowly focused bill, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, H.R. 4445, that bans enforcement of pre-dispute arbitration mandates for sexual harassment and sexual assault claims. Ending Forced Arbitration of Sexual Assault and

increasingly tweaked their mandatory arbitration provisions to provide consumer counterparties with the nominal right to opt out of arbitration.[59] The right to opt out of arbitration creates a semblance of assent without significant effect, however, because not only is the right to opt out inconspicuously located within the boilerplate fine print, but it also requires that consumers follow the relatively onerous procedure of providing notice in writing, mailed to the company.[60] There is also only a short window of time during which the consumer can elect to opt out: typically within a month of the first interaction with the company. Because the option to refuse the arbitration mandate is inconspicuous and requires the consumer to take affirmative steps within a short time period, consumers are unlikely to avail themselves of this option, even in situations where the boilerplate permits an opt-out.[61]

Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 402, 136 Stat. 26, 27 (2022). State courts' efforts to strike down arbitration provisions in consumer contracts as unconscionable are sometimes overruled by reference to the FAA. For example, the Vermont Legislature in 2019 voted to amend state law to create a rebuttable presumption that certain boilerplate terms are substantively unconscionable: choice of forum that requires dispute resolution out of state, waivers of jury trial or the right to bring a class action, provisions limiting the time to commence an action, limitations on punitive damages, and requiring fees greater than a court proceeding be paid to resolve a dispute. VT. STAT. ANN. tit. 9 § 6055 (2020). The portion of this law creating a rebuttable presumption that waivers of jury trials and class actions are substantively unconscionable may run into federal preemption issues regarding arbitration, but because it is not exclusively targeting mandatory arbitration provisions, it might survive a claim that the FAA trumps its provisions. *See* David Seligman, *Three June State Law Actions Helping Consumers Fight Arbitration Requirements*, NAT'L CONSUMER L. CTR. (July 31, 2019), https://library.nclc.org/three-june-state-law-actions-helping-consumers-fight-arbitration-requirements [https://perma.cc/U87J-K55H]. In addition, the Ninth Circuit has upheld the right of consumers to seek injunctive relief in court if a state statute provides that limitations on such rights in contracts are unfair or deceptive acts and practices ("UDAP"). *See id.* (discussing generally Blair v. Rent-A-Center, Inc., 928 F.3d 819 (9th Cir. 2019)). Some states in the Ninth Circuit have such UDAP clauses. *See, e.g.*, CAL. CIV. CODE § 3513 (West 2016); ALASKA STAT. § 45.50.535(a) (2023). Other circuits could follow the same approach and hold that consumers seeking injunctions could skirt arbitration mandates based on similar state UDAP provisions. *See, e.g.*, D.C. CODE § 28-3905(k) (2013); IOWA CODE § 714H.5(1) (2024).

59. Opt-out clauses for arbitration mandates have been criticized as "dark patterns" in reference to a term used by the Federal Trade Commission to refer to "practices that trick or manipulate" consumers. BUREAU CONSUMER PROT., FED. TRADE COMM'N, BRINGING DARK PATTERNS TO LIGHT 2 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [https://perma.cc/E6E3-Z58W]. For more on the debate regarding opt-out provisions in particular, see Jeff Sovern, *Opaque (Formerly Dark) Patterns and Arbitration Opt Outs*, PUB. CITIZEN: CONSUMER L. & POL'Y BLOG (June 2, 2023), https://clpblog.citizen.org/opaque-formerly-dark-patterns-and-arbitration-opt-outs [https://perma.cc/PU3V-9EVY]; Mark J. Levin, *Challenges Accepted, Professor Sovern*, CONSUMER FIN. MONITOR (June 15, 2023), https://www.consumerfinancemonitor.com/2023/06/15/challenges-accepted-professor-sovern [https://perma.cc/52LW-PUNJ].

60. Note that opt-out provisions require notice by mail, not email. For a discussion of why opt-out clauses are inconsequential in promoting consumer choice, see Jeff Sovern, *St. John's Arbitration Study Suggests Opt-Outs Are Not the Answer to Arbitration Clauses*, CASETEXT (Nov. 15, 2014), https://casetext.com/analysis/st-johns-arbitration-study-suggests-opt-outs-are-not-the-answer-to-arbitration-clauses [https://perma.cc/7V7C-6B3P].

61. It is less likely for a consumer to affirmatively opt out of an arbitration baseline than for a consumer to simply retain their default legal rights by not opting into an arbitration regime. For a discussion of how choice of default impacts outcomes, see RICHARD H. THALER & CASS R. SUNSTEIN,

In the rare instance when consumers are empowered to exert some negotiation power and, therefore, have input into contract content, mandatory arbitration clauses are one of the first provisions to go.[62] For example, Harvard Law School students being courted by law firms and prospective employers in 2019. The students organized their objection to mandatory arbitration clauses in the firms' employment contracts and collectively exerted sufficient bargaining power to convince the prospective employers to remove the offending provisions. Coordinated by the People's Parity Project, these students successfully influenced the content of law firm employment contracts by rejecting offers of employment that came bundled with arbitration mandates. Knowledgeable, assertive, Harvard-trained lawyers are unwilling to accept mandatory arbitration clauses. This suggests that more consumers would demand the removal of mandatory arbitration provisions from their contracts, if they only could.[63]

Because limitations on consumers' access to and rights in court are so essential to enforcing consumer legal rights, five of the eleven topics tracked in the T&C Study relate to contractual limits and mandates relating to the consumer-company dispute resolution process. Three such provisions change the method by which such a dispute will be resolved (arbitration mandates, waiver of the right to jury trial, and waiver of class action).[64] One provision

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NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 11–13 (2008); *see also* Boyack, *supra* note 1, at 57–58 (discussing the opt-out provisions and the power of default rules).

62. *Cf. infra* Part II (discussing results of empirical study).

63. Stephanie Francis Ward, *Parity to the People*, ABA J., Sept.–Oct. 2019, at 26, 27 (opining that "at this point, the only thing keeping businesses from requiring arbitration in both employment and consumer contracts is bad press and perhaps not attracting sought-after candidates for high-level jobs"). Arbitration agreements in consumer contracts have been treated by courts as being presumptively enforceable because of the FAA, but employee advocates have argued that arbitration agreements in employment agreements violate the National Labor Relations Act, which guarantees workers the right to pursue collective action against employers. Nevertheless, in *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018), the Supreme Court held that the NLRA did not clearly reflect congressional intent to displace the FAA and that courts still must "vigorously" enforce arbitration provisions in employment agreements, notwithstanding limitations they impose on collective remedies. *Id.* at 515–17. Until Congress or the Court reverses its approach to arbitration clause enforceability, the only way for consumers to be protected from mandatory arbitration would be if such clauses were not deemed part of an enforceable contract. For more on arbitration clause enforceability, see, for example, Alyssa S. King, *Arbitration and the Federal Balance*, 94 IND. L.J. 1447, 1450 (2019) (arguing that because states cannot deem arbitration clauses in consumer contracts unenforceable, state legislatures should "regulate what happens in arbitration and what happens afterwards"). There is a political and intellectual split on the arbitration issue. *Compare* EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 309 (2006) (debating potential changes to the FAA), *with* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167, 168 (2004) ("[T]he FAA's contract-law standards of consent are constitutional.").

64. The Supreme Court has confirmed the enforceability of class action waivers in consumer contracts. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011); DirecTV v. Imburgia, 577 U.S. 47, 58–59 (2015). The pro-waiver policy justification focuses on the overall litigation expense of class action and the individually nominal recoveries generated. Levin, *supra* note 59. Nevertheless, allowing class action litigation may be the only way that company overreach is policed outside of regulation. For an examination of the critiques and benefits of class action

changes the time frame in which a claim must be brought, and one mandates the place in which the dispute must be brought.[65] There is significant overlap among the types of provisions grouped under the dispute resolution rubric.[66] For example, boilerplate may mandate a particular forum, which, in effect, precludes class actions. Virginia is currently one of two states that prohibit class action lawsuits, so a forum selection clause designating Virginia implicitly, but effectively, bars class actions.[67] Arbitration clauses also do double duty as limiting class action litigation.[68] Because of the overlap among various sorts of waivers and mandates pertaining to dispute resolution, it is particularly relevant to consider the prevalence of such provisions both as a group and individually.

2. Liability Reallocation

The second category of rights deletion provisions examined and tracked in the T&C Study pertain to limitations on potential company liability. Based on the language in such provisions, consumers (i) disclaim the effect of any representations not expressly included in the written terms and conditions, (ii) wave all implied warranties, and (iii) waive their privacy rights.[69] Some standard forms go even further and include indemnification language that provides for consumer reimbursement of company losses that the company may suffer due to the consumer's actions. According to Radin, clauses insulating the company from liability and shifting the risk of loss onto consumers are common, worrisome boilerplate provisions.[70] To assess how extensive such limitations are within the standard terms in the sample, the T&C Study tracked which contracts contain each such type of liability disclaimer articulated above.

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litigation in a consumer contractual context, see generally FED. TRADE COMM'N STAFF, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS (2019).

65. Carrington & Haagen, *supra* note 50, at 401 ("[F]orum selection clauses in contracts of adhesion are sometimes a method for stripping people of their rights."). Review of boilerplate terms in the Study showed that choice of law provisions were often bundled with choice of forum as well.

66. At least five circuit courts have held that a mandatory arbitration clause implicitly waives the right to a jury trial. RADIN, *supra* note 1, at 131; *see, e.g.*, Cooper v. MRM Inv. Co., 367 F.3d 493, 507–08 (6th Cir. 2004).

67. RADIN, *supra* note 1, at 25. A pending bill in Virginia could change access to class actions in the state. David N. Anthony, Jonathan Floyd, Alan D. Wingfield & Ethan G. Ostroff, *Virginia House Bill 418 Could Authorize Class Action Lawsuits in the Commonwealth*, TROUTMAN PEPPER: CONSUMER FIN. SERVS. L. MONITOR (Feb. 14, 2024), https://www.consumerfinancialserviceslawmonitor.com/2024/02/virginia-house-bill-418-could-authorize-class-action-lawsuits-in-the-commonwealth [https://perma.cc/L6ER-RL3Y].

68. Some courts are reluctant to enforce class action waivers unless coupled with arbitration provisions. *E.g.*, Stuart v. State Farm Fire & Cas. Co., 910 F.3d 371, 375–76 (8th Cir. 2018); Dupler v. Costco Wholesale Corp., 249 F.R.D. 29, 37, 46 (E.D.N.Y. 2008); *see also* J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1745–48 (2006) (arguing federal courts should "guarantee that arbitration agreements do not thwart the vindication of substantive rights").

69. Radin lists exculpatory clauses and liability waivers as a common, but troubling, example of "rights deletion clauses" in boilerplate. RADIN, *supra* note 1, at 138–40.

70. *Id.* at 8. She also noted that outside the United States, such warranty and rights disclaimers and liability waivers are not nearly as "ubiquitous." *Id.*

The T&C Study also noted provisions requiring the consumer to indemnify the company.[71]

Many of the liability reallocation provisions are broadly written, blanket waivers of liability, perhaps coupled with an indemnity provision. As written, some such clauses purport to completely insulate the company from any liability, even though public policy generally treats boilerplate exculpatory clauses as ineffective with respect to crimes, intentional torts, and gross negligence.[72] The inclusion of an overly broad liability limitation in boilerplate, however, can provide extrajudicial benefits to the company. Even though a court examining a broadly written liability waiver may refuse to enforce it, the mere existence of such a provision may dissuade a would-be consumer plaintiff from bringing a legal claim to begin with.[73] In addition to this *in terrorem* effect, it is difficult to predict what limits private arbitration would impose on broadly written liability waivers.

One reason that exculpatory clauses are commonly included in company boilerplate is that companies' insurance companies want them to be. Radin cites insurance underwriting requirements as an important source of broad exculpatory boilerplate language, pointing out that by requiring companies to include broad liability waivers in their terms and conditions, insurance companies may be able to collect premiums to cover liability exposure that the insured company may have effectively limited by its contract.[74] Some scholars analyzing the phenomenon of contractual liability waivers through the lens of law and economics argue that consumers might desire—and therefore should be permitted—to preemptively waive negligence claims in exchange for more affordable products and services.[75] But the consumer's "agreement" to change the parameters of tort law and avoid the effect of implied-at-law contractual waivers occurs in the context of non-negotiable boilerplate. Boilerplate waivers

71. See Appendix B for sample provisions of each type, including indemnification clauses.

72. RADIN, *supra* note 1, at 138–39. Some courts also treat waivers of negligent harms as contra public policy as well. *See generally* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 38 FLA. ST. U. L. REV. 563 (2012) (conducting an empirical study). The degree to which public policy limits the enforcement of such provisions varies significantly from state to state. For a fifty-state survey of the treatment of liability waivers (and helpful chart), see generally MATTHIESEN, WICKERT & LEHRER, S.C., EXCULPATORY AGREEMENTS AND LIABILITY WAIVERS IN ALL 50 STATES (2022), www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY-AGREEMENTS-AND-LIABILTY-WAIVERS-CHART.pdf [https://perma.cc/ND7U-JK8J]; and Zahra Takhshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 CARDOZO L. REV. 2183 (2021) (comparing the treatment of contractual liability waivers in the United States to their treatment in the United Kingdom and France, focusing on products liability and personal injury claims).

73. Colin P. Marks, *Online Terms as* In Terrorem *Devices*, 78 MD. L. REV. 247, 290 (2019); *see also* Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 555 (2015) ("[T]he text . . . may be misleading and stop users from seeking relief to which they may be entitled."). A clause has an "in terrorem" effect when it "serv[es] or intended to threaten or intimidate." *In Terrorem*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/in%20terrorem [https://perma.cc/V5AB-KLBV].

74. RADIN, *supra* note 1, at 139–40.

75. *See* THALER & SUNSTEIN, *supra* note 61, at 209–15; Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1581–84 (2005).

fail to reflect consumers' voluntary choices or even their knowledge.[76] Treating exculpatory clauses in online terms and conditions as reflections of consumer preferences is a rather flimsy attempt to justify a reconfigured liability regime that allocates the risk of loss to the least powerful of the three involved parties—the consumer rather than the company or its insurer.

3. Limits on Remedies

Contract law limits recoverable damages to those actual unavoidable losses that are foreseeable, reasonably certain, and proximately caused by a party's breach.[77] But parties to a contract may agree to further limit or cap recoverable damages.[78] Accordingly, in addition to eliminating legal bases for company liability, many companies choose to further limit the measure of a consumer plaintiff's recovery in cases where company liability might still exist. Limits on the measure of damages is the third category of rights deletion provisions tracked in the T&C Study. There are two approaches to damage limitations, and companies frequently use one or both to significantly reduce their liability cost exposure. The T&C Study measured both types of limitations on remedies. First, boilerplate often limits the type or category of damages available to the consumer, for example, disclaiming any ability to recover for "incidental, consequential, indirect, punitive, or special damages." The Study also tracked provisions that impose a dollar cap on the amount of damages that can be recovered. Caps on consumer damages are almost always so small as to be nominal or are limited to a mere refund of amounts the consumer previously paid to the company over a certain time frame.[79] The consequence of such provisions is to restrict even successful consumer claimants from obtaining little or no damages beyond—at most—a refund.[80]

Even if consumers were generally aware that companies' boilerplate provisions limited the amount they could recover from a successful claim, most would not understand the meaning and effect of clauses that limit damages by type.[81] Practitioners and scholars continually debate the precise meaning and parameters of terms such as "special damages," "incidental damages," and

76. *See* Boyack, *supra* note 1, at 14.

77. RESTATEMENT (SECOND) OF CONTS. §§ 350–353 (AM. L. INST. 1981).

78. *E.g.*, U.C.C. § 2-719 (AM. L. INST. & UNIF. L. COMM'N 2002). Courts do occasionally exercise oversight to ensure that stipulated damages are not penalty clauses, over-compensating the non-breaching party and thus providing an unjustified breach deterrent, but courts do not police damage stipulations or limits for potential under-compensation.

79. Radin noted that a "common provision" in online boilerplate "limits remedies for losses caused by a defective product or service to the replacement, repair, or reimbursement of the project itself" and explained the impact of such a limitation as "eliminating damages for injurious consequences of the product's failure." RADIN, *supra* note 1, at 8.

80. Related to the question of recovery for breach of contract is the question of which party must fund associated legal costs. Although the Study tracked clauses that change the legal default rule that each party pays their own legal costs, this Article does not include that data within the metrics analyzed quantitatively or qualitatively because there is no consensus with respect to whether the changing the legal default rule to a "loser-pays" framework harms or benefits consumers.

81. Michael L. Rustad, *Why a New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521, 524–25 (2022).

"consequential damages."[82] Dollar caps are easier for consumers to understand, but consumers may lack the knowledge and experience to preemptively estimate their actual damages from breach. Simply refunding the consumer's payment in lieu of actual damages, in effect, destroys one party's benefit of the bargain and expectation interest in the contract.[83] In all cases, the impact of limits on damages is to reduce the possible recovery of consumers from a successful dispute with the company. A reduced potential recovery disincentivizes consumers from bringing a claim to protect their rights.

4. Unilateral Modification

Finally, the T&C Study also tracks provisions that pre-authorize future company modifications of the parties' contract terms. Unilateral modification provisions typically assert that, by merely continuing the transactional relationship with the company, the consumer counterparty will be deemed to have assented to any such contract changes. Every company's online terms reviewed in the T&C Study—one hundred out of one hundred companies' boilerplate—contained language expressly authorizing the company to make unilateral changes to terms, at its option, from time to time.[84]

Radin points out that unilateral modification clauses, while routinely enforced, are provisions that traditional contract law would have deemed too illusory and indeterminate to be effective. After all, "if one party can modify at will, it can modify its way out of the obligations that were supposedly basic to the deal."[85] Modern consumer contract law, however, shows no hesitancy in enforcing such terms.[86]

Unilateral modification provisions undercut the theory that consumers' market choices represent their voluntary election of particular boilerplate terms since, in every case, such terms are always subject to change by the company. The ubiquity of express authorization for unilateral company modification of terms itself is strong evidence of the complete control that companies exert over their relationship with consumer counterparties, not only with respect to initial governing terms but with respect to consumer rights in the future.

The selection of clauses tracked by the T&C Study was also guided by the treatment of online boilerplate by judicial systems outside the United States. European Union contract law identifies seventeen types of terms that are presumptively unfair in standard form contracts.[87] Unlawful destructive

82. *See, e.g.*, Glenn D. West & Sara G. Duran, *Reassessing the "Consequences" of Consequential Damage Waivers in Acquisition Agreements*, 63 BUS. LAW. 777, 788–98 (2008).

83. The company's profit is protected, but the consumer's "win" in the win–win transaction is ephemeral and illusory. The best outcome a non-breaching consumer can obtain in case of the company's breach is a return to *status quo ex ante*.

84. This result is fairly consistent to that of Becher and Benoliel who, in their study, found unilateral modification provisions in ninety-eight percent of consumer contracts. Becher & Benoliel, *supra* note 6, at 681.

85. RADIN, *supra* note 1, at 271.

86. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

87. Council Directive 93/13, 1993 O.J. (L 95) 29 (EC).

terms include those that enable "the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract."[88] EU regulation also prohibits non-negotiable provisions "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration."[89]

II. A SNAPSHOT OF BOILERPLATE RIGHTS DELETIONS

A. CHANGING DISPUTE RESOLUTION LEGAL DEFAULTS

Two-thirds (sixty-six percent) of all consumer contracts surveyed contain a mandatory arbitration clause, but prevalence of arbitration clauses varied widely among different sectors of the economy.[90] For example, eighty-two percent of retail sector contracts, eighty-one percent of contracts for companies offering streaming and entertainment, and seventy-five percent of contracts by companies in the travel and transportation sector, as well as sixty-nine percent of social media companies require that disputes be resolved through mandatory arbitration. In the other two sectors, however, mandatory arbitration clauses are relatively less common: Only forty-two percent of financial services companies and fifty percent of computer/browsing companies include a mandatory arbitration provision in their boilerplate.

Boilerplate waivers of jury trial and waivers of class action litigation are about equally as prevalent as arbitration mandates (sixty-eight percent waive a jury trial, and sixty-five percent explicitly waive class actions). Such provisions are also more common in certain sectors than others. Retail is the sector most likely to include both a waiver of the right to a jury trial (ninety-four percent) and a waiver of class actions (eighty-eight percent). At the other end of the spectrum, only forty-two percent of financial services companies include a jury waiver in their boilerplate, and only thirty-seven percent of such companies include a class action waiver.[91] Arbitration mandates must be considered together with waivers of jury trial and class action (and other provisions) to obtain a complete picture of how boilerplate provisions impact consumer dispute

88. *Id.* at Annex ¶ (1)(j).

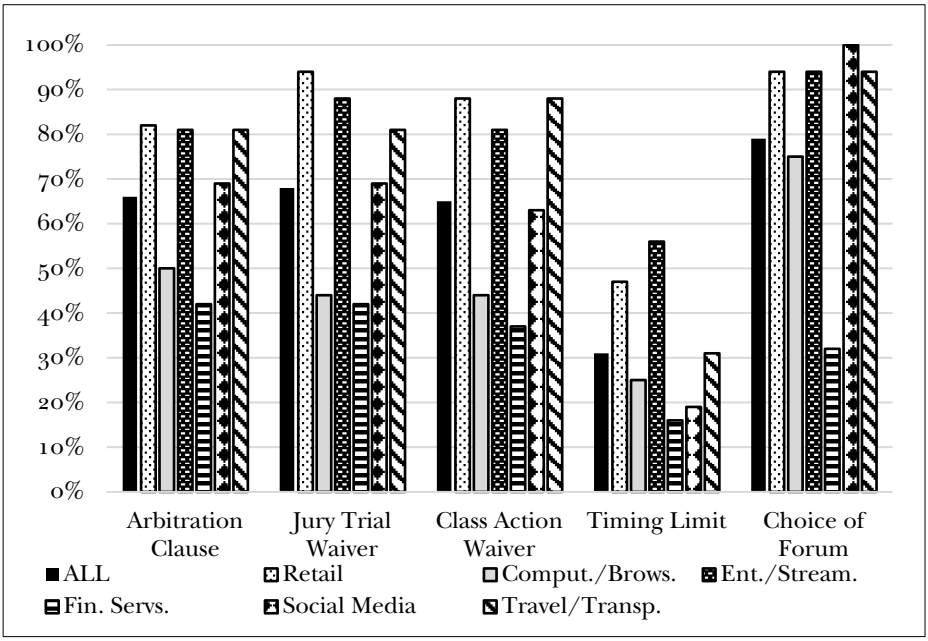
89. *Id.* at Annex ¶ (1)(q).

90. Results are consistent with prior studies that found roughly two-thirds to three-fourths of consumer contracts contain mandatory arbitration clauses, as compared to only ten percent of the same companies' commercial contracts. Eisenberg et al., *supra* note 13, at 884; *see also* Szalai, *supra* note 13, at 238–40 ("[E]ighty-one companies in the Fortune 100 . . . have used arbitration agreements in connection with consumer transactions.").

91. More extensive regulatory oversight at federal and state levels of financial institutions may account for the relatively lower prevalence of mandatory arbitration clauses and waivers of jury and class action lawsuits in contracts in that sector.

resolution options. Disputes resolved through arbitration will not be jury trials, by definition.[92] Nor do most arbitral proceedings permit class actions.[93]

Figure 1: Boilerplate Destructive Terms re: Dispute Resolution



Legal claims are time-bound by the applicable statute of limitations, but many companies' boilerplate contains language that shortens the time frame for bringing claims against the company. Although thirty-one percent of all contracts surveyed explicitly shrink the temporal window to bring a claim, stricter time limits on claims are relatively more popular among companies offering streaming services: Fifty-six percent include such a provision in their online boilerplate. State statutes of limitations for breach of contract and tort actions range from two to five years, but boilerplate provisions that shorten the time to bring a claim typically reduce that period to at most a single year.[94]

Of the company terms and conditions examined, seventy-nine percent contained a choice of forum clause. A choice of forum clause can double as a method to limit the timing to bring a claim or even as a class action waiver in some states. For example, Virginia does not currently permit class action litigation, so mandating litigation in Virginia implicitly waives the right to participate in a class action. Choice of forum clauses appear more frequently

92. Eisenberg et al., *supra* note 13, at 872–73.

93. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 70–76 (2015) (discussing the development of arbitration over class actions).

94. See Appendix B for further information regarding content of clauses limiting the time to bring a claim.

in the boilerplate of companies in certain sectors. Among streaming and retail companies, ninety-four percent included a choice of forum clause in their boilerplate, and one-hundred percent of the companies in the social media sector included a forum selection clause in their online terms.

Some state laws are hostile to choice of forum clauses in certain contexts. In such states, courts are unlikely to enforce contractual mandates in non-negotiable terms and conditions.[95] Sixteen states invalidate outbound forum selection clauses in contracts for consumer credit, and eleven states refuse to enforce such clauses in consumer insurance contracts.[96] Four states (California, Oregon, Nevada, and Wisconsin) have passed statutes invalidating forum selection clauses in all consumer contracts.[97] The Tennessee Code provides that outbound choice-of-forum provisions are ineffective in the context of claims brought under the State's consumer protection act.[98]

Some private ordering is necessary to create infrastructure for a transaction. Transactional infrastructure typically includes price, a description of goods or services provided by the company, time frames for delivery, cancellation, and return. But there is no transactional efficacy justification for contractual terms mandating a particular time, place, and method of dispute resolution.[99] The parties' anticipated transaction can function equally well without provisions that mandate arbitration, waive a jury trial or class action lawsuit, or constrain where and when suits may be brought. But for the provision in the company's boilerplate to the contrary, the counterparties would simply have the dispute resolution default rights that are generally afforded by our legal system.[100] Because such clauses do not impact any part of the parties' actual transaction, but rather simply operate to limit these default rights, striking them from the governing terms would have no substantive impact on the transaction itself.[101] An agreement to sell, hire, lend, or lease would be complete even if all provisions changing dispute resolution defaults disappeared.[102]

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95. John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1110–13 (2021). The U.C.C., adopted in nearly every state, prohibits outbound choice of forum clauses in consumer leases. U.C.C. § 2A-106(2) (AM. L. INST. & UNIF. L. COMM'N 2012).

96. Coyle & Richardson, *supra* note 95, at 1110–13.

97. CAL. CIV. PROC. CODE § 116.225 (West 2023); OR. REV. STAT. § 81.150 (2023); NEV. REV. STAT. § 97B.100 (2021); WIS. STAT. § 421.201(10)(c) (2016).

98. TENN. CODE ANN. § 47-18-113(b) (2013). For more details regarding which states have statutes invalidating which types of forum-selection clauses, see Coyle & Richardson, *supra* note 95, at 1113 (providing a chart with such information).

99. James Gibson cogently and forcefully explained the difference between terms necessary for the transaction's function and those other boilerplate terms that had no impact on the parties' transaction but merely operated to delete consumer rights and uses empirical case studies to show that these rights deletion provisions are unnecessary to consumer transactions. Gibson, *supra* note 2, at 277–79. The concept of transactional infrastructure is discussed more in Boyack, *supra* note 1, at 51–52.

100. This point is explained in greater detail conceptually in RADIN, *supra* note 1, at 69–72 and theoretically in Gibson, *supra* note 2, at 271–77.

101. Gibson, *supra* note 2, at 271–77.

102. *See* Boyack, *supra* note 1, at 52.

Consumers are unlikely to knowingly and voluntarily limit their rights of redress unless (a) their only other choice is to forgo the transaction entirely or (b) they are compensated for assenting to such limitations.[103] Boilerplate apologists frequently claim that companies' cost savings from dispute resolution destructive terms are passed on to consumer counterparties in the form of lower prices. This claim is unsupported by any empirical evidence. Furthermore, even if company-imposed liability waivers did result in lower prices for consumers, our legal system does not permit privately coerced sales of rights—even for a fair price.[104] Nevertheless, eighty-five percent of all boilerplate terms reviewed in the T&C Study contained at least one dispute resolution limitation.

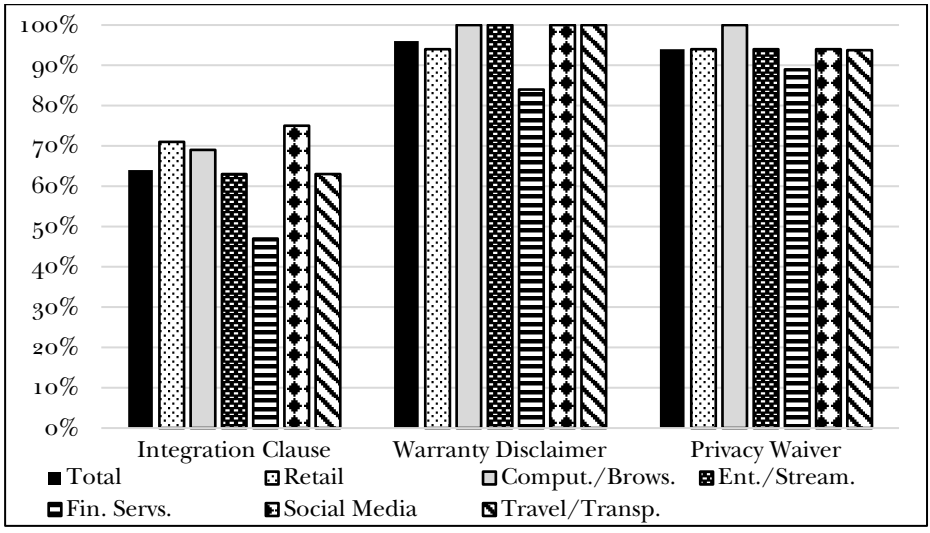
B. WAIVERS OF POTENTIAL CLAIMS

Contract and tort laws establish default rules that allocate responsibility for losses based on misrepresentation, breach of warranty, and negligence. For example, party misrepresentations or fraudulent omissions can form the basis of tort liability and contract rescission. Unless warranties implied by law are expressly disclaimed, defective goods may give rise to breach of contract as well as tort claims against merchant sellers. Companies frequently modify these tort and contract law default liability allocations in their standard forms. For example, sixty-four percent of all the terms and conditions examined in the Study contained integration clauses expressly disclaiming the effect of any representations outside the online written terms.

103. *See* RADIN, *supra* note 1, at 160. Note also that consumer choice to waive rights in exchange for payment may further be suspect because of consumer heuristic biases that systematically underestimate the likelihood of future disputes in their transactions. *Id.* at 26–28.

104. *Id.* Radin's point—that private parties should be unable to extract values from others against their will, even for fair compensation—is the foundation of the extensive jurisprudence and advocacy protecting private property rights against private co-opting of the government's right of eminent domain. *See* U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE 21–62 (2014), https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf [https://perma.cc/S6S8-NEDC] (outlining the debate between private property rights and eminent domain); *see also* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 9–18 (2006) (describing the history of "public use").

Figure 2: Boilerplate Destructive Terms re: Claims



Standard forms in all sectors almost universally waive all warranties implied by law.[105] Only four of the one hundred forms reviewed lacked a warranty disclaimer, and every company's boilerplate in the computer/browsing, streaming, social media, and transportation/travel sectors included language disclaiming warranties otherwise implied by law. In the retail sector, only one company (Aldi) did not waive implied warranties.[106] Even in the financial sector (where implied warranties are likely less common to begin with), eighty-four percent of the contracts contained a warranty disclaimer.

Privacy waivers are also common features of company boilerplate. Ninety-four percent of the surveyed standard forms contain an explicit waiver of the customer's rights of privacy, including one hundred percent of all surveyed companies in the computer/browsing sector.[107] Boilerplate for every company in the retail, computer/browsing, streaming/entertainment, social media, and

105. Nearly all warranties implied in law are waivable by private agreement. One of the only exceptions, in many states, is the implied warranty of habitability in residential leases. Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 526 (1984); *see also* Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 3 (2016) (citing the non-waivability of the implied warranty as key to its survival).

106. Aldi's terms and conditions are fairly exceptional, perhaps because the company is German, not American. *See infra* note 153 and accompanying text.

107. Because many such companies provide a more detailed separate privacy protection regime that often permits the customer to change default rules in many cases. For example, many social media sites give users the option to adjust what information the company may freely disclose. These customization options suggest companies have determined it is not prohibitively costly to have different contract provisions apply among their various consumer contracts, and these customization schemes also show how defining default contract terms is a key issue. See *infra* Part III for more discussion of both concepts.

transportation/travel (every sector but financial services) included at least one sort of liability-limiting provision.

Like limitations on methods of redress, liability waivers fall outside the transactional infrastructure.[108] The boilerplate clauses that change default liability allocations serve only to insulate the company from liability and other losses while allocating additional risks to the consumer.[109] Certain exculpatory provisions are invalid based on protective statutes or public policy—for example, those waiving liability for intentional harm. Evidence suggests, however, that companies include overbroad waivers in their contracts deliberately in order to deter consumer claims.[110] The disclaimers and waivers in boilerplate are not "gap filler" provisions that help clarify the mechanics of the transaction. Rather, they create gaps in the parties' contract by punching holes in default allocations of liability in favor of the drafting party.[111] Nevertheless, of the surveyed forms, ninety-eight percent contain one or more clauses that expressly change the default allocation of liability to provide a (likely free) benefit to the company.

C. LIMITS ON CONSUMERS' REMEDIES

Like a belt added to suspenders, company boilerplate also minimizes the amount that a company would have to pay in damages in the unlikely event that some sort of consumer claim against it is successful. Boilerplate rights deletion provisions that limit the amount of damages that a company would ever have to pay come in two basic varieties: (i) waivers of certain types of damages (typically excluding consequential, incidental, punitive, and special damages), and (ii) caps on the amount of damages that a company will have to pay upon a successful consumer claim.[112] Most of the reviewed terms and conditions do both. Some forms cap damages at a nominal amount (typically a small dollar amount: $10, $25, $50, or $100), but most damage caps are defined as the

108. Gibson, *supra* note 2, at 271–77.

109. Courts do not always enforce exculpatory clauses in boilerplate. For example, broadly written clauses that purport to waive all claims will be ineffective in waiving intentional harm. Encarnacion, *supra* note 51, at 1313.

110. *Id.*; Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 6–7 (2017); *see also* RADIN, *supra* note 1, at 13 ("It might prevent someone from suing us, if indeed someone were to read it."). Unenforceable exculpatory clauses do appear to be effective at chilling valid consumer claims. Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 91 (1997).

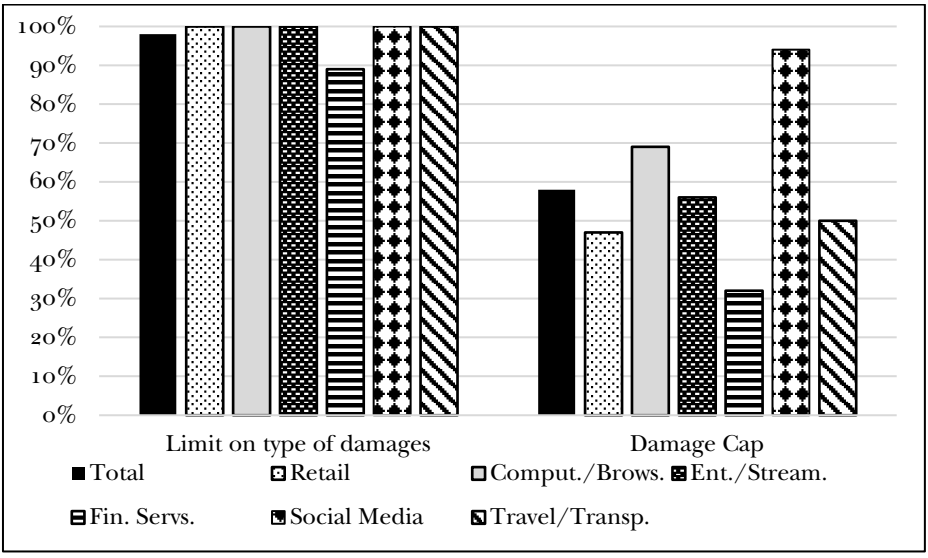
111. Note that replication among and within sectors suggests use of precedents (possibly without clearly thinking it through). *See* MITU GULATI & ROBERT E. SCOTT, THE THREE-AND-A-HALF-MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 120 (2013).

112. Courts sometimes strike down liquidated damages clauses that set the amount of recovery unreasonably higher than actual damages a party suffers, but courts do not ignore liquidated damages provisions that result in under-recovery for the non-breaching party. *See, e.g.*, Wassenaar v. Panos, 331 N.W.2d 357, 364 (Wis. 1983) (holding that liquidated damages that are "grossly disproportionate to the actual harm" are unreasonable and unenforceable); Colonial at Lynnfield, Inc. v. Sloan, 870 F.2d 761, 768 (1st Cir. 1989) (holding that complete absence of actual loss renders a liquidated damages provision unenforceable); Orr v. Goodwin, 953 A.2d 1190, 1197 (N.H. 2008) (finding that an enforceable liquidation clause caps recovery by the non-breaching party).

amount a consumer paid to the company over a certain period of time. In most cases, damage caps set a consumer's maximum recovery at a simple refund.[113]

The prevalence of damage caps in boilerplate varies widely among the sectors: Ninety-four percent of social media companies cap damages in their online terms, but only thirty-two percent of financial companies do. Limitation of damages by type is more common among all sectors. Ninety-eight of the one hundred surveyed companies include a limitation on types of damages in their boilerplate, and the only two companies that do not limit the type of damages are both within the highly regulated financial services industry. Every surveyed company within the other five sectors limits possible consumer damages by type through its boilerplate terms.

Figure 3: Boilerplate Destructive Terms re: Remedies



As with the other rights deletion provisions tracked in the Study, there is no pragmatic transactional justification for a contractual stipulation limiting the consumer counterparty's legal remedies.[114] Waivers of and caps on damages in no way affect the mechanics of the parties' transaction, and clear legal rules for calculating damages would apply in the absence of such clauses.[115] By limiting the amount of damages via boilerplate, companies erase their consumer counterparties' legal rights to be made whole from the company's contractual breach or tort. Once again, ninety-eight percent of the companies in the sample set had boilerplate terms that included some sort of limitation of damages. And (once again) the only companies that do not use boilerplate

113. This sort of "heads, I win, tails, no one wins" approach to contractual liability erases the consumer's expectation interest. *See supra* note 83 and accompanying text.

114. *See* Gibson, *supra* note 2, at 260–61.

115. *See* RADIN, *supra* note 1, at 184.

to reduce the potential recovery amount for successful consumer plaintiffs are within the highly regulated financial services sector.

D. UNILATERAL MODIFICATIONS

Finally, the T&C Study tracked boilerplate terms expressly authorizing the company to make unilateral changes to the parties' contract terms. Unilateral modification provisions are universally present in the examined boilerplate: One hundred percent of the standard forms reviewed expressly authorized the company to make changes to the rules governing the transaction, from time to time, at its sole option. And all the companies asserted in their non-negotiable terms that by continuing the relationship with the company after such changes, the counterparty would be deemed to have assented to the new terms.[116] Based on the boilerplate provisions of ninety-eight percent of the surveyed companies, the only way the consumer counterparty can avoid being bound to revised terms and conditions would be by terminating their transactional relationship with the company.[117] Two companies in the sample set provided consumers the option to remain in the transactional relationship while opting out of a "material adverse change" made by the company to the boilerplate terms, but in each case, a consumer must mail a written notice to the company within a short period of time after the applicable change is made to effectively opt out.[118] Furthermore, this opt-out possibility appears to reflect industry-specific regulatory oversight rather than consumer inputs. The U.S. Federal Communications Commission regulations and telecommunications law require that regulated telecommunications companies provide their customers with notice of and an opportunity to opt out of changes to terms of service.[119] The only two companies in the T&C Study that are telecommunications companies

116. Unilateral modifications theoretically could run into enforcement difficulties at contract law because of a lack of new consideration, but in the context of a continuing transactional relationship between the parties, courts typically find that consideration for modified terms exist.

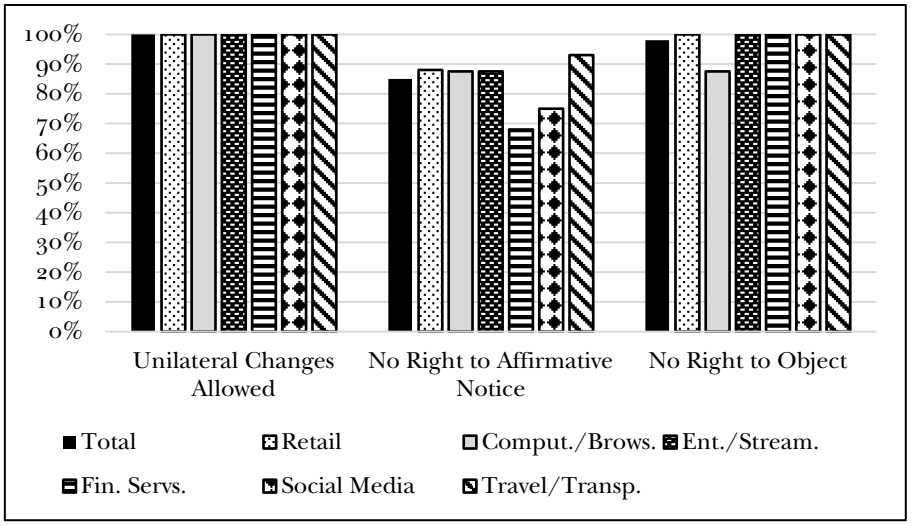
117. In several states, companies have the right to change binding contract terms with consumers even if initial contract terms lacked explicit authorization for unilateral modifications by the company. *E.g.*, DEL. CODE. ANN. tit. 5, § 952 (2001) (permitting credit card issuers to change terms of their contracts as long as customers are given affirmative written notice and an opportunity to reject changes); *see* Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 10 (2010).

118. AT&T's boilerplate provides that: "If we notify you of a materially adverse change concerning an AT&T Service during your Service or Programming Commitment, and if you don't accept the change, you must cancel the AT&T Service within [fourteen] days of the notice to avoid an early termination fee, if applicable." *AT&T Consumer Service Agreement*, AT&T, https://www.att.com/legal/terms.consumerServiceAgreement.html [https://perma.cc/8FFE-2MSL]. Previously, AT&T came under fire for charging an early termination fees when its customers chose to terminate their service in response to changes to the boilerplate arbitration provision. For a discussion of several consumer–cellular company disputes regarding early termination fees, see generally Ben Everard, *Early Termination Fees: Fair Game or Federally Preempted?*, 77 GEO. WASH. L. REV. 1033 (2009).

119. 47 U.S.C. § 552; *see also When Your Telephone Company Discontinues Service*, FCC, https://www.fcc.gov/consumers/guides/when-your-telephone-company-discontinues-service [https://perma.cc/FJS3-T65R] ("FCC rules help to prevent telephone companies from abruptly discontinuing, reducing, or impairing wireline telecommunications service without proper notice . . . .").

(AT&T and Verizon) were the only two companies that provided a possibility for their counterparty to opt out of "materially adverse" unilateral changes.

Figure 4: Boilerplate Destructive Terms re: Contract Modifications



Every company in the T&C Study sample set pre-authorizes unilateral modifications, but fifteen percent of the boilerplate also includes a promise by the company to notify the consumer when material changes to the terms are made.[120] The boilerplate of eighty-five percent of the companies in the sample, though, explicitly disclaim any obligation of the company to provide the consumer counterparty with any notice of changes to terms and conditions other than by updating the terms and conditions available by hyperlink on the company website.[121] Instead of promising to provide notice, most boilerplate clauses simply advise consumers to frequently check the website to become aware of any such modifications.[122] There have been a handful of cases in which

120. Two additional companies explicitly promised to notify their counterparties of changes if such notice was required by law (although one could argue that every company would have to provide notices required by law notwithstanding language failing to include this explicit promise). Requiring affirmative notice of changes to be given to consumers is becoming less common. In 2007, for example, Minnesota deleted its prior statutory requirement that required affirmative notice and customer consent in order to change the terms of service for telecommunications customers. MINN. STAT. ANN. § 325F.695 (West 2006) (expired 2007). In addition, at least one company that had previously promised to provide advanced notice of changes (PayPal) changed their terms and conditions in 2021 to delete the company's promise to notify their counterparty of changes and permit changes with no affirmative notice. According to general business advice for companies posted online, however, providing consumers with notice of changes is a "best practice" for boilerplate modifications.

121. Some provisions indicate that the website will be updated to show the last date of modifications at the top. Consumer counterparties are typically admonished in the boilerplate terms to frequently check company websites to become aware of the current version of the terms and conditions that purportedly govern their relationship with the company.

122. See sample clauses in Appendix B.

a court refused to enforce unilateral modifications without affirmative notice of changes provided to consumer counterparties.[123] But most courts accept the contention that consumers have adequate notice of terms when updated versions are posted on the company website.[124]

Notice, of course, is not synonymous with consent.[125] As Radin explained in *Boilerplate*, however, the current legal approach to consumer contract formation not only conflates the two but degrades the contractual requirement of actual consent to mere constructive notice.[126] Courts generally agree that by continuing their relationship with a company, consumers have implicitly assented to whatever set of governing terms the company drafts and posts online from time to time.[127]

According to nearly all examined boilerplate, the consumer counterparty can only reject modifications by terminating the transactional relationship with the company. Bundling the transaction with terms that are completely within the control of the company—past, present, and future—leaves consumers with two bad choices: either acquiesce to company unilateral power to erase their default

123. *E.g.*, Douglas v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 495 F.3d 1062, 1066 (9th Cir. 2007) (holding that parties to a contract should not have an obligation to periodically check the company's website to see whether and how terms have been updated); Rodman v. Safeway, Inc., 125 F. Supp. 3d 922, 945 (N.D. Cal. 2015) ("[T]he validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014))).

124. *See, e.g.*, Weber v. Amazon.com, Inc., No. 17-cv-8868, 2018 WL 6016975, at *13 (C.D. Cal. June 4, 2018) (distinguishing *Douglas*, by pointing out that Amazon.com's online terms directed all subscribers "to carefully review those terms" from time to time); Lee v. Ticketmaster L.L.C., 817 F. App'x 393, 395 (9th Cir. 2020) (finding *Douglas* inapposite if consumers continuously use a website on which updated terms are posted); *In re* StubHub Refund Litig., No. 20-md-02951, 2021 WL 5447006, at *4 (N.D. Cal. Nov. 22, 2021) (same). In fact, just a few months after its opinion in *Douglas,* the same California court held that consumers actually should periodically check websites for updated terms. Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 907 (N.D. Cal. 2011) (explaining that the consumer counterparties had agreed to the company had "the right to change the terms at any time, that use after notice of the change in terms constitutes acceptance of the changes, and that the changes take effect after notice by posting the changes" on the company website); *see also* Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 695–97 (2013) (discussing how the Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), permits a unilaterally added arbitration provision to effectively bind the consumer who does not cancel their account with the company).

125. *See* Boyack, *supra* note 1, at 6.

126. RADIN, *supra* note 1, at 30. "The ultimate result of this process," says Radin, "is the contention by some scholarly apologists for boilerplate that if a recipient of boilerplate could reasonably have found out that terms existed, that is enough to constitute consent." *Id.* Radin takes issue with the conclusion, "that because a recipient should have known there were terms, he is therefore (*therefore??)* bound by them," explaining that this approach "leaves the firm with power to change consumers' entitlements without their consent or even knowledge." *Id.* at 31.

127. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 609 (2010); Bar-Gill & Davis, *supra* note 117, at 30; *see, e.g.*, Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 836 (S.D. Miss. 2001) (holding that a unilateral modification to terms that added a mandatory arbitration clause was binding on the consumer, notwithstanding any affirmative act indicating knowledge or assent); Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 900 (Ill. App. Ct. 2003) (same); Joseph v. M.B.N.A. Am. Bank, N.A., 775 N.E.2d 550, 553–54 (Ohio Ct. App. 2002) (same).

legal rights as the cost of doing business with that company or withdraw from the subject economic activity altogether. Allowing companies the power to continually tweak their contract terms keeps the consumer at the continuing mercy of the company (and the company's lawyers), but the New Restatement of the Law of Consumer Contracts concludes that such clauses should generally be enforceable as written, not based on any policy or contract-theory justification, but because courts often do treat unilateral revisions to boilerplate as binding.[128] Two recent (2024) state supreme court decisions from Massachusetts and North Carolina are illustrative. Each court concluded that by proceeding with the transactional relationship, the counterparty adequately manifested assent to whatever amended and restated terms the company presented as the parties' contract.[129]

III. DISAPPEARING LEGAL DEFAULTS: AN ASSESSMENT

The majority (in fact, a supermajority) of companies surveyed include all four types of destructive terms in their boilerplate.[130] The T&C Study found that more than eighty-five percent of all companies use their boilerplate terms to delete consumer default rights with respect to dispute resolution. Ninety-eight percent of the examined companies have boilerplate provisions that reallocate liability and risk of loss to the consumer and reduce available remedies. And one hundred percent of the companies anticipate and require their customers to pre-authorize unilateral modifications to the terms of the parties' contract. Because any company reserves the right to change the terms and conditions of the transaction from time to time, every company can add more extensive destructive terms in the future, and courts following the New Restatement will presume that these additional waivers and limitations of consumers' default legal rights will be automatically effective. Even in those few instances where destructive terms do not already appear in the boilerplate, there is therefore no reason to believe that such terms will not be added at some point during the parties' transactional relationship.

Economic and market theorists attempt to justify the enforcement of boilerplate based on party reliance and market functionality, but the ubiquity

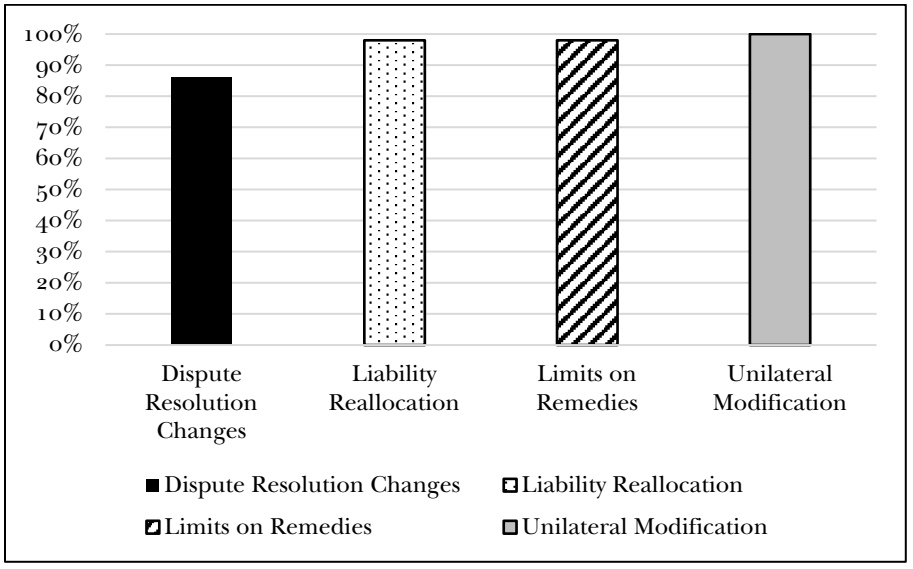
128. RESTATEMENT OF THE L. OF CONSUMER CONTS. § 3 (AM. L. INST., Tentative Draft 2019). For a more thorough discussion of issues surrounding the American Law Institute's conclusion, in their proposed new Restatement of the Law of Consumer Contracts, that unilateral modification clauses create pre-assent by consumers to future changes to contract terms made from time to time by the company, see Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 392–95 (2020).

129. Good v. Uber Techs., Inc., 234 N.E.3d 262, 287 (Mass. 2024) (emphasizing that Uber's counterparty was alerted to its change of terms through a pop-up window on the company's app and interpreted the counterparty's click to dismiss the pop-up window as affirmative blanket assent to all revised terms promulgated by Uber); Canteen v. Charlotte Metro Credit Union, 900 S.E.2d 890, 898 (N.C. 2024).

130. Radin both predicts and critiques the problem of "copycat boilerplate" (boilerplate proliferation) in her book. RADIN, *supra* note 1, at 41–45.

of unilateral modification clauses delegitimizes such theories.[131] If one party has the unilateral ability to change the rules in the middle of the game, reliance (even generously defined) diverges from boilerplate enforcement and market discipline theory fades into fantasy.[132] Companies' discretion to modify contract terms renders the parties' transaction reminiscent of the ever-changeable rules of "Calvinball" in Bill Watterson's comic strip *Calvin & Hobbes*.[133] Instead of promoting party expectations and rule certainty, enforcing unilaterally changeable company boilerplate reinforces the imbalance of power between the parties. (At least in Calvinball, *both* players have an equal opportunity to make up new rules as they go along.)[134]

Figure 5: Prevalence of Destructive Terms in Boilerplate
(by Destructive Term Type)



131. Oman, *Pragmatic*, *supra* note 7, at 78. For Oman, in fact, unilateral capacity to modify terms is actually a virtue because it accelerates the rate at which companies can "experiment[] with different solutions" to transactional problems which can help standard forms evolve in a value-enhancing way. *Id.* at 104; *see also* Bix, *supra* note 21, at 227 (discussing predictability issues that would arise from lack of clarity regarding the parties' contractual terms).

132. Horton, *supra* note 127, at 609 ("The fact that drafters enjoy the power to alter procedural terms unilaterally undermines the bedrock economic assumption that adherents can impose market discipline on procedural terms."); Bar-Gill & Davis, *supra* note 117, at 26 ("The upshot is that unilateral modifications make it difficult for consumers to become informed about the terms being offered by sellers. Uninformed consumers cannot comparison shop effectively.").

133. For a brief description of Calvinball in *Calvin and Hobbes*, see Deb Amlen, *The Crossword Stumper*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/01/06/crosswords/heck-calvinball-crosswords.html (on file with the *Iowa Law Review*) ("CALVINBALL has no rules; the players make up their own rules as they go along . . . .").

134. Calvinball as a concept has been applied to concepts as varied as liberal relativism and foreign policy. *See, e.g.*, Marc Lynch, *Calvinball in Cairo*, FOREIGN POL'Y (June 18, 2012, 1:58 PM), https://foreignpolicy.com/2012/06/18/calvinball-in-cairo [https://perma.cc/KPB2-24A5].

A. DOES BOILERPLATE REFLECT MARKET CHOICES?

The T&C Study measures the prevalence of boilerplate limitations of consumer rights, and the results of the study are sobering: A supermajority of companies in the sample set have standard terms that significantly limit the consumer counterparties' default legal rights. The vast majority—eighty-five percent—of the companies constrain consumers' dispute resolution rights, most commonly via a prescribed forum for resolution of disputes. Two-thirds of the companies mandate dispute resolution via arbitration.[135] Provisions that explicitly limit the basis on which the company can be held liable and provisions that constrain the measurement of damages for any such liability are nearly universal among the examined boilerplate: Ninety-eight percent provided at least one sort of exculpatory clause, and ninety-eight percent limited the possible damages. Furthermore, the companies in the Study unanimously reserved the right to unilaterally change governing terms, which of course permits further erasure of consumer default legal rights. The T&C Study shows that boilerplate rights deletion provisions are not simply common—they are nearly universal.

Some market theorists claim that consumer contract terms naturally evolve toward more pro-consumer forms through consumer market choices.[136] Theoretically, consumers can select from among variable sets of terms and conditions in the competitive marketplace, and consumer selection power incentivizes companies to account for consumer preferences in their terms.[137] But the T&C Study suggests that there is no market choice when it comes to boilerplate rights deletion provisions. Consumers cannot choose better terms over more abusive ones through market choices when all their possible counterparties offer essentially identical rights deletion schemes. The convergence among terms and prevalence of rights deletion provisions shows market theory to be unjustifiably optimistic as to the trajectory of consumer boilerplate.[138] When it comes to the content of company terms and conditions, the T&C results show a race to the bottom, not a survival of the fittest.[139]

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135. Two-thirds of the standard forms also include an explicit waiver of class actions and jury trial, although mandatory arbitration provisions often implicitly include such waivers as well.

136. *See* Oman, *Pragmatic*, *supra* note 7, at 103.

137. For such market theorists, competition will serve as an effective check against the creation of a proliferation of abusive or poorly conceived contractual content. *See* Oman, *Reconsidering*, *supra* note 7, at 217 (hypothesizing that a competitive market will weed out stupid or abusive contracts because consumers will elect other contracting parties rather than subject themselves to suboptimal terms).

138. To the extent that the market fails in this task, says Oman, legal rules have evolved to fill the gap. *See id.* at 223. Where market doesn't protect, however, Oman suggests that courts and legislatures will. Judicial responses to theory–reality mismatch in the realm of consumer contracts. *See id.* at 238.

139. Radin analogized the race-to-the-bottom outcome from industry-wide standardization of boilerplate waivers to the market failure sometimes termed the "lemons equilibrium." RADIN, *supra* note 1, at 107–08, 108 n.* ("A 'lemons equilibrium' occurs when no (or not enough) buyers can accurately assess the value of a product through examination before sale."). Radin's explanation

There is also no evidence from the T&C Study suggesting that companies with relatively fewer limits on consumer rights enjoy any competitive advantage in the market. Differences in the prevalence of rights deletion provisions from sector to sector seem to reflect different business models or regulatory oversight rather than the degree of competition in the industry. For example, the retail sector is perhaps the most highly competitive of the six sectors analyzed, and yet one hundred percent of the reviewed companies in that sector deleted their customer's default legal rights with respect to (a) resolving disputes, (b) holding the company liable for torts or contract breaches, (c) obtaining damages for harms, and (d) having input with respect to changes to contract terms.[140]

As explained in Part II, destructive contract terms exist only to delete consumer default rights and add no value to the relationship's transactional infrastructure itself. Thus, if it were at all costly and cumbersome to add such provisions, many companies may choose to leave these irrelevant and unnecessary terms out of their boilerplate. Digital contracting, however, has eliminated any practical barrier to the inclusion of extensive, irrelevant boilerplate waivers. Today, companies can post terms through a hyperlink and avoid spending any money or effort disseminating their terms. The modest logistical constraint previously imposed by needing to print, copy, and disseminate paper forms has disappeared with the advent of online contracting. No additional regulatory oversight or market discipline has arisen to impose any corresponding restraint on the use—and abuse—of non-negotiable standard terms. Today, neither law nor logistics effectively limit how long, complex, and onerous company boilerplate can be. The near-universal erasure of consumer default rights in company boilerplate is the result.

In *Carnival Cruise Lines, Inc. v. Shute*, Justice Blackman opined that "it stands to reason" that when companies can save costs through risk-reducing terms and conditions, the consumers will "benefit in the form of reduced fares reflecting the savings that the [company] enjoys."[141] Nothing in the T&C Study, though, indicates that companies offering more onerous rights deletion provisions pass their cost savings onto consumers in order to enjoy a competitive advantage

refers to economist George Akerlof's "Market for Lemons" theory that information asymmetry leads to a market where defective goods become the norm. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

140. Mordor Intelligence Reports calls the retail industry "highly competitive." *Retail Industry Size & Share Analysis - Growth Trends & Forecasts (2024 - 2029)*, MORDOR INTEL., www.mordorintelligence.com/industry-reports/retail-industry (on file with the *Iowa Law Review*).

141. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991). A similar justification has been offered by scholars with respect to justifications for enforcing arbitration mandates in non-negotiable contracts. For example, Stephen Ware asserts that "implicit in an arbitration agreement with a prohibition on class adjudication" is "an even better price or wage than would have been achieved by an arbitration agreement without such a prohibition." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 278 (2006). Ware presents no evidence that any cost savings created by arbitration mandates are passed on to the consumer, however. *See generally id.*

in terms of pricing.[142] If companies with extensive rights deletion provisions in their contracts pass some of their cost savings on to consumers, then those companies with the most burdensome terms should offer their goods and services at relatively lower prices. Although no correlation between companies' pricing and the extent of their boilerplate rights deletions is apparent, perhaps a deeper look at comparative prices against an overlay showing the extent of companies' limitations on consumers' default legal rights would provide more clarity regarding whether consumers who give up those rights in the fine print enjoy a corresponding economic benefit by sharing the company's cost savings. The prevalence of boilerplate waivers, however, suggests that consumers have little choice but to relinquish their rights, whether or not they are paid to do so.[143]

Consumer market choices can only provide meaningful, substantive input to contract terms if there is an adequate variation among consumer contract terms and conditions within a particular industry to provide choice and impetus for evolution.[144] The T&C Study shows that companies' boilerplate terms in general lack significant substantive variation when it comes to destructive terms. Lack of variation is even more pronounced within each sector of the economy. In some industries, there is complete or nearly complete uniformity among companies with respect to the substance of boilerplate destructive terms. For example, every surveyed retail, streaming, and computer/browsing company limits the types of damages that can be recovered. All but one social media company caps damages. All transportation/travel companies mandate a particular forum to resolve disputes. All computer and browsing companies waive warranties. All streaming companies channel and constrain the dispute resolution process in some way. When the sneak-in waivers and mandates in every competitor's boilerplate are substantively identical, consumer market choices cannot be said to indicate any particular preference with respect to those terms. For example, a consumer preferring to find a contracting partner among the surveyed one hundred companies who does not have the express permission to unilaterally modify contract terms will look in vain for online terms that do not so provide.

The T&C Study supports the claim that consumer contracting today systematically denies consumers their legal rights. This results from the companies' drafting hegemony and industry boilerplate uniformity. The

142. In fact, one of the companies with the least extensive destructive terms, Aldi, offers discount prices rather than a premium, reflecting the consumer benefit of lighter-touch boilerplate. *See supra* note 106 and accompanying text.

143. As discussed *infra* Section III.B, some companies already offer goods at different prices to different consumers based on their estimated ability and willingness to pay. It is conceivable that the purported preference of consumers to, say, waive their Seventh Amendment right to jury trial in exchange for a discounted price could be shown through some mechanism that offered consumers a choice rather than a mechanism that simply assumed it.

144. Term variability is a prerequisite to the idea that market choice incorporates the content of boilerplate. Not only must terms vary from company to company, but it also must be true that certain consumers take the time and trouble to review the various terms and conditions and publicize their findings in order to assist people in making their market choices accordingly. There is no need to determine whether there are extraordinary consumers who are comparing terms, however, when terms are essentially identical.

content of waivers and disclaimers in online terms and conditions does not seem to reflect consumer market choices or preferences. Evidence suggests that boilerplate waivers, disclaimers, and limitations are imposed on consumers by nearly every company with whom they do business. If all transactions come bundled with virtually the same substantive terms that shift costs and risks away from companies, consumers can do nothing but acquiesce to these reallocations. Under the consumer contracting status quo, then, consumer rights are erased without their choice and, likely, without any compensation. Contract law must, therefore, evolve in order to more effectively limit the ability of companies to use the fine print in their online terms to change applicable legal rules for consumers and their transactions.

B. GRADING COMPANIES' CONSUMER CONTRACT TERMS

Boilerplate terms of consumer contracts in all sectors share some troubling features, specifically those that restrict the legal rights of consumers and insulate companies from liability. There is some utility in going beyond the calculation of what percentage of contracts contain which sorts of terms and attempting to assess and compare how extensively various individual companies' boilerplate modifies consumers' default rights. Data from the T&C Study can help with an analysis of the extent to which companies individually as well as companies within a broad economic sector erase consumer legal default rights. These more qualitative assessments create a basis for comparison and ranking among companies and industries with respect to their boilerplate waivers. Considering comparative effects of boilerplate can inform the questions of whether and to what extent consumers use their market choices to influence boilerplate evolution and can provide a tool for advocacy and positive policy and legal developments. After all, consumers cannot tailor their market choices based on the content of online terms if they cannot reasonably compare companies' boilerplate. Currently, consumers have no easy way to make that comparison other than meticulously pouring through screen after screen of legalese on the websites of multiple competing companies.[145] A grading or ranking system could, therefore, improve the transparency of rights deletion provisions in boilerplate and help consumers and their advocates determine which companies' boilerplate provisions are more and less objectionable.

What follows is a simple illustrative example of a possible grading methodology based on the data obtained for the T&C Study. This analysis scores each company based on how many destructive terms its boilerplate contains and, in some cases, how extensively those terms change legal defaults. Making a qualitative analysis allows the data to be examined more holistically and provides a more complete picture of the pervasiveness of such boilerplate waivers and mandates. More thorough future analyses could be tailored to address specific concerns in order to determine how significantly and in what

145. One nearly universally recognized deficiency of the market theory of consumer contract discussed *supra* is the reality that the market is characterized by "entrenched information failure" regarding the content of boilerplate. *See* RADIN, *supra* note 1, at 104–07; Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 9–12 (2009).

ways the terms deviate from legal defaults. A grading methodology could also be refined to include categories not assessed here, such as whether the boilerplate provides for automatic renewals of a subscription or makes a subscription difficult to terminate. Ratings and rankings of this type could become tools for consumer advocacy and responsive market behavior.

The sample rating system described here assigns each company from the T&C Study four different scores, with a maximum sum of these four scores (the "Company Score") of fourteen.[146] The four components of the Company Score are as follows:

(1) The *Dispute Score* reflects whether the consumer retains the ability to participate in a class action dispute resolution, litigate rather than arbitrate at its option, bring a lawsuit in a chosen relevant forum, have the full statutory period to bring any claim, and have findings of fact made by a jury.[147] The Dispute Resolution Score reflects a binary input for each of these five listed criteria, so a score of zero represents no deviation from the relevant legal dispute resolution defaults, and a score of five represents a mandatory arbitration clause, waiver of both class actions and jury trials, a mandatory forum for dispute resolution, and a shortened time to bring a claim.[148]

(2) The *Claims Score* is derived from whether or not provisions waive or disclaim representations, warranties, and rights to privacy. A waiver of all possible types of claims coupled with an indemnification clause would be scored at a three. The score would be lower (two or one) if one of these three sorts of

146. The rankings methodology and the assessed score for each company in the sample are shown in Appendix C.

147. Attorney fee provisions may also create an adverse consumer impact if they provide that company dispute resolution legal fees could be charged to consumers. Consumers who risk incurring large legal costs from company lawyers may be disincentivized from bringing litigation. The Supreme Court justified the default rule for most states—that each party bears their own attorney fees in a breach of contract dispute—on the basis that this approach provides better access to the court system. "[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). Such a disincentive would impact consumers far more than most company counterparts. *See also* Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 317–18 (2005) (explaining that requiring the loser to pay the other party's attorney fees discourages "frivolous litigation"). On the other hand, fee-shifting provisions for attorney fees may, in some cases, create a consumer benefit (if the consumer is successful). Although the data collection included information on whether boilerplate provisions provided for dispute resolution fee shifting, because this provision is not typically one-sided, it was not included in the qualitative assessment.

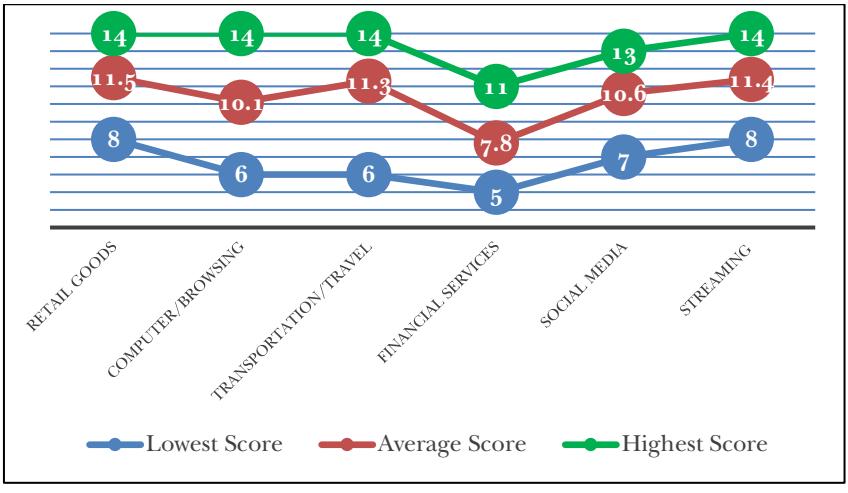
148. This simple approach to scoring fails to account for hidden impacts of certain boilerplate clauses. For example, if boilerplate includes a choice of forum clause mandating litigation in Virginia, that effectively and implicitly—by Virginia law disallowing collective proceedings—limits the consumer's ability to participate in a class action, even though the terms do not expressly waive that right. Yet the scoring methodology used here would score the choice of forum clause as a one even though its effect, in this case, is akin to including both a mandatory forum and class action waiver provision—which would be scored as a one. Similarly, boilerplate that provides for arbitration is usually read to implicitly disallow collective proceedings. Because of these overlapping effects, the Dispute Score for many companies will be under-calculated (in terms of the boilerplate's practical effects).

waivers were not included. No boilerplate changes to default legal claims would be scored as a zero.[149]

(3) The *Remedies Score* reflects how extensively legal remedies are limited by the boilerplate. Restrictions on the type of damages available would earn one point, and a cap on damages would earn another one point. A final point would be allocated if the cap on damages simply provided for a refund of monies paid by the consumer to the company. Absence of all boilerplate limitations on remedies would be scored as zero.

(4) The *Modification Score* illustrates whether a company has the right to unilaterally modify the contract, whether the company must provide the consumer with actual notice prior to any such modification, and whether the consumer can opt out of company modifications without terminating the transactional relationship. Boilerplate providing unlimited unilateral power to modify, effective immediately without actual notice and with consumer "assent" to changes derived from the consumer's failure to terminate the transactional relationship would be scored at three.[150] Terms that promise express notification of or the ability to opt out of term changes would be scored as a two or one. Because every company in the study included a unilateral modification provision in their boilerplate, none of the companies were scored zero for this category.

Figure 6: Company Scores by Sector



149. More granularities could be based on a closer examination of the particular types of warranties and default liabilities that the boilerplate waives or, perhaps, purports to but legally cannot waive, with the understanding that unenforceable, overly broad waivers can create an *in terrorem* effect. *See supra* note 73 and accompanying text.

150. Actual notice would mean some sort of direct communication, for example, by email or mail, notifying the consumer of any changes before those changes are effective. Merely instructing the consumer to periodically check the website terms to see if they have been updated was not considered actual notice to the consumer.

Grading the companies and comparing top, bottom, and average scores within each sector shows that at least one company in four of the six sectors included the most extensive waivers possible in every category scored, earning fourteen out of a possible fourteen points. No company in the study earned fewer than five points overall. Competition within a sector does not seem to have resulted in more variable boilerplate provisions. Retail goods boilerplate, perhaps the most competitive sector in the study, showed both the highest "low score" (eight points) and the least deviation among scores (a spread of just six points).[151] A comparison of company grading by sector does suggest that regulation may effectively limit company contractual overreach since the most heavily regulated sector, financial services, had both the lowest average and the lowest "high score" of all sectors (7.8 and 11, respectively).[152] Because the sample companies in each sector were so varied, however, including both very large and very small companies, more research would be required to confirm the consistency of such trends.

It is also interesting to compare the scores of companies within the same industry. Among retail companies examined, the company with the lowest score (with boilerplate least impactful on consumers' legal defaults) was a German-owned grocery store, Aldi, with a score of eight.[153] Blue Apron, a New York meal subscription company, scored the highest: fourteen out of fourteen possible points.[154] Boilerplate provisions of the largest company in retail, Amazon, does not cap damages, waive class action suits, or require arbitration, while Walmart—the largest brick-and-mortar retailer in the study—has boilerplate that does all three of those things. Amazon scored a nine, and Walmart scored a twelve. In the computer/browsing sector, Acer, a Taiwanese multinational hardware and electronics corporation, had the lowest score (six), and Microsoft, a U.S. multinational technology corporation, had the highest score. In the transportation/travel sector, cruise lines (Princess Cruises and Carnival Cruises) both had similar high scores (fourteen and twelve), ride share companies (Lyft and Uber) both had similar medium scores (ten and nine), but hotel companies' scores varied significantly (Hyatt and Marriott were scored six and thirteen respectively).

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151. For sector competitiveness, see *supra* note 90 and accompanying text.

152. Numerous statutes and agencies at both the federal and state levels have some level of oversight with respect to institutions transacting with consumers in the finance sector. For example, the Federal Trade Commission and the Consumer Financial Protection Bureau have rulemaking and oversight authority with respect to this sector, and statutes such as the Fair Credit Reporting Act, the Consumer Deposit Accounts, and the Electronic Funds Transfer Act limit the power of financial companies over their consumer counterparties.

153. Aldi is owned by a German company, ALDI SÜD; Aldi's retail presence is almost completely in the brick-and-mortar space of its stores. *Company Profile*, ALDI S. GRP., https://sustainability.aldisouthgroup.com/about-aldi/company-profile [https://perma.cc/P799-TDB5].

154. At the other end of the scoring spectrum among the retail companies, Blue Apron is an ingredient and recipe meal service that operates through subscriptions without any brick-and-mortar component to its retail operations. Blue Apron Holdings, Inc., Registration Statement Under the Securities Act of 1933, at 2 (Amendment No. 3 to Form S-1) (June 28, 2017).

The mean score of all one hundred surveyed companies was 10.4 out of 14. Only four companies scored fourteen out of fourteen: Sling TV, Princess Cruises, Microsoft, and Blue Apron. And only five companies scored lower than seven: Acer, Hyatt, Western Union, Capital One, and Meritrust Credit Union. Three of these companies provide financial services—a highly regulated sector of the economy. Two of these financial services companies enjoy a strong market position: Western Union has seventeen percent of the cash-to-cash and account-to-cash remittance flows worldwide,[155] and Capital One is the fourth largest credit card company measured by purchase volume.[156] Acer and Hyatt have modest market positions.[157] Meritrust Credit Union is a small financial services company, local to Wichita, Kansas. The scores of companies in the Social Media sector provide an interesting case study. Two of these companies, Facebook (now Meta) and Twitter (now X), have an enormous market share, but the range of Company Scores in the sector is very tight.

The Company Scores derived from the T&C Study do not provide enough detail to discern the relationship between market share and extent of boilerplate waivers. These ratings suggest, however, that competition among companies has not resulted in the popularity of more consumer-friendly boilerplate terms. The data shows no discernable correlation between market dominance and heavy or light use of boilerplate waivers. The T&C Study examined boilerplate provisions of a wide variety of companies and found that virtually all include substantively identical provisions. Huge companies and small companies, national companies and local companies, financial services providers and retail sellers, companies providing computer hardware, software, browsing services, streaming services, travel, telecommunication, and transportation companies—they all include boilerplate clauses that change dispute resolution mechanisms, limit company liability, reduce potential consumer remedies, and permit unilateral changes to contract terms. The companies in the sample set vary from one another in many different ways, but in one way, they are all alike: They all use the same sorts of destructive terms to erase the default legal rights of their consumer counterparties.

155. *Become a Western Union Agent*, W. UNION, https://www.westernunion.com/vn/en/become-agent.html [https://perma.cc/36TW-XX4A].

156. Ben Luthi, *8 Biggest US Credit Card Companies This Year*, U.S. News & World Rep. (Feb. 21, 2024, 5:42 PM), https://money.usnews.com/credit-cards/articles/biggest-us-credit-card-companies-this-year (on file with the *Iowa Law Review*) (citing the Nilson Report).

157. In 2023, Acer had a 6.4% market share. Sheila Chiang, *PC Demand Is Back, Says Acer CEO Who Sees Robust Growth in the 'Foreseeable Future'*, CNBC (Oct. 20, 2023, 12:50 AM), https://www.cnbc.com/2023/10/20/pc-demand-is-back-says-acer-ceo-who-sees-robust-growth.html [https://perma.cc/J8X8-HBCW]. In 2024, Hyatt had an 8.27% market share. *H's vs. Market Share Relative to Its Competitors, as of Q2 2024*, CSIMARKET.COM (Aug. 14, 2024, 2:36 PM), https://csimarket.com/stocks/competitionSEG2.php?code=H [https://perma.cc/X2Z9-RCNX].

C. CONSUMER PREFERENCES AND MARKET CHOICES

Some market theorists posit that competition will serve as an effective check against the creation and proliferation of abusive boilerplate content.[158] According to this theory, competition among variable terms will lead to consumer choice of better contracts over more restrictive ones, and companies that create and impose abusive terms will lose customers and eventually go out of business if they do not change their ways (or at least cut their prices).[159] The T&C Study and the grading of company boilerplate based on its findings provides no indication that competition has led or is leading to less onerous boilerplate terms.[160] Companies include the same sneak-in waivers in more and less competitive sectors and whether or not they dominate their market niche. There are a few outlier companies that have relatively fewer restrictions on consumer default rights in their boilerplate, but this difference in terms does not appear to have resulted in any corresponding market advantage.[161]

The ubiquity of boilerplate rights waivers and the lack of any correlation between market power and less onerous terms suggests that market competition may not itself lead to a positive evolution of boilerplate terms. There is an alternate market theory that explains unfriendly consumer terms among dominant companies, however. As Justice Blackman opined in *Carnival Cruise Lines*, companies' savings from risk-reducing standard terms could create at least some consumer benefit as long as there are "reduced fares reflecting the savings that the [company] enjoys."[162] According to this logic, companies with higher numerical scores should be offering discount prices or losing market share. It is at least conceivable that some consumers might want to trade their legal rights for a price reduction, but companies do not offer consumers the wherewithal to make this election.[163] If Blackman's reasoning is sound, then companies with the most consumer-unfriendly terms should be able to offer

158. *See, e.g.*, Oman, *Reconsidering*, *supra* note 7, at 217 (hypothesizing that a competitive market will weed out stupid or abusive contracts because consumers will elect other contracting parties rather than subject themselves to suboptimal terms).

159. To the extent that the market fails in this task, says Oman, legal rules have evolved to fill the gap. *See id.*

160. Where the market doesn't protect, Oman suggests that courts and legislatures will. *See id.* at 238, 248. There have been some judicial responses to theory-reality mismatch in the realm of consumer contracts, using doctrines of unconscionability and public policy. In addition, a few courts have used the doctrine of reasonable expectations—*see, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 211 (AM. L. INST. 1981)—to constrain contractual abuse, particularly in the insurance sector. Other courts have pushed back on the easy threshold of "assent," finding that browsewrap and other more passive actions by consumers do not adequately manifest an intent to be bound, particularly to terms that were at the time unknowable by the consumer. For a brief discussion of all such judicial responses, see Boyack, *supra* note 1, at 45–49.

161. Several outlier companies are either unique in their market position (small, local companies) or owned by a foreign parent entity (like Aldi).

162. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991).

163. They could. Companies already offer goods at different prices to different consumers based on their estimated ability and willingness to pay. They could also offer a menu of terms and permit consumers to indicate their preference to, say, a right to bring a class action for a lower price. *See* Boyack, *supra* note 1, at 54.

discount prices and thereby dominate their market; however, there is no apparent relationship between onerous boilerplate, pricing, and market dominance, neither positive nor negative.[164] Perhaps consumer preferences—for lighter-touch terms on the one hand and low prices on the other—simply balance each other out, leaving no discernable net impact on companies' market share. Indeed, some of the largest and most dominant companies included in the T&C Study, including Amazon and Apple, have completely average Company Scores, both within their industries and overall.

If consumers do have indirect contract input through marketplace behavior, (i) contract forms will either tend to offer consumers better legal rights, or (ii) companies will tend to lower their prices in exchange for consumers acquiescing to give up rights to seek redress, bring claims, and obtain the full measure of their actual damages in a dispute. The proliferation of onerous boilerplate terms provides no evidence for either outcome.[165] The theory that consumers shape contract terms through their market choices must scale some significant conceptual hurdles as well. First, there must be adequate variations among boilerplate terms within an industry to provide consumer choice of terms (or of terms in concert with price). Second, there must be an adequate number of market competitors who provide similar goods or services to consumers. If there are multiple equivalent substitute counterparties who have crafted more favorable contract frameworks from which to choose, a consumer's choice would reward providers of friendlier contracts with more customers, borrowers, and workers. Finally, in order to assess and implement choices of preferences, consumers must be adequately aware of their options and able to analyze the differences among them so that they can make rational choices in pursuit of their best interests.[166]

It is likely that in many market sectors today, these prerequisites are not met. Consumer contract forms are not significantly variable in terms of boilerplate waiver content. The vast majority of companies include waiver of dispute resolution defaults, claims that may otherwise accrue to the consumer, and legal damages.[167] Even if a sector is competitive in terms of price and

164. Perhaps a study of comparative prices for substitute goods and services with an overlay of the ranking of such companies' boilerplate terms might provide evidence that consumers are willingly selling their legal rights for cost savings (or not).

165. This conclusion could be put to a more stringent test by having companies publicize the scoring or rating of their boilerplate to permit a more informed consumer choice to occur.

166. Note that even if consumers are aware of options and capable to analyze and compare them, this theory also presumes a level of consumer rationality: that individuals knowing their best interests will pursue it. Although the ideal of the rational decision-maker underlies much economic theory, rational decision-making is not necessarily a constant in the real world. *See, e.g.*, RADIN, *supra* note 1, at 26–29 (explaining heuristic biases). *See generally* RODRIGO PEÑALOZA, SOME THOUGHTS ON HOMO OECONOMICUS (2018) (discussing the psychology of irrationality); THALER & SUNSTEIN, *supra* note 61 (explaining bounded rationality and giving examples of how choice architecture predetermines outcomes).

167. *See generally* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017) (asserting that when the market doesn't produce enough choices, the state must "shap[e] contract law" to "enhance people's autonomy so they can make their lives meaningfully their

multiple market substitutes, inadequate variation stymies an attentive consumer's ability to choose a transactional partner based on their boilerplate terms. Today's consumers may not be attentive to terms, but it would make little difference if they were.[168] Lack of knowledge, know-how, sophistication, and variety among terms all suggest that consumer market choices likely do not check company temptation to exploit their control of boilerplate terms to grow profits when possible.[169]

A case study illustrates the point that adopting more consumer-friendly contract terms does little to give a competitor any measurable market advantage. Facebook (now Meta) has long dominated the social media market and has periodically suffered significant bad press based on its onerous terms and policies.[170] In 2012, a would-be competitor, MeWe, attempted to compete with Facebook, specifically framing its business and marketing strategy around having explicitly pro-consumer terms in order to attract users to its social media platform.[171] Over the following decade, and even after the fallout from

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own"). Oman nakedly suggests that there is a great variety in the market but cites no evidence for this assertion. *See* Oman, *Reconsidering*, *supra* note 7, at 245–48.

168. Tim R. Samples, Katherine Ireland & Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKELEY TECH. L.J. 47, 82–107 (2024); Bakos et al., *supra* note 12, at 3–4; Sovern et al., *supra* note 12, at 4–5.

169. That is not to say that companies will engage in shockingly exploitative practices. To do so would not be in the companies' best interests. Judicial doctrines, like unconscionability, would more easily apply to cases where there is bad faith and blatant overreaching. And commercial misbehavior toward consumers is likely to spur legislative push-back and increased regulatory oversight. Commercial parties know this, however, and attempt to navigate up to the boundary where rent-seeking is recharacterized as greed and ends up being counter-productive to the bottom line. Pigs get fat; hogs get slaughtered. But just because companies endeavor to avoid being slaughtered hogs doesn't mean that they will adequately consider consumer interests in crafting contract terms. Companies are not fiduciaries and need not put consumer interest above their own. They only need to avoid deliberate harm and bad faith. That threshold is, actually, pretty low. Theoretically, contract term assent allows people to self-police against terms that would work to their disadvantage. But without consumer input into terms, there is no protection against disadvantageous contractual frameworks.

170. Facebook's terms of service limited recourse in several newsworthy cases, including *We Are the People, Inc. v. Facebook, Inc.*, No. 19-cv-8871, 2020 WL 2908260, at *2 (S.D.N.Y. June 3, 2020); and *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1062–63 (N.D. Cal. 2016). Recently, Facebook agreed to a $725 million settlement in litigation regarding use of consumers' private information. *Facebook Parent Meta Will Pay $725M to Settle User Data Case*, ASSOCIATED PRESS (Dec. 23, 2022, 5:20 PM), https://apnews.com/article/steve-bannon-technology-business-social-media-donald-trump-13d01e05b42398fb49aced1a1e8dcc23 [https://perma.cc/6ZB9-5XJF]. Back in 2013, Facebook's terms of services were deemed unfair and unenforceable under European law. Press Release, Mark Demesmaeker, Member, Eur. Parliament, Facebook Terms and Conditions Unfair and Not Valid in Europe (Apr. 18, 2013), https://www.greens-efa.eu/en/article/press/facebook-terms-and-conditions-unfair-and-not-valid-in-europe [https://perma.cc/3QV4-7PWK].

171. *Tell Us About Yourself*, MEWE, https://mewe.com [https://perma.cc/7W44-EKNP]. MeWe is a product of Sgrouples, a company created in 2012 by Mark Weinstein. Paul Sawers, *Is Building a Facebook Alternative Worth the Effort? MeWe Thinks So*, VENTUREBEAT (July 5, 2018, 9:00 AM), https://venturebeat.com/2018/07/05/is-building-a-facebook-alternative-worth-the-effort-mewe-thinks-so [https://perma.cc/RWD7-HH62]. Ever since its founding, MeWe marketed itself by highlighting its terms and conditions, specifically touting consumer-friendly terms and conditions on its "about" page. *See About MeWe*, MEWE, https://mewe.com/cms/about [https://perma.cc/QDE2-FJH6].

multiple public relations disasters, Facebook (Meta) retained and even grew its enormous market share.[172] In 2018, Facebook had over one thousand times more users than MeWe, notwithstanding the latter's marketing campaign stressing its more consumer-friendly contract terms.[173] MeWe's CEO recently admitted that the company has virtually no chance of succeeding in a market dominated by the Metaverse.[174] Although still significantly dwarfed by the size of Facebook (3.065 billion users compared to 20 million),[175] MeWe gained a slightly increased more market share after 2021 based on a growing perception that it offered users more privacy and autonomy over content than Meta.[176]

172. Note that Facebook (Meta) has recently tweaked its boilerplate terms to remove some of the dispute resolution default waivers. For example, Meta no longer mandates that its subscribers arbitrate disputes with the company. Still, Meta's Company Score (eight) remains higher than MeWe's Company Score (five)—which is one of the lowest scores in the study.

173. In 2018, Facebook claimed over 2.2 billion monthly active members. MeWe at the time had about two million (or 1/1,000 of that number), which "is a drop in the ocean compared to Facebook." Sawers, *supra* note 171. Although MeWe users more than doubled from 2018 to 2019, that represented an increase of only three million users. Steven Loeb, *MeWe CEO Mark Weinstein on How His Company Is Positioning Itself as the Anti-Facebook*, VATORNEWS (July 17, 2019), https://vator.tv/news/2019-07-17-mewe-ceo-mark-weinstein-on-how-his-company-is-positioning-itself-as-the-anti-facebook [https://perma.cc/SZ6P-K49D]. MeWe has struggled with market share, notwithstanding the company attracting investors, attracting buzz, and receiving awards or recognition for its pro-consumer contract terms. *Remarkable MeWe Closes $4.5 Million Offering, Rockets Beyond 5 Million Members*, PR NEWSWIRE (June 27, 2019, 9:00 AM), https://www.prnewswire.com/news-releases/remarkable-mewe-closes-4-5-million-offering-rockets-beyond-5-million-members-300876012.html [https://perma.cc/X3KY-A5FY]; *MeWe Is the #1 Trending Social Media Site*, MEWE, PR NEWSWIRE (Dec. 12, 2018, 4:13 PM), https://www.prnewswire.com/news-releases/mewe-is-the-1-trending-social-media-site-300764605.html [https://perma.cc/7H76-5JSQ]; *From the 2nd Annual Shorty Social Good Awards: MeWe*, SHORTY AWARDS, https://shortyawards.com/2nd-socialgood/mewe [https://perma.cc/9BMB-SL96].

174. Half of the world's population (3.14 billion people) uses Facebook or a Facebook social media product. Mark Weinstein, *I Changed My Mind—Facebook Is a Monopoly*, WALL ST. J.: OP. (Oct. 1, 2021, 2:05 PM), https://www.wsj.com/articles/facebook-is-monopoly-metaverse-users-advertising-platforms-competition-mewe-big-tech-11633104247 (on file with the *Iowa Law Review*).

175. As of 2023 Q4, Facebook had 3.065 billion users. *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2023*, STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide [https://perma.cc/YJ4K-HJPT]. As a comparison, at the end of 2023, MeWe had approximately twenty million users. *Amplica Labs and MeWe Celebrate Migration of 500K Users from Web 2.0 to Web3, Enabled by Frequency Blockchain*, MCCOURT GLOB. (Jan. 16, 2024), https://www.mccourt.com/amplica-labs-and-mewe-celebrate-migration-of-500k-users-from-web-2-0-to-web3-enabled-by-frequency-blockchain [https://perma.cc/PFC7-CZ5Y]. Although MeWe had increased the number of its users by six hundred percent over the five years previous, it seems unlikely it could ever become a real competitor with Facebook, which continues to dominate the social media sector. In 2024, NapoleonCat calculated the number of Facebook users in the United States as 279,206,100, which is 81.5% of the country's entire population. *Facebook Users in United States of America*, NAPOLEONCAT (Feb. 2024), https://napoleoncat.com/stats/facebook-users-in-united_states_of_america/2024/02 [https://perma.cc/697W-84ZJ].

176. MeWe and other social media alternatives saw an uptick of users in the aftermath of riots at the Capitol on January 6, 2021, a market shift thought to reflect Trump supporters' objections to greater content oversight on Facebook. Sara Fischer, *MeWe to Join Project Liberty's Internet Protocol*, AXIOS (Sept. 20, 2022), https://www.axios.com/2022/09/20/me-we-project-liberty-frank-mccourt [https://perma.cc/CHV7-BLNE]. In 2022, MeWe began migrating its platform to a blockchain-based system, the Decentralized Social Networking Protocol. *Id.*

Other examples also indicate that the theory of market-based consumer contractual input and protection does not translate to the real world. A study of several public "scandals" involving company contractual abuse found that companies' market position was often not adversely affected—and in some cases actually improved—after public shaming from poor customer service and contractual abuse.[177] Jeff Sovern posits that the tragedy of the commons and incentive to free-ride may help explain why consumers do not make market choices to punish companies for bad behavior.[178] Whatever the reason, such case studies and anecdotal evidence align with the results of the T&C Study. Companies enjoy no significant competitive advantage from having consumer-friendly boilerplate terms. Nor does the market punish companies for using boilerplate to extensively modify consumer rights.

CONCLUSION

An examination of the content of company terms and conditions and the strikingly similar way that the vast majority of companies craft boilerplate to reduce or eliminate consumer default rights suggests that current laws and markets provide inadequate constraints on abuse of contract. Because existing market checks and affirmative contract defenses are ineffective in directing the evolution of consumer contract terms in a positive direction, changes to our legal system and improvements in market transparency are justified.

There are multiple methods of managing companies' power to force feed waivers to their customers. If markets provided choices—in terms of true substitutes of goods and services as well as substantive variation among boilerplate terms—then perhaps consumers who become aware of their boilerplate options could choose to avoid companies using objectionable terms. But there is limited variation with respect to destructive terms, and without such variation, consumers have no real choice. Data from the T&C Study show that sneak-in waivers and mandates are pervasive. Existing systemic constraints—reputation and market choice, judicial policing, and regulation—must therefore be ineffective. It seems more likely, in fact, that the ubiquity of destructive terms in online boilerplate reflects a race to the bottom rather than a positive evolution.[179] Rather than attempting to attract customers by offering increasingly friendly terms, companies engage in competitive rent-seeking tweaks to their standard forms, enjoying relative benefits based on how extensively their boilerplate limits consumer counterparty default rights.[180] Not only does competition fail to curb abusive boilerplate, it actually seems to reward it.

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177. *See generally* Jeff Sovern, *Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 1 (2021) (discussing scandals involving United Airlines, Wells Fargo Bank, Target, JP Morgan/Chase, General Motors, and Volkswagen).

178. *Id.* at 18–19.

179. *See* Wickelgren, *supra* note 8, at 31 ("[S]ome scholars and courts acknowledge that very few consumers actually do read these contracts, thus there is little likelihood that including inefficient or unfair terms in the fine print will significantly reduce demand.").

180. *Id.* As long as companies retain the ability to set their contract terms, companies with the "worst" terms will enjoy a competitive advantage—meaning that market forces, ironically, force companies "to offer progressively worse and more onerous terms." RADIN, *supra* note 1, at 108.

Transparency and variability of terms might, to some extent, enhance positive impacts of market choice and competition. Data regarding the content of online terms could inform a system of company ratings to communicate to consumers the extent to which a particular company's boilerplate impacts consumers' legal rights. If ratings are easily understood and adequately publicized, boilerplate content could conceivably become a factor in consumer market choice (along with price, shipping costs, return policy, etc.). It would be challenging, however, to ensure that consumers—bombarded with information and misinformation in today's market—pay adequate heed to ratings and reports regarding the standard terms of companies they transact with. Even if consumers themselves do not consider such ratings, consumer protection groups and advocates could use data tracking destructive boilerplate terms to publicize and lobby for responses to company, industry, and overall patterns of contractual abuse. Even if well-designed ratings and publicity mechanisms were created, however, it would require great effort to review the extensive and continuously changing set of online terms for each company. As long as companies retain the power to make unilateral changes to terms from time to time, their ratings and information regarding boilerplate content might quickly become stale.

In addition to public opinion and market choices, tracking the individual company, economic sector, and patterns of online term content generally can also inform impactful legal developments. Judicial and legislative policing of contractual abuse requires information regarding the extent and pervasiveness of particular non-negotiable terms. For example, courts determine substantive unconscionability based on whether a particular term shocks the judicial conscience. Data regarding boilerplate content would give judges a basis beyond their own intuition to make such determinations. Furthermore, procedural unfairness resulting from monopoly market position can be supplemented by evidence showing industry term consistency and associated absence of consumers' meaningful choice to waive their rights. A given term can be analyzed for its unfairness, deceptiveness, and abusiveness in the abstract, but industry pervasiveness of particular destructive terms provides an additional layer of unfairness. Agencies and regulators can use such data to direct attention and responses based on the content of boilerplate terms and can use scoring of companies and sectors generally to discover where additional oversight is most necessary and would be most impactful.

The T&C Study, limited competition, and rational (and irrational) ignorance regarding the content of boilerplate suggest that the status quo disempowers consumers. Standard terms frequently inhibit consumer avenues of redress and limit both the basis for and measure of and remedies for company breaches. Even if consumers would prefer to relinquish their legal rights in exchange for lower prices, there is no evidence that prices reflect such an exchange.[181] Without knowledge and choices, boilerplate waivers, disclaimers,

181. This theory is oft asserted but has not been proven. *See, e.g.*, Ben-Shahar, *supra* note 3, at 897 ("Even when they pay top price for premium products, few consumers would regard the

and limitations are imposed on consumers who have no option but to acquiesce to whatever terms the company supplies. Our systemic elevation of unilaterally drafted boilerplate, mischaracterizing all non-negotiable terms and conditions as the "parties' contract," strips consumers of their contractual freedom, leaving them in the untenable situation of going through the click-through motions of assent because there is no other way that they can engage in needed and desired market transactions. The T&C Study supports the claim that consumers are being systemically denied legal rights due to a misapplication of freedom of contract principles to the context of commercial drafting hegemony. Nothing shows that consumer preferences adequately impact boilerplate content. Because data disproves a satisfactory consumer contract law status quo, legal and policy decision-makers can turn their focus away from debating whether the problem of contractual abuse exists and toward crafting more effective limits on the power of companies to erase consumer rights.

overall value of the deal as based on anything that boilerplate regulates . . . ."). Furthermore, even if prices were discounted to allow consumers to share in company cost-savings, this exchange would be a coerced, not voluntary sale. *See* RADIN, *supra* note 1, at 19–32; Radin, *supra* note 3, at 10; discussion *supra* notes 125–27.

APPENDIX A: DATA FROM T&C STUDY

Companies & Industries (& size)	
Retail (17)	
Walmart (mega)	The Home Depot (mega)
Academy Sports (small)	Ross Dress for Less (large)
Amazon (mega)	Aldi (private)
Target (large)	Walgreens (large)
Dick's Sporting Goods (large)	HelloFresh (large)
Abercrombie & Fitch (mid)	Blue Apron (large)
Glossier (private)	Overstock.com (mid)
CVS Health (large)	Best Buy (large)
Kroger (large)	
Computer & Browsing (16)	
Apple (mega)	Yahoo (large)
HP (large)	Microsoft (mega)
LG (mega)	Examsoft (private)
Intel America (mega)	T-Mobile (large)
Dell (large)	AT&T (large)
Lenovo (large)	Verizon (mega)
Toshiba (large)	Boost Mobile (large)
Google (mega)	Acer (mid)
Transportation & Tourism (16)	
Uber (large)	Kayak (large)
Lyft (large)	Booking.com (large)
Bird (recent IPO)	Hyatt (large)
Airbnb (large)	Marriott (large)
Hotels.com (large)	Turo (private)
Southwest (large)	DoorDash (large)
Princess Cruises (large)	Carnival Cruise (large)
Expedia (large)	United (large)
Streaming/Entertainment (16)	
Pandora (large)	Sling (large)
Netflix (mega)	crunchyroll (large)
Hulu (private)	funimation (large)
Disney+ (mega)	FuboTV (mid)
Amazon Prime (mega)	Paramount+ (mid)
Max (large)	Vudu (nano)
Peacock/nbc (mega)	Crackle (micro)
Apple TV (mega)	Showtime (large)

Financial Services (19)	
Meritrust Credit Union (small)	E-Trade (large)
Bank of America (mega)	Western Union (mid)
Capital One (mega)	Venmo (mega)
Citigroup (large)	PayPal (mega)
Wells Fargo (mega)	Zelle (private)
Farmers Insurance (large)	Cash App (large)
State Farm (private)	Payoneer (mid)
JP Morgan Chase (mega)	Payment Spring (private)
Ally Bank (large)	SuperPay (private)
Discover (large)	
Social Media (16)	
Facebook (mega)	Clubhouse
Facebook commercial/marketplace (mega)	Reddit (private)
Instagram (mega)	TikTok (private)
WhatsApp (mega)	VSCO (private)
Twitter (large)	Discord (private)
Snapchat (large)	MeWe (private)
Pinterest (large)	Twitch (private)
LinkedIn (large)	

Table 1

Boilerplate Terms re: Dispute Resolution						
Business Category	Arbitration	Jury Waiver	Class Action Waiver	Statute of Limitation	Forum Requirement	**Contains at Least One**
Retail (17)	Y- 82% N- 18%	Y- 94% N- 6%	Y- 88% N- 12%	Y- 47% N- 53%	Y- 94% N- 6%	**100%**
Computer/ Browsing (16)	Y- 50% N- 50%	Y- 44% N- 56%	Y- 44% N- 56%	Y- 25% N- 75%	Y- 81% N- 19%	**81%**
Entertainment/ Streaming (16)	Y- 81% N- 19%	Y- 88% N- 13%	Y- 81% N- 19%	Y- 56% N- 44%	Y- 94% N- 6%	**100%**
Financial Services (19)	Y- 42% N- 58%	Y- 42% N- 58%	Y- 37% N- 63%	Y- 16% N- 84%	Y- 32% N- 68%	**58%**
Social Media (16)	Y- 69% N- 31%	Y- 69% N- 31%	Y- 63% N- 38%	Y- 19% N- 81%	Y- 87.5% N- 12.5%	**87.5%**
Travel/ Transportation (16)	Y- 75% N- 25%	Y- 75% N- 25%	Y- 81% N- 19%	Y- 25% N- 75%	Y- 88% N- 13%	**88%**
TOTAL (100)	**Y- 66%** N- 34%	**Y- 68%** N- 32%	**Y- 65%** N- 35%	**Y- 31%** N- 69%	**Y- 79%** N- 21%	**85%**

Table 2

Boilerplate Terms re: Bases of Liability				
Business Category	Integration Clause	Warranties	Waiver of Privacy	**Contains at Least One**
Retail (17)	Y- 71% N- 29%	Y- 94% N- 6%	Y- 94% N- 6%	**100%**
Computer/ Browsing (16)	Y- 69% N- 31%	Y- 100% N- 0%	Y- 100% N- 0%	**100%**
Entertainment/ Streaming (16)	Y- 63% N- 38%	Y- 100% N- 0%	Y- 94% N- 6%	**100%**
Financial Services (19)	Y- 47% N- 53%	Y- 84% N- 16%	Y- 89% N- 11%	**89%**
Social Media (16)	Y- 75% N- 25%	Y- 100% N- 0%	Y- 94% N- 6%	**100%**
Travel/ Transportation (16)	Y- 63% N- 38%	Y- 100% N- 0%	Y- 94% N- 6%	**100%**
TOTAL (100)	**Y- 64%** N- 36%	**Y- 96%** N- 4%	**Y- 94%** N- 6%	**98%**

Table 3

Boilerplate Terms re: Remedies			
Business Category	Limit on Type of Damages	Cap on the Amount of Damages	**Contains at Least One**
Retail (17)	Y- 100% N- 0%	Y- 47% N- 53%	**100%**
Computer/ Browsing (16)	Y- 100% N- 0%	Y- 69% N- 31%	**100%**
Entertainment/ Streaming (16)	Y- 100% N- 0%	Y- 56% N- 44%	**100%**
Financial Services (19)	Y- 89% N- 11%	Y- 32% N- 68%	**89%**
Social Media (16)	Y- 100% N- 0%	Y- 94% N- 6%	**100%**
Travel/ Transportation (16)	Y- 100% N- 0%	Y- 50% N- 50%	**100%**
TOTAL (100)	**Y- 98%** N- 2%	**Y- 57%** N- 43%	**98%**

Table 4

Boilerplate Terms re: Contract Modifications			
Business Category	Unilateral Changes Allowed	No Right to Affirmative Notice	No Right to Object
Retail (17)	Y- 100% N- 0%	Y- 88% N- 12%	Y- 100% N- 0%
Computer/ Browsing (16)	Y- 100% N- 0%	Y- 87.5% N- 12.5%	Y- 100% N- 0%
Entertainment/ Streaming (16)	Y- 100% N- 0%	Y- 87.5% N- 12.5%	Y- 87.5% N- 12.5%
Financial Services (19)	Y- 100% N- 0%	Y- 68% N- 32.5%	Y- 100% N- 0%
Social Media (16)	Y- 100% N- 0%	Y- 75% N- 25%	Y- 100% N- 0%
Travel/ Transportation (16)	Y- 100% N- 0%	Y- 93% N- 7%	Y- 100% N- 0%
TOTAL (100)	**Y- 100%** N- 0%	**Y- 85%** N- 15%	**Y- 98%** N- 2%

Table 5: Data Table – RETAIL

Company name	Review / effective date	Arbitration	No jury trial	No class action	Designated forum	Time limited claims	Integration clause	No Warranties	No Privacy	Limited type of damages	Cap on damages	Unilateral Changes
Walmart	5/28/21	yes	yes	yes	ADR (JAMS)	no	no	yes	yes	yes	Refund only	yes (w/o notice)
Academy Sports & Outdoors	4/8/20	no	yes	yes	Harris Co, TX	1 year	yes	yes	yes	yes	< of $100 or 6mo refund	yes (w/o notice)
Amazon Web Svcs	5/3/21	no	yes	no	Hennepin Co,MN	no	yes	yes	yes	yes	no	yes (w/o notice)
Target	4/14/20	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	no	yes (w/o notice)
Dick's Sporting Goods	6/6/21	yes	yes	yes	NY state	1 year	yes	yes	yes	yes	no	yes (w/ posted notice)
Abercrombie & Fitch	6/1/21	yes	yes	yes	ADR (AAA)	1 year	no	no	yes	yes	no	yes (w/o notice)
Glossier	(3/4/18)	yes	yes	yes	ADR (JAMS)	1 year	yes	yes	yes	yes	$500	yes (w/ reason. notice)
CVS Health	(8/9/16)	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	< of $25 or refund	yes (w/o notice)
Kroger	(1/1/20)	yes	yes	yes	ADR (AAA)	1 year	yes	yes	yes	yes	no	yes (w/o notice)
The Home Depot	(1/1/16)	yes	yes	yes	ADR Atlanta	no	yes	yes	yes	yes	no	yes (w/o notice)
Ross Dress for Less	7/7/21	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	< of $100 or refund	yes (w/o notice)
Aldi	7/7/21	no	no	no	IL state	1 year	yes	yes	no	yes	no	yes (w/o notice)
Walgreens	2/18/21	yes	yes	yes	ADR (AAA)	1 year	yes	yes	yes	yes	refund only	yes (w/o notice)
Hello Fresh	10/8/20	yes	yes	yes	ADR (JAMS)	no	no	yes	yes	yes	30day refund	yes (w/o notice)
Blue Apron	10/30/19	yes	yes	yes	ADR (JAMS)	1 year	yes	yes	yes	yes	> of $250 or 1mo refund	yes (w/o notice)
Overstock	5/19/21	yes	yes	yes	ADR Salt Lake City	no	no	yes	yes	yes	no	yes (w/o notice)

Table 6: Data Table - COMPUTER/BROWSING

Company name	Review / effective date	Arbitration	No jury trial	No class action	Designated forum	Time limited claims	Integration clause	No Warranties	No Privacy	Limited type of damages	Cap on damages	Unilateral Changes
Apple Inc.	9/16/20	no	no	no	Santa Clara, CA	no	yes	yes	yes	yes	$250	yes (w/o notice)
HP	7/13/21	no	no	no	CA	no	yes	yes	yes	yes	refund only	yes (w/o notice)
LG	7/13/21	no	no	no	no	no	yes	yes	yes	yes	no	yes (w/o notice)
Intel Americas	7/13/21	no	no	no	ADR/ state	1 year	yes	yes	yes	yes	refund only	yes (w/o notice)
Dell	8/16/19	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	refund only	yes (w/o notice)
Lenovo	10/20/20	no	no	no	no	no	yes	yes	yes	yes	refund only	yes (w/o notice)
Toshiba	5/11/05	yes	no	no	ADR/ state	no	no	yes	yes	yes	no	yes (w/o notice)
Google	3/31/20	no	no	no	Santa Clara, CA	no	no	yes	yes	yes	< of 12mo refund or $200	yes (w/ reason. notice)
Yahoo	1/2/18	no	no	no	Santa Clara, CA	no	yes	yes	yes	yes	6mo refund	yes (w/o notice)
Microsoft	1/1/21	yes	yes	yes	ADR (AAA)	1 year	yes	yes	yes	yes	< or 1mo refund or $10	yes (w/o notice)
ExamSoft	7/13/21	yes	yes	yes	Dallas, TX	no	no	yes	yes	yes	pro rata refund less admin fee	yes (w/o notice)
T Mobile	3/1/21	yes	yes	yes	ADR (AAA)	2 years	yes	yes	yes	yes	No	yes (w/ reason. notice)
AT&T	7/13/21	yes	yes	yes	ADR (AAA)	2 years	yes	yes	yes	yes	24mo refund	yes; can REJECT w/30days notice
Verizon	7/13/21	yes	yes	yes	ADR (AAA)	no	no	yes	yes	yes	No	yes; can REJECT w/30days notice
Boost Mobile	9/8/17	yes	yes	yes	ADR (JAMS)	no	yes	yes	yes	yes	pro rata refund	yes (w/o notice)
Acer	7/20/21	no	no	no	no	no	no	yes	yes	yes	no	yes (w/o notice)

Table 7: Data Table – ENTERTAINMENT/STREAMING

Company name	Review / effective date	Arbitr-ation	No jury trial	No class action	Designated forum	Time limited claims	Integra-tion clause	No Warranties	No Privacy	Limited type of damages	Cap on damages	Unilateral Changes
Pandora	2/1/19	yes	yes	yes	ADR (AAA)	1 year	yes	yes	yes	yes	12mo refund	yes (w/o notice)
Netflix	1/1/21	yes	yes	yes	ADR (AAA)	no	no	yes	no	yes	no	yes (w/o notice)
Hulu	9/27/19	yes	yes	yes	ADR (JAMS)	1 year	yes	yes	yes	yes	6mo refund	yes (w/posted notice)
Disney+	3/4/21	yes	yes	yes	ADR (JAMS)	no	yes	yes	yes	yes	$1000	yes (w/o notice)
Amazon Prime Vid.	5/4/21	no	yes	no	WA state	no	no	yes	yes	yes	$50	yes (w/o notice)
HBO Max	6/22/21	yes	yes	yes	ADR (JAMS)	1 year	yes	yes	yes	yes	no	yes (w/posted notice)
Peacock	3/18/21	yes	yes	yes	ADR (JAMS)	1 year	yes	yes	yes	yes	no	yes (w/o notice)
Apple TV	1/1/19	no	no	no	LA, CA	no	yes	yes	yes	yes	no	yes (w/o notice)
Slingm	2/3/21	yes	yes	yes	ADR (AAA)	1 year	yes	yes	yes	yes	6mo refund	yes (w/o notice)
crunchyroll	3/14/19	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	$50	yes (w/o notice)
funimation	4/17/20	yes	yes	yes	ADR (JAMS)	2 years	no	yes	yes	yes	refund only	yes (w/o notice)
Fubotv	6/2/21	yes	no	yes	ADR (JAMS)	no	no	yes	yes	yes	12mo refund	yes (w/posted notice)
Paramount+	2/18/21	yes	yes	yes	ADR (JAMS)	1 year	yes	yes	yes	yes	no	yes (w/o notice)
Vudu	11/13/17	no	yes	no	no	no	no	yes	yes	yes	6mo refund	yes (w/o notice)
Crackle	6/11/20	yes	yes	yes	ADR (JAMS)	1 year	no	yes	yes	yes	no	yes (w/o notice)
Showtime	11/16/20	yes	yes	yes	ADR (AAA)	1 year	yes	yes	yes	yes	no	yes (w/o notice)

Table 8: Data Table – FINANCIAL SERVICES

Company name	Review / effective date	Arbitration	No jury trial	No class action	Designa-ted forum	Time limited claims	Integration clause	No Warranties	No Privacy	Limited type of damages	Cap on damages	Unilateral Changes
Meritrust Credit Union	7/16/21	no	no	no	KS state	1 year	no	no	no	yes	no	yes (w/reason. notice)
Bank of America	5/21/21	no	no	no	no	no	no	yes	yes	yes	$100	yes (will try to give reas. notice)
Capital One	11/2/20	no	no	no	no	no	no	yes	yes	yes	no	yes (w/o notice)
Citigroup	7/16/21	yes	yes	yes	no	no	no	yes	yes	no	no	yes (w/reason. notice)
Wells Fargo	9/30/20	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	no	yes (w/reason. notice)
Farmers Ins.	6/16/19	no	no	no	no	no	yes	yes	yes	yes	no	yes (w/o notice)
State Farm	3/14/21	yes	no	no	no	no	yes	yes	yes	yes	$1,000,000	yes (w/reason. notice)
JPMorgan Chase	8/14/21	no	no	no	NY state	no	no	yes	yes	yes	no	yes (w/o notice)
Ally Bank	7/29/21	no	no	no	no	no	yes	yes	yes	yes	$100	yes (w/reason. notice)
Discover	10/20/20	no	yes	no	no	1 year	yes	yes	yes	yes	no	yes (w/o notice)
E trade	3/31/21	yes	yes	yes	no	no	yes	yes	yes	yes	no	yes (w/o notice)
Western Union	8/14/21	no	no	no	no	no	no	no	no	yes	$500	yes (w/o notice)
Venmo	7/20/21	yes	yes	yes	ADR (AAA)	1 year	no	yes	yes	yes	no	yes (w/o notice)
Paypal	8/2/21	yes	yes	yes	ADR (AAA)	no	no	yes	yes	yes	no	yes (w/o notice)
Zelle	7/16/21	no	no	no	no	no	yes	yes	yes	yes	$100	yes (w/o notice)
Cashapp	6/24/21	yes	yes	yes	ADR (AAA)	no	no	yes	yes	yes	< of $100 refund or $500	yes (w/o notice)

Table 9: Data Table – SOCIAL MEDIA

Company name	Review / effective date	Arbitration	No jury trial	No class action	Designated forum	Time limited claims	Integration clause	No Warranties	No Privacy	Limited type of damages	Cap on damages	Unilateral Changes
Facebook	10/22/20	no	no	no	N. Dist. of CA	no	yes	yes	yes	yes	< of 12mo refund or $100	Yes (app/website notice)
Facebook commerce	8/31/20	yes	yes	yes	ADR (AAA)	no	no	yes	yes	yes	< of 12mo refund or $100	yes (w/o notice)
Instagram	12/20/20	yes	yes	yes	N. Dist. of CA	no	no	yes	yes	yes	< of 12mo refund or $100	yes (w/o notice)
Reddit	10/15/20	no	no	no	N. Dist. of CA	no	yes	yes	yes	yes	< of 6mo refund or $100	yes (w/o notice)
TikTok	2/1/19	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	< of 12mo refund or 6100	yes (w/o notice)
VSCO	3/12/20	yes	yes	yes	Almeda Co, CA	no	yes	yes	yes	yes	< of 12mo refund or $100	yes (w/o notice)
Twitter	6/18/20	no	no	no	no	no	no	yes	yes	yes	< of 6mo refund or $100	yes (w/o notice)
Parler	11/27/20	yes	yes	no	state court (DC)	no	yes	yes	yes	yes	< of 6mo refund or $200	yes (w/o notice)
Snapchat	10/30/19	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	< of 12mo refund or $100	yes (w/o notice)
Twitch	1/1/21	yes	yes	yes	CA / ADR (JAMS)	1 year	yes	yes	yes	yes	< of 12mo refund or $100	yes (w/o notice)
Pinterest	5/1/18	yes	yes	yes	ADR (AAA)	no	yes	yes	no	yes	$100	yes; will notify if material
LinkedIn	8/11/20	no	no	no	state court (CA)	no	yes	yes	yes	yes	< of refund or $1,000	yes; will notify if material; changes not retro-active.
Discord	5/7/20	yes	yes	yes	ADR (JAMS)	no	yes	yes	yes	yes	< of 3mo refund or $100	yes; will notify at least 7 days before effective
MeWe	10/10/19	no	no	no	no	no	no	yes	yes	yes	$10	yes (w/o notice)
Whatsapp	1/4/21	yes	yes	yes	ADR/ state court	1 year	yes	yes	yes	yes	< of 12mo refund or $100	yes (w/o notice)
Clubhouse	9/1/21	yes	yes	yes	ADR/ state court	1 year	yes	yes	yes	yes	No	yes (w/o notice)

Table 10: Data Table – TRAVEL/TRANSPORTATION

Company name	Review / effective date	Arbitration	No jury trial	No class action	Designated forum	Time limited claims	Integration clause	No Warranties	No Privacy	Limited type of damages	Cap on damages	Unilateral Changes
Uber	7/12/21	yes	yes	yes	ADR (AAA)	no	no	yes	yes	yes	No	yes (w/o notice)
Lyft	4/21/21	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	no	yes (w/o notice)
Bird	3/13/19	yes	yes	no	ADR / state court	no	yes	yes	yes	Yes	< of 6mo refund or $25	yes (w/o notice)
AirBnB	10/30/20	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	Yes	< of 12mo refund or $100	yes (w/o notice)
Hotels.com	9/10/20	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	< of refund or $10	yes (w/o notice)
Southwest	4/4/17	no	no	yes	Dallas, TX	1 year	no	yes	yes	Yes	< of 12mo refund or $50	yes (w/o notice)
Princess Cruises	4/1/21	yes	yes	yes	ADR / state court	1 year	yes	yes	yes	Yes	refund only	yes (w/o notice)
Expedia	6/16/20	yes	yes	yes	ADR / state court	no	yes	yes	yes	yes	no	yes (w/o notice)
Kayak	9/17/19	yes	yes	yes	ADR / state court	no	yes	yes	yes	yes	no	yes (w/o notice)
Booking.com	8/13/21	yes	yes	yes	ADR (AAA)	1 year	no	yes	yes	Yes	reservation cost refund	yes (w/o notice)
Hyatt	8/13/21	no	no	no	no	no	no	yes	no	yes	No	yes (w/o notice)
Marriott	12/5/19	yes	yes	yes	ADR (AAA)	1 year	no	yes	yes	yes	reservation cost refund	yes (w/o notice)
Turo	8/13/21	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	Yes	< of 12mo refund or $10	yes (w/o notice)
Door Dash Driver/ Contractor	10/7/21	yes	yes	yes	ADR (AAA)	no	yes	yes	yes	yes	no	yes (w/o notice)
Carnival Cruise line	12/16/20	yes	Yes	Yes	S.D. Fla./ Admiralty	yes	yes	yes	yes	yes	no	yes (w/o notice)
United airlines	12/2/2021	no	no	yes	ADR/ state court	no	no	yes	yes	yes	no	yes (w/o notice)

APPENDIX B: SAMPLE DESTRUCTIVE TERMS

Arbitration Clause

Instagram at https://www.facebook.com/help/instagram/termsofuse [https://perma.cc/Y7XA-BV6Z].

> ARBITRATION NOTICE: YOU AGREE THAT DISPUTES BETWEEN YOU AND US WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.
> . . . .
> You can opt out of this provision within 30 days of the date that you agreed to these Terms. To opt out, you must send your name, residence address, username, email address or phone number you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement, and you must send them here: [address]

Netflix at https://help.netflix.com/legal/termsofuse [https://perma.cc/GF6G-N6T8].

> You and Netflix agree that any dispute, claim or controversy arising out of or relating in any way to the Netflix service, these Terms of Use and this Arbitration Agreement, shall be determined by binding arbitration or in small claims court. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award and nothing in this Arbitration Agreement shall be interpreted as limiting any non-waivable statutory rights. You agree that, by agreeing to these Terms of Use, the U.S. Federal Arbitration Act governs the interpretation and enforcement of this provision, and that you and Netflix are each waiving the right to a trial by jury or to participate in a class action. This arbitration provision shall survive termination of this Agreement and the termination of your Netflix membership.

Walmart at https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af4034od6bbd596f116fae5ao [https://perma.cc/6YBX-C5J7].

> EXCEPT FOR DISPUTES THAT QUALIFY FOR SMALL CLAIMS COURT, YOU AGREE THAT ALL DISPUTES ARISING OUT OF OR RELATED TO THESE TERMS OF USE OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND WALMART, INCLUDING ANY PRODUCTS OR SERVICES OFFERED OR SOLD BY WALMART OR THE WALMART ENTITIES, WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL THEORY, WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION BEFORE A SINGLE NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY. EXCEPT AS OTHERWISE PROVIDED IN THESE TERMS OF USE,

> YOU AND WALMART AGREE THAT EACH IS WAIVING THE RIGHT TO SUE IN COURT AND TO HAVE A TRIAL BY A JURY.

Waiver of Jury Trial & Waiver of Class Action

Max at https://www.max.com/terms-of-use/en-us [https://perma.cc/XT42-JEDE].

> **Requirement of Individualized Relief**: The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, YOU AND WE AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR OUR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL PROCEEDING.** Further, unless both you and we agree otherwise, the arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative, class or private attorney general proceeding. If, after exhaustion of all appeals, any of these prohibitions on non-individualized declaratory or injunctive relief; class, representative and private attorney general claims; and consolidation are found to be unenforceable with respect to a particular claim or with respect to a particular request for relief (such as a request for injunctive relief sought with respect to a particular claim), then the parties agree such a claim or request for relief shall be decided by a court of competent jurisdiction, after all other arbitrable claims and requests for relief are arbitrated. You agree that any arbitrations between you and Max will be subject to this Section 5.4 and not to any prior arbitration agreement you had with Max, and, notwithstanding any provision in this Agreement to the contrary, you agree that this Section 5.4 amends any prior arbitration agreement you had with Max, including with respect to claims that arose before this or any prior arbitration agreement.

TikTok at https://www.tiktok.com/legal/terms-of-service?lang=en [https://web.archive.org/web/20230223053502/https://www.tiktok.com/legal/page/us/terms-of-service/en].

> **Class Action Waiver.** Any Claim must be brought in the respective party's individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar proceeding ("Class Action"). The parties expressly waive any ability to maintain any Class Action in any forum. If the Claim is subject to arbitration, the arbitrator will not have authority to combine or aggregate similar claims or conduct any Class Action nor make an award to any person or entity not a party to the arbitration. Any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void, or voidable may be determined only by a court

> of competent jurisdiction and not by an arbitrator. The parties understand that any right to litigate in court, to have a judge or jury decide their case, or to be a party to a class or representative action, is waived, and that any claims must be decided individually, through arbitration.
>
> If this class action waiver is found to be unenforceable, then the entirety of the Arbitration Agreement, if otherwise effective, will be null and void. The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. If for any reason a claim proceeds in court rather than in arbitration, you and TikTok each waive any right to a jury trial.

Dick's Sporting Goods at https://www.dickssportinggoods.com/s/terms-of-use [https://perma.cc/29PT-YG34].

> Class Action Waiver. THE PARTIES FURTHER AGREE THAT ANY ARBITRATION SHALL BE CONDUCTED IN THEIR INDIVIDUAL CAPACITIES ONLY AND NOT AS A CLASS ACTION OR OTHER REPRESENTATIVE ACTION, AND THE PARTIES EXPRESSLY WAIVE THEIR RIGHT TO FILE A CLASS ACTION OR SEEK RELIEF ON A CLASS BASIS . . . .

Limitation of Statute of Limitations

Glossier at https://www.glossier.com/policies/terms-of-service [https://web archive.org/web/20240223190148/https://www.glossier.com/policies/terms-of-service].

> Any claim arising out of or related to this Agreement or our Services must be filed within one year after such claim arose; otherwise, the claim is permanently barred, which means that you and Glossier will not have the right to assert the claim.

Academy at https://help.academy.com/app/answers/detail/a_id/206/~/terms-and-conditions-of-website-use#ClaimResolution [https://perma.cc/LK2S-U4YG].

> Any Claim you may have must be made to Academy within one (1) year after the event giving rise to the Claim. If a Claim is not made to Academy within one (1) year, then you agree that you are not permitted to bring that Claim.

Aldi at https://www.aldi.us/en/terms-of-use [https://perma.cc/DN8L-UC3A].

> YOU AND ALDI AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO THE SITES MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES OR THE CAUSE OF ACTION IS PERMANENTLY BARRED.

Pandora at https://www.pandora.com/legal [https://web.archive.org/web/20240116215811/https://www.pandora.com/legal].

> Limitation of Actions. Regardless of any statute or law to the contrary, any claim or cause of action you may have arising out of, relating to, or connected with your use of the Services, must be filed within twelve (12) months of the date the facts giving rise to the suit were known or should have been known by you, or forever be barred.

Max at https://www.max.com/terms-of-use/en-us [https://perma.cc/XT42-JEDE].

> TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY CLAIM RELATING IN ANY WAY TO THE PLATFORM OR THIS AGREEMENT MUST BE COMMENCED WITHIN ONE (1) YEAR OF THE EVENTS FIRST GIVING RISE TO THE CLAIM. IF NOT COMMENCED WITHIN THIS ONE (1) YEAR PERIOD, YOU AND WE ARE EACH PERMANENTLY BARRED FROM PURSUING THAT CLAIM.

Forum Selection Clause

Reddit at https://www.redditinc.com/policies/user-agreement-october-15-2020 [https://perma.cc/93SW-EEWV].

> All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco, California, and you consent to personal jurisdiction in these courts.

Marriott at https://www.marriott.com/about/terms-of-use.mi [https://perma.cc/SX4L-C7AS].

> The exclusive jurisdiction for any dispute not covered by the terms of the Arbitration provision set forth in these Terms and Conditions may be filed only in the state or federal courts located in the State of Maryland, United States.

Amazon at https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000&pop-up=1 [https://perma.cc/C2QD-9MQM].

> Any dispute or claim relating in any way to your use of any Amazon Service will be adjudicated in the state or Federal courts in King County, Washington, and you consent to exclusive jurisdiction and venue in these courts. We each waive any right to a jury trial.

Hulu at https://www.hulu.com/subscriber_agreement [https://perma.cc/A4ZA-RUSM].

> Choice of Forum. You agree that any action at law or in equity arising out of or relating to this Agreement that is not subject to arbitration shall be filed, and that venue properly lies, only in the state or federal courts located in the borough of Manhattan, New York, New York, United States of America and you consent and submit to the personal jurisdiction of such courts for the purposes of litigating such action.

Integration Clause/Disclaimer of Prior Representations

crunchyroll at https://www.crunchyroll.com/tos [https://perma.cc/YLX3-HJAZ].

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Waiver of Warranties:

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Limitation on Type of Damages

Uber at https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en [https://perma.cc/W3YT-NFRH].

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Marriott at https://www.marriott.com/about/terms-of-use.mi [https://perma.cc/SX4L-C7AS].

> To the maximum extent permitted by law, we, other members of our group of and affiliated companies and third parties connected to us hereby expressly exclude any liability for any direct, indirect or consequential loss or damage incurred by any user in connection with our Sites or in connection with the use, inability to use, or results of the use of our Sites, any websites linked to them and any materials posted on them, including, without limitation any liability for loss of income or revenue; loss of business; loss of profits or contracts; loss of anticipated savings; loss of data; loss of goodwill; wasted management or office time; and for any other loss or damage of any kind, however arising and whether caused by tort (including negligence), breach of contract or otherwise, even if foreseeable, provided that this condition shall not prevent claims for loss of or damage to your tangible property or any other claims for direct financial loss that are not excluded by any of the categories set out above.

HelloFresh at https://www.hellofresh.com/about/termsandconditions [https://perma.cc/8Z84-FXC3].

> TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HELLOFRESH, ITS AFFILIATES (INCLUDING, BUT NOT LIMITED TO, THEIR LICENSORS, SERVICE PROVIDERS, DIRECTORS, OFFICERS, AGENTS, PARTNERS, REPRESENTATIVES AND EMPLOYEES) SHALL NOT BE LIABLE TO YOU OR ANY THIRD PARTY FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR EXEMPLARY/PUNITIVE DAMAGES. THIS LIMITATION SHALL INCLUDE, BUT IS NOT LIMITED TO, DAMAGES RELATED TO PERSONAL INJURY; PAIN AND SUFFERING; EMOTIONAL DISTRESS; BUSINESS INTERRUPTION; LOSS OF PROFITS, REVENUE, BUSINESS OR ANTICIPATED SAVINGS, USE, GOODWILL, DATA; AND WHETHER CAUSED BY TORT (INCLUDING NEGLIGENCE) BREACH OF CONTRACT, OR OTHERWISE, EVEN IF FORESEEABLE. ADDITIONALLY, IN NO EVENT SHALL HELLOFRESH BE LIABLE FOR DISPUTES ARISING OUT OF OR IN ANY WAY RELATED TO THE ACCESS TO OR USE OF, OR INABILITY TO ACCESS OR USE, THE SITE, APP OR CONTENT (INCLUDING, BUT NOT LIMITED TO, USER CONTENT, THIRD PARTY CONTENT, CONTENT OF LINKED THIRD PARTY SITES), OR THE ORDERING, RECEIPT, OR USE OF ANY PRODUCT, OR OTHERWISE RELATED TO THIS AGREEMENT (INCLUDING, BUT NOT LIMITED TO, ANY DAMAGES CAUSED BY OR RESULTING FROM RELIANCE ON ANY INFORMATION OBTAINED FROM HELLOFRESH, OR FROM EVENTS BEYOND HELLOFRESH'S REASONABLE CONTROL, SUCH AS SITE INTERRUPTIONS, DELETIONS OF FILES OR EMAILS, ERRORS OR OMISSIONS, DEFECTS, BUGS, VIRUSES,

> TROJAN HORSES, DELAYS IN OPERATION OR TRANSMISSION OR ANY FAILURE OF PERFORMANCE).

Walmart at https://www.walmart.com/help/article/walmart-com-terms-of-use/3b7508oaf4034od6bbd596f116fae5ao [https://perma.cc/6YBX-C5J7].

> YOU ACKNOWLEDGE AND AGREE THAT, TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, WALMART ENTITIES WILL NOT BE LIABLE TO YOU OR TO ANY OTHER PERSON UNDER ANY CIRCUMSTANCES OR UNDER ANY LEGAL OR EQUITABLE THEORY, WHETHER IN TORT, CONTRACT, STRICT LIABILITY, OR OTHERWISE, FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL LOSSES OR DAMAGES OF ANY NATURE EVEN IF AN AUTHORIZED REPRESENTATIVE OF A WALMART ENTITY HAS BEEN ADVISED OF OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES. TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, THIS DISCLAIMER APPLIES TO, BUT IS NOT LIMITED TO, ANY DAMAGES OR INJURY ARISING FROM ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECTS, DELAY IN OPERATION OR TRANSMISSION, LOST PROFITS, LOSS OF GOODWILL, LOSS OF DATA, WORK STOPPAGE, ACCURACY OF RESULTS, COMPUTER FAILURE OR MALFUNCTION, COMPUTER VIRUSES, FILE CORRUPTION, COMMUNICATION FAILURE, NETWORK OR SYSTEM OUTAGE, THEFT, DESTRUCTION, UNAUTHORIZED ACCESS TO, ALTERATION OF, LOSS OF USE OF ANY RECORD OR DATA, AND ANY OTHER TANGIBLE OR INTANGIBLE LOSS.

Limitation on Amount of Damages

Marriott at https://www.marriott.com/about/terms-of-use.mi [https://perma.cc/SX4L-C7AS].

> IN THE EVENT MARRIOTT IS HELD LIABLE FOR ANY DAMAGES RELATED TO THE SITE, TO THE FULLEST EXTENT PERMITTED BY LAW, YOUR SOLE AND EXCLUSIVE REMEDY WILL BE LIMITED TO REIMBURSEMENT OF THE CHARGES FOR SERVICES OR PRODUCTS PAID BY YOU.

HelloFresh at https://www.hellofresh.com/about/termsandconditions [https://perma.cc/8Z84-FXC3].

> UNDER NO CIRCUMSTANCES WILL HELLOFRESH BE LIABLE TO YOU FOR MORE THAN THE TOTAL AMOUNT PAID TO HELLOFRESH BY YOU DURING THE THIRTY (30) DAY PERIOD PRIOR TO THE ACT, OMISSION OR OCCURRENCE GIVING RISE TO SUCH LIABILITY. THE LIMITATIONS SET FORTH IN THIS SECTION 22 SHALL NOT AFFECT LIABILITY THAT CANNOT BE EXCLUDED OR LIMITED UNDER THE APPLICABLE LAW/JURISDICTION, SUCH AS LIABILITY FOR PERSONAL INJURY OR PROPERTY DAMAGE DIRECTLY AND PROXIMATELY

> CAUSED BY OUR ACTS OR OMISSIONS, OR FOR OUR GROSS NEGLIGENCE, OR WILLFUL MISCONDUCT.

Walmart at https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0 [https://perma.cc/6YBX-C5J7].

> SUBJECT TO THE FOREGOING, TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, NO WALMART ENTITY WILL BE LIABLE FOR ANY DAMAGES IN EXCESS OF THE FEES PAID BY YOU IN CONNECTION WITH YOUR USE OF THE WALMART SITES DURING THE SIX (6) MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM AROSE.

Reddit at https://www.redditinc.com/policies/user-agreement-october-15-2020 [https://perma.cc/93SW-EEWV].

> IN NO EVENT WILL THE AGGREGATE LIABILITY OF THE REDDIT ENTITIES EXCEED THE GREATER OF ONE HUNDRED U.S. DOLLARS ($100) OR ANY AMOUNT YOU PAID REDDIT IN THE PREVIOUS SIX MONTHS FOR THE SERVICES GIVING RISE TO THE CLAIM. THE LIMITATIONS OF THIS SECTION WILL APPLY TO ANY THEORY OF LIABILITY, INCLUDING THOSE BASED ON WARRANTY, CONTRACT, STATUTE, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, AND EVEN IF THE REDDIT ENTITIES HAVE BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH DAMAGE, AND EVEN IF ANY REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED ITS ESSENTIAL PURPOSE. THE FOREGOING LIMITATION OF LIABILITY WILL APPLY TO THE FULLEST EXTENT PERMITTED BY LAW IN THE APPLICABLE JURISDICTION.

Twitter [now, X] at https://twitter.com/en/tos [https://web.archive.org/web/20230203191048/https://twitter.com/en/tos].

> IN NO EVENT SHALL THE AGGREGATE LIABILITY OF THE TWITTER ENTITIES EXCEED THE GREATER OF ONE HUNDRED U.S. DOLLARS (U.S. $100.00) OR THE AMOUNT YOU PAID TWITTER, IF ANY, IN THE PAST SIX MONTHS FOR THE SERVICES GIVING RISE TO THE CLAIM. THE LIMITATIONS OF THIS SUBSECTION SHALL APPLY TO ANY THEORY OF LIABILITY, WHETHER BASED ON WARRANTY, CONTRACT, STATUTE, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, AND WHETHER OR NOT THE TWITTER ENTITIES HAVE BEEN INFORMED OF THE POSSIBILITY OF ANY SUCH DAMAGE, AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

Pandora at https://www.pandora.com/legal [https://web.archive.org/web/20240116215811/https://www.pandora.com/legal].

> PANDORA'S CUMULATIVE LIABILITY TO YOU OR ANY PARTY RELATED TO YOU FOR ANY LOSSES OR DAMAGES ARISING

> OUT OF OR RELATING TO THIS AGREEMENT OR USE OF THE SERVICES WILL NOT EXCEED THE AMOUNT YOU ACTUALLY PAID FOR THE APPLICABLE PORTION OF THE SERVICES AT ISSUE WITHIN THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF YOUR CLAIM.

Booking.com at https://www.booking.com/content/terms.html [https://perma.cc/Y7HV-6NFZ].

> The cost of your Booking, shown in your confirmation email, is the most we, or any Service Provider, will be liable for, whether for one event or a series of events. These liability limitations shall apply to all forms of legal action, whether related to contract, tort, negligence, strict liability, or any other legal action.

Indemnification Provision

Lyft at https://www.lyft.com/terms [https://perma.cc/HVL7-JH72].

> You will indemnify and hold harmless and, at Lyft's election, defend Lyft including our affiliates, subsidiaries, parents, successors and assigns, and each of our respective officers, directors, employees, agents, or shareholders (collectively, the "Indemnified Parties") from and against any claims, actions, suits, losses, costs, liabilities and expenses (including reasonable attorneys' fees) relating to or arising out of your use of the Lyft Platform, Lyft Services, Third-Party Services, and participation in the Rideshare Services, including: (1) your breach of this Agreement or the documents it incorporates by reference; (2) your violation of any law or the rights of a third party, including, Drivers, Riders, other motorists, and pedestrians, as a result of your own interaction with such third party; (3) any allegation that any materials or Information that you submit to us or transmit through the Lyft Platform or to us infringes, misappropriates, or otherwise violates the copyright, trademark, trade secret or other intellectual property or other rights of any third party; (4) your ownership, use or operation of a motor vehicle or passenger vehicle, including your provision of Rideshare Services as a Driver; and/or (5) any other activities in connection with the Lyft Platform, Lyft Services, Third-Party Services, or Rideshare Services. This indemnity shall be applicable without regard to the negligence of any party, including any indemnified person. You will not, without Lyft's prior written consent, agree to any settlement on behalf of any Indemnified Party which includes either the obligation to pay any monetary amounts, or any admissions of liability, whether civil or criminal, on the part of any Indemnified Party.

crunchyroll at https://www.crunchyroll.com/tos [https://perma.cc/YLX3-HJAZ].

> You agree to defend, indemnify and hold Crunchyroll and its affiliates, subsidiaries and distribution partners and their respective officers, directors, employees and/or agents harmless from and against any

> claims, liabilities, damages, losses and expenses, including, without limitation, reasonable attorneys' fees and costs, arising out of or in any way connected with: (i) your access to or use of the Site, Services, Crunchyroll Content or User Submissions; (ii) your violation of these Terms of Use; (iii) your violation of any third party right, including without limitation any intellectual property right, publicity, confidentiality, property or privacy right; or (iv) any claim that any content you posted to the Site or via the Services (including without limitation your User Submissions) caused damage to a third party, including without limitation claims that your User Submissions are infringing. As to (i), (iii) and (iv) in this Section 10, your obligation to indemnify Crunchyroll applies to your activities on the Site at any time.

Walmart at https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af4034od6bbd596f116fae5ao [https://perma.cc/6YBX-C5J7].

> You agree to defend (at Walmart's option), indemnify, and hold the Walmart Entities harmless from and against any and all liabilities, claims, damages, costs, and expenses, including attorneys' fees and costs, arising from or related to your misuse of the Walmart Sites or any breach by you of these Terms of Use. Walmart reserves the right, at our expense, to assume exclusive defense and control of any matter otherwise subject to indemnification by you and, in any case, you agree to cooperate with Walmart if and as requested by Walmart in the defense and settlement of such matter.

Glossier at https://www.glossier.com/policies/terms-of-service [https://web.archive.org/web/20240223190148/https://www.glossier.com/policies/terms-of-service].

> To the fullest extent permitted by applicable law, you agree to defend, indemnify, and hold harmless the Glossier Parties from and against any claims, actions or demands, including, without limitation, reasonable legal and accounting fees, arising or resulting from your breach of this Agreement, any User Content or Feedback you provide, or your access to, use or misuse of the Content or the Services. We shall provide notice to you of any such claim, suit, or proceeding that triggers this indemnification obligation, and you agree to do the same by writing to the Glossier Legal Department at legal@glossier.com. We reserve the right to assume the exclusive defense and control of any matter which is subject to indemnification under this section. In such case, you agree to cooperate with any reasonable requests assisting our defense of such matter.

Unilateral Changes

Apple Media Services at https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/2FYK-6PUU].

> Apple reserves the right at any time to modify this Agreement and to add new or additional terms or conditions on your use of the Services.

> Such modifications and additional terms and conditions will be effective immediately and incorporated into this Agreement. Your continued use of the Services will be deemed acceptance thereof.

Hyatt at https://help.hyatt.com/en/hyatt-terms.html [https://perma.cc/CKG8-JNQ3].

> We reserve the right to change, update, or correct any of the Terms & Conditions or any information contained in the Site at any time without notice other than by posting amended terms to the Site. Your continued use of the Site means that you accept and agree to the revised Terms & Conditions.

Aldi at https://www.aldi.us/en/terms-of-use/#c863076 [https://perma.cc/PL45-J3BB].

> ALDI reserves the right to change, modify, add or remove any portion of these Terms of Use, in whole or in part, at any time, by updating this posting. We may also provide notice to you in other ways, such as through contact information you have provided. Any changes will be effective immediately upon the posting of the revised Terms unless otherwise specified. Please check back periodically for changes. Your continued use of the Services after the effective date of the revised Terms (or taking such other act as specified by ALDI) will constitute your consent to those changes to the fullest extent allowed by applicable law.

Pandora at https://www.pandora.com/legal [https://web.archive.org/web/20240116215811/https://www.pandora.com/legal].

> We may modify this Agreement from time to time. If we make material changes to the Agreement, we will notify you by email or through a message posted on the Services. You agree that such modified Agreement will be effective thirty (30) days after our notice to you, except for changes that relate to new features or for legal reasons, which will become effective immediately. Your continued use of the Services after our provision of notice to you will constitute your affirmative acceptance to the modified Agreement. If you do not agree to, or cannot comply with, the Agreement as amended, you must stop using the Services.

Hulu at https://www.hulu.com/subscriber_agreement [https://perma.cc/A4ZA-RUSM].

> We may amend this Agreement. Any such amendment will be effective thirty (30) days following either our dispatch of a notice to you or our posting of the amendment on the Services. If you do not agree to any change to this Agreement, you must discontinue using the Services. Our customer service representatives are not authorized to modify any provision of this Agreement, either verbally or in writing.

Lyft at https://www.lyft.com/terms [https://perma.cc/HVL7-JH72].

> Lyft reserves the right to modify the terms and conditions of this Agreement, and such modifications shall be binding on you only upon your acceptance of the modified Agreement. Lyft reserves the right to modify any information on pages referenced in the hyperlinks from this Agreement from time to time, and such modifications shall become effective upon posting. Continued use of the Lyft Platform after any such changes shall constitute your acceptance of such changes. Unless material changes are made to the arbitration provisions herein, you agree that modification of this Agreement does not create a renewed opportunity to opt out of arbitration (if applicable).

APPENDIX C: GRADING COMPANIES' TERMS AND CONDITIONS

Name of Company	Dispute Score	Claims Score	Remedies Score	Modification Score	COMPANY SCORE
RETAIL					
Walmart	4	2	3	3	12
Academy Sports & Outdoors	4	3	3	3	13
Amazon	2	3	1	3	9
Target	4	3	1	3	11
Dick's Sporting Goods	5	3	1	3	11
Abercrombie & Fitch – US	5	2	1	3	10
Glossier	5	3	2	3	13
CVS Health	4	3	3	3	13
Kroger	5	3	1	3	12
The Home Depot	4	3	1	3	11
Ross Dress for Less	4	3	3	3	13
Aldi	2	2	1	3	8
Walgreens	5	3	3	2	13
HelloFresh	4	2	3	3	12
Blue Apron	5	3	3	3	14
Overstock	4	2	1	3	10
Best Buy	4	2	1	3	10
COMPUTER/BROWSING					
Apple, Inc.	1	3	3	3	10
HP	1	3	3	3	10
LG	0	3	1	3	7
Intel Americas, Inc.	2	3	3	3	11

Dell	4	3	3	3	13
Lenovo	0	3	3	3	9
Toshiba	2	3	1	3	8
Google	1	2	3	2	8
Yahoo	1	3	3	3	10
Microsoft	5	3	3	3	14
ExamSoft	4	2	3	3	12
T-Mobile	5	3	1	2	11
AT&T	5	3	2	1	11
Verizon	4	2	1	1	8
Boost Mobile	4	3	3	3	13
Acer	0	2	1	3	6
TRAVEL/TRANSPORTATION					
Uber	4	2	1	3	9
Lyft	4	3	1	2	10
Bird	3	3	3	3	12
Airbnb	4	3	3	3	13
Hotels.com	4	3	3	3	13
Southwest	3	2	3	3	11
Princess Cruises	5	3	3	3	14
Expedia	4	3	1	3	11
Kayak	4	3	1	3	11
Booking.com	5	2	3	3	13
Hyatt	0	2	1	3	6
Marriott	0	2	3	3	13
Turo	4	3	3	3	13
DoorDash	4	3	1	3	11
Carnival Cruise Line	5	3	1	3	12
United Airlines	2	2	1	3	8
FINANCIAL SERVICES					
Meritrust Credit Union	2	0	1	2	5
Bank of America	0	2	3	2	7
Capital One	0	2	1	3	6
Citigroup	3	2	0	2	7
Wells Fargo	4	3	1	2	10
Farmers Insurance	0	3	1	3	7

State Farm	1	3	2	2	8
JP Morgan Chase	1	2	1	3	7
Ally Bank	0	3	2	2	7
Discover	2	3	1	3	9
E-Trade	3	3	1	3	10
Western Union	0	0	2	3	5
Venmo	5	2	1	3	11
PayPal	4	2	1	3	10
Zelle	0	3	2	3	8
Cash App	4	2	2	3	11
Payoneer	3	1	0	3	7
Payment Spring	0	3	1	3	7
SuperPay	0	3	1	3	7
SOCIAL MEDIA					
Facebook (now Meta)	1	3	2	2	8
Facebook – commerce	4	2	2	3	11
Instagram	4	2	2	3	11
Reddit	1	3	2	3	9
TikTok	4	3	2	3	12
VSCO	4	3	2	3	12
Twitter (now X)	0	2	2	3	7
Parler	3	3	2	3	11
Snapchat	4	3	2	3	12
Twitch	5	3	2	3	13
Pinterest	4	2	2	2	10
LinkedIn	1	3	2	2	8
Discord	4	3	2	2	11
MeWe	0	2	3	3	8
WhatsApp	5	3	2	3	13
Clubhouse	5	3	2	3	13
ENTERTAINMENT/STREAMING					
Pandora	5	3	3	2	13
Netflix	4	1	1	3	9
Hulu	5	3	2	1	11
Disney+	4	3	2	3	12
Amazon Prime Video	2	2	3	3	10

HBO Max (now Max)	5	3	1	3	12
Peacock	5	3	1	3	12
Apple TV	1	3	1	3	8
Sling TV	5	3	3	3	14
crunchyroll	4	3	3	3	13
funimation	5	2	3	3	13
FuboTV	3	2	3	3	11
Paramount+	5	3	1	3	12
Vudu	1	2	3	3	9
Crackle	5	2	1	3	11
Showtime	5	3	1	3	12