Behavioral Instruments in Consumer Contract Law (A Lecture)

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I would like to begin by thanking Professors Brigitta Lurger and Karl Stoeger for inviting me to give a lecture at the conference on Nudging and Information at the University of Graz. The topic of this talk is: “behavioral instruments in consumer contract law,” and I was specifically asked to focus on the U.S. approach.

But first, let me give you a little background.

1. *Behavioral Market Failures in Consumer Markets*

By now, it is an undisputable and universally acknowledged truth that consumers almost never read the fine print before signing or clicking “I agree.”[[2]](#footnote-2) In fact, researchers have already found that non-reading consumers may even agree to sell their first-born child in order to obtain Wi-Fi access, or to give their soul to the devil for a videogame.[[3]](#footnote-3) Consumers face an incredible amount of fine print in their daily lives, and it’s practically impossible for them to read every contract they sign or click through.[[4]](#footnote-4)

If this is not problematic enough, sellers often make it even harder for consumers to read and understand these standardized agreements by using long forms, small fonts, and complex legal jargon.[[5]](#footnote-5) It is not surprising that no one reads these egregiously lengthy and often unintelligible agreements. In fact, it is probably even rational not to read them.[[6]](#footnote-6) But overall, these agreements are legally binding.

Sellers gain from consumers’ non-readership because they can insert unfair and one-sided terms into their boilerplates without worrying that some consumers will be discouraged from entering the transaction because of these terms.[[7]](#footnote-7) Such terms may include, for example waivers of the consumer’s right to a jury trial, arbitration clauses, class action waivers, and choice-of-law clauses.[[8]](#footnote-8)

But even if certain terms are clearly disclosed so that consumers are made aware of them, sellers often design contracts in ways that take advantage of consumers’ cognitive biases and systematic misperceptions.[[9]](#footnote-9) For example, consumers may underestimate the probability that a product will fail to work or cause damage. As a result, sellers might be incentivized not to provide a warranty, because consumers will not be willing to pay the full costs of the warranty.[[10]](#footnote-10) Or take another example*—*credit card late payment fees. Consumers, being overly optimistic, might underestimate the probability they will not pay their credit card bills on time.[[11]](#footnote-11) In these cases, credit card issuers can increase the late payment fees, while seducing consumers to enter the agreement by lowering the more salient, annual fees.[[12]](#footnote-12) Consequently, consumers might enter into inefficient transactions.

1. *Regulatory Solutions*

In light of the recognition that sellers often insert one-sided or exploitative terms into their boilerplates, scholars have consistently called for stronger, broader regulation of consumer contracts, and regulators have followed suit.[[13]](#footnote-13) I will now address the various regulatory instruments governing U.S. consumer contract law.

One principal instrument is disclosure. Indeed, disclosure is probably the most commonly used tool in American consumer protection law today.[[14]](#footnote-14) Disclosure mandates are attractive because disclosure provides information to consumers without intervening too strongly in the market.The only problem is that they usually do not work.[[15]](#footnote-15) And they do not work mainly because, just like the rest of the fine print, disclosures largely remain unread. Furthermore, even if consumers try to read the disclosed information, they often do not understand it, let alone succeed in incorporating this information into their decision-making processes. Sellers are not incentivized to convey the disclosed information in an effective manner. In fact, they have the opposite incentives. Take the following anecdote. When I visited Bank of America a few days ago, the bank officer persuaded me to enroll in another credit card program, and he made me extremely uncomfortable when I tried to actually read before clicking through. He said: “trust me, that just says what I told you a few minutes ago, you can sign here” and made it very clear that I am expected not to read, and to just trust him. The bottom line is that disclosure has generally failed to adequately protect consumers from exploitative practices and contract terms.[[16]](#footnote-16)

In light of the recognition that disclosure alone cannot provide a solution, there is an ongoing trend towards increasing consumer protection by adopting stronger and more coercive regulatory tools. We can divide these tools roughly into two main types. The first one consists of judicial intervention *ex post*: Courts can police contract terms by using common-law doctrines such as unconscionability or fraud to strike out clauses that are considered exploitative or extremely unfair. The second one consists of mandatory restrictions on permissible contracting *ex ante*. These restrictions either prohibit the inclusion of certain contract terms, or force sellers to include certain terms in their contracts.[[17]](#footnote-17) For example, the U.S. residential rental market is characterized by comprehensive *ex ante* regulation. Landlords are prohibited, among other things, from disclaiming the warranty of habitability, or from disclaiming their liability for loss or damage caused to the tenant or to third parties on the leased premises as a result of the landlord’s negligence.[[18]](#footnote-18) There are many other markets in which mandatory regulation has been adopted, including the credit card and insurance markets.[[19]](#footnote-19)

1. *Does Substantive Regulation Adequately Protect Consumers?*

In the time I have left, I will focus on these more substantive measures, and I will try to convince you that we should at least be worried that even these stronger techniques might not adequately protect consumers. This is because all of these regulatory measures heavily rely on consumers to take action against a non-compliant seller. Yet, in many cases, consumers might perceive the contract as enforceable and binding, even when it is voidable or already is void under the law.[[20]](#footnote-20)

Now, I will quickly point out that, like in Europe, the U.S. has public enforcement mechanisms and consumer advocacy groups that may help to protect consumers; but these, too, often rely on consumers’ complaints.[[21]](#footnote-21)

I will now present two studies casting doubt on the possibility that consumers will complain when they face a contractual arrangement that is simply unenforceable or deceptive.

* 1. *Unenforceable Terms in the Residential Rental Market*

Let us take the residential rental market as a first example. As I mentioned, landlords are not allowed to include clauses disclaiming their negligence liability in their residential lease agreements.[[22]](#footnote-22) But what happens if they *do* include such terms? One possibility is that nothing will happen because the terms are unenforceable and therefore legally meaningless and because residential leases, like other types of standard form contracts, typically remain unread and are therefore harmless. And indeed, this is the conventional wisdom in consumer contracts scholarship today.

But here, it is important to make two important distinctions. First, there are different types of consumer contracts, and it is possible that even if certain types—mostly involving low-stake transactions, like the purchase of online software—largely remain unread, substantial proportions of consumers *will* read contracts in the context of high-stake transactions, like renting or buying a house.[[23]](#footnote-23)

Second, and perhaps more importantly, it is essential to draw a distinction between readership (or non-readership) *ex ante* and readership *ex post*.[[24]](#footnote-24) Namely, as I found in my work, even if consumers do not always read their contracts *ex ante*, before entering the agreement, they might look at their contracts when a problem or a dispute with the seller arises. And, at this point in time, they are likely to rely on their contracts as their main, or even only source of information about their rights; in doing so, they might misperceive unenforceable terms as enforceable and binding, thereby restricting or disclaiming their rights and remedies. Consequently, they might forego valid legal rights and claims, and end up bearing costs that the law deliberately and explicitly imposes on the seller or landlord.[[25]](#footnote-25)

To test this intuition, I surveyed a random sample of 279 tenants from Massachusetts about their rental experiences.[[26]](#footnote-26) And among other things, I asked them to describe what they did when they encountered a rental problem. My survey results revealed, remarkably, that 51% of the tenants reportedly read the relevant parts of their leases when something went wrong.[[27]](#footnote-27) Building on these findings, I conducted a series of experiments in which tenants read scenarios about rental problems and reported how they would behave.[[28]](#footnote-28)

Participants were asked to assume that after moving into a rented apartment, they noticed that the roof in their apartment is leaking. They subsequently read that their landlord failed to fix the leaking roof, even after they had sent him a letter of complaint. Finally, they read that two months later, rain water fell from a leak in the roof and damaged their television set.

Participants were randomly assigned to one of three contract-term conditions: enforceable, unenforceable, or no term. The conditions were designed to be as similar as possible in all dimensions except the content (and respective legal status) of the contract term. Participants assigned to the “enforceable term” condition read a clause holding the landlord liable in negligence for damage caused to the tenant or third parties in the leased premises, while participants assigned to the “unenforceable term” condition read a clause disclaiming the landlord’s liability for damages to the premises; and those assigned to the “no term” condition read a contract that said nothing about the landlord’s liability for loss or damage to the tenant. Participants were then asked to report, in an open-ended question, how they would behave, and three independent research assistants coded their responses. The experimental findings revealed that tenants who read an unenforceable liability disclaimer were almost three times more likely to bear the TV’s repair costs than were tenants who read an enforceable liability provision or a silent lease.[[29]](#footnote-29)

These results illustrate that sellers and landlords have a strong financial incentive to misinform non-drafting parties about their legal rights through their contracts. And indeed, in one of my previous studies, I found that unenforceable terms are regularly included in residential lease agreements in Massachusetts.[[30]](#footnote-30) Unenforceable liability disclaimers, for example, were present in twenty-three percent of the sampled contracts.[[31]](#footnote-31)

Now you may think that this is a U.S. problem, so let me give you a European example. It revolves around a company you may have heard about: Apple. In 2009, Apple was fined €900,000 for misleading consumers about their warranty rights.[[32]](#footnote-32) All Apple did was to inform its customers that they were entitled for a one-year warranty free of charge, while offering them to extend their warranty to two or even three years by purchasing the “Apple Care Protection Plan.” What Apple did not tell its customers was that they were automatically entitled for a two years’ warranty free of charge. Remarkably, two years after Apple had been fined, the European Union Justice Commissioner, Ms. Vivian Reding, reported that Apple continues to misinform consumers about their warranty rights in at least 21 EU member states.[[33]](#footnote-33)

* 1. *Fraud and Fine Print Cases*

Sellers are able to misinform consumers about the law because of the interaction between consumers’ ignorance of the law and their common-sense assumption that whatever the contract says is the final word. In fact, in a study conducted in collaboration with Roseanna Sommers, we found that consumers feel so committed to the fine print that they fail to realize that their contracts may be voidable even when they were signed as a result of clear and material fraud.[[34]](#footnote-34)

Notably, consumer fraud is one of the main concerns permeating consumer contract law today. In fact, according to a report by the Federal Trade Commission, as many as 25 million Americans fall prey to consumer fraud every year.[[35]](#footnote-35) In many of these cases, the fine print that the defrauded consumer signs—typically without reading—contains a statement that contradicts, qualifies, or disclaims the seller’s prior representations. For example, in the context of mortgage loan agreements, loan officers often lure consumers into signing floating rate loan agreements after promising them that the interest on their loan is fixed. In the insurance context, too, homeowners are often promised that they will receive full coverage; only when something bad happens do they find out that their policies only cover certain types of damages, like damage due to fire or wind.[[36]](#footnote-36) I am guessing that many of you have, at a certain point in time, made a purchase while relying upon a written advertisement or on the salesperson’s statements, only to end up with a product materially different from what you were promised and had in mind.

By now I hopefully do not need to convince you that fraud and fine print practices are bad. In fact, they are not only harmful to consumers, but might also harm the aggregate welfare. From an economic perspective, efficient markets require that consumers only enter those transactions that make them better off, and for that to happen, consumers need accurate information.[[37]](#footnote-37)

 Because of the social costs associated with these practices, it is not surprising that all jurisdictions in the U.S. have adopted a firm anti-deception approach. The common-law doctrine of fraudallows consumers to void a contract or term that conflicts with a seller’s fraudulent representation.[[38]](#footnote-38) But also beyond contract law, all fifty states have adopted consumer protection statutes (or UDAPS) that have even looser requirements for proving fraud.[[39]](#footnote-39) Finally, the Draft Restatement of Consumer Contracts calls to deem any standard contract term inconsistent with a company’s prior representation as presumptively deceptive, and to render it voidable without having to prove reliance*.*[[40]](#footnote-40) Thus, consumers are not barred from bringing a fraud claim on the basis that their contract conflicts with the seller’s prior statement, because if we barred consumer claims in fraud and fine print cases, we would effectively be granting sellers a license to deceive consumers.[[41]](#footnote-41) Or, as the Supreme Court of Wyoming noted in *Snyder v. Lovercheck*, “[a] perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it.”[[42]](#footnote-42)

This hostile approach towards fraud and fine print cases is supposed to protect consumers, but Sommers and I feared that these regulatory measures might fail to achieve their intended effect, because all of these measures rely on consumers to take action against the deceptive company; and we hypothesized that consumer psychology will discourage consumers from complaining or from taking sellers to court in fraud and fine print situations, because consumers might blame themselves for failing to read the fine print, and might believe that courts do the same.[[43]](#footnote-43) To explore this intuition, we conducted a series of experiments.

In one of our experiments, participants read three scenarios based on real cases spanning three different types of consumer sectors in which “fraud and fine print” cases are relatively prevalent: the auto loan, telecommunications, and mortgage industries. For example, in the auto loan scenario, participants read about a consumer named William who decides to buy a new car. On the day of his purchase, a salesperson from the auto company offers him to enroll in a payment program that is supposed to help William finance his car. After enrolling, William begins to notice that the auto company charges fees every time it debits his account. He quickly does the math and realizes that the plan ends up losing him money. Importantly, we highlighted to participants that the fee is a material fact: William would not have enrolled in the program if he had known about the fee. When poor William complains, the company’s representative refers him to the “terms and conditions” in the paperwork that he signed, *without reading*, when he enrolled in the program.

In terms of the experimental manipulation, participants were randomly assigned to one of three experimental conditions. In the “fraud only”condition, the seller promises William that the company will *not* charge any fees, but the company charges the fees anyway. Now, importantly, in this condition, there is no conflicting fine print. In other words, the contract is silent about the fees. In contrast, in the “fine print only”condition, the seller does not mention any fees. Yet, here, the contract *allows* the company to charge them, and the consumer is surprised to learn about these fees simply because he failed to read the fine print. Finally, in the “fraud and fine print” condition, the seller promises William that the company will not charge any fees, but the contract contains a conflicting term, allowing the company to charge these fees. These are the typical fraud and fine print situations we discussed before.

Participants were then asked to indicate on a seven-item scale whether they agree with the following, randomly presented, statements:

1. A court would probably rule that William is legally required to pay the fee [if William seeks to void the transaction].
2. It is fair to require William to pay the fee.
3. William consented to pay the fee.
4. William had fair notice about the fee.

Now let us have a look at the results.

The results revealed that, as we expected, participants in the “fraud only”condition largely believed that William would not be legally required to pay the fee, that it is unfair to require him to pay, and accordingly – that he did not consent or receive fair notice about the fee.

Now let’s look at participants’ judgments under the “fraud and fine print”condition. I remind you that this condition is identical to the “fraud only” condition, with one important difference: this time after the seller tells William there will be no fees, he signs a contract disclosing the fee. And here, we were surprised by these findings, as there were no significant differences between the
“fraud and fineprint” and “fine print only” only conditions across all dependent measures. Participants felt that the consumer is bound to pay the fee in the presence of the fine print disclosure, regardless of whether there was a prior misrepresentation. These findings suggest that consumers put excessive weight on the fine print, and that they believe they are bound by whatever the contract says, notwithstanding any prior misrepresentations.

Importantly, as the following figure illustrates, we also observed a mismatch between consumers’ legal judgments and their moral intuitions.

Lay perceptions of Fraud & Fine Print Cases

Even though consumers generally thought it was unfair to impose the fees on the non-reading and defrauded consumers, they generally thought that this was the current state of the law.[[44]](#footnote-44)

We also asked participants what they would do if they were in the consumer’s shoes. Three independent research assistants coded the participants’ qualitative responses. Remarkably, most participants (85%) in the “fraud only” condition expressed interest in taking some kind of action, including legal action, against the company.[[45]](#footnote-45) Some mentioned tarnishing the company’s reputation or complaining to management. By contrast, participants in the other two conditions involving the permissive fine printexhibited the opposite trend. Most of them expressed willingness to pay the fees and learn their lesson going forward, while the proportion of people that expressed interest in taking some sort of action shrank by half: from 85% to about 30%.[[46]](#footnote-46) These findings illustrate that the fine print plays a role in shaping not only people’s perceptions, but also their decisions.

1. *Concluding Remarks*

So, what can we learn from all of this? We started by observing that consumer markets are prone to, and often suffer from, behavioral market failures. These failures are the result of the interaction between consumer psychology and imperfect information on the one hand, and market forces on the other hand. Consequently, we see that sellers often use one-sided terms in the fine print, or even terms that exploit consumers’ systematic biases or misperceptions.

We then surveyed the regulatory tools that policymakers use in order to combat these deceptive market practices, with a focus on the stronger, more coercive, tools in the policymaker’s arsenal. But we saw that although these tools are promising, they might not achieve their intended effect as long as they rely mainly upon consumers to take action. This is because as long as consumers remain uninformed about the law, they are unlikely to complain or take action against a deceptive company—even when they face unenforceable or deceptive terms, and even when they were victims of pre-contractual misrepresentations. I therefore believe that public enforcement mechanisms should be prepared to take on the lion’s share of enforcement, as consumers, thanks to their formalistic intuitions about the contract and the law, are unlikely to protect themselves.

1. \* Incoming John M. Olin Research Fellow and Lecturer in Law, University of Chicago Law School; S.J.D. candidate, Harvard Law School. This lecture builds on heavily on three main papers: (1) Meirav Furth-Matzkin, *On the Unexpected Use of Enforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Legal Analysis 1 (2017); (2) Meirav Furth-Matzkin & Roseanna Sommers, *Fool Me Once, Shame on Me:*

*How Consumers and Lawyers Perceive the Fine Print in Deception Cases* 1–55 (Harvard John M. Olin Center for Law, Economics, and Business Fellows’ Discussion Paper Series, Discussion Paper No. 82, 2018), http://www.law.harvard.edu/programs/olin\_center/fellows\_papers/pdf/Furth\_82.pdf ; and (3) Meirav Furth-Matzkin, *Bargaining in the Shadow of the Contract* 4 Ala. L. Rev. (2019). [↑](#footnote-ref-1)
2. *See, e.g.*, Tess Wilkinson-Ryan, *The Perverse Behavioral Economics of Disclosing Standard Terms*, 103 Cornell L. Rev. 117, 118–20 (2017) (observing “the now-uncontroversial fact of universal non-readership”); David A. Hoffman, *From Promise to Form*: *How Contracting Online Changes Consumers*, 91 N.Y.U. L. Rev. 1595, 1605 (2016) (“[O]f course, almost no one reads any of these additional, increasingly long contracts.”); Zev J. Eigen, *Experimental Evidence of the Relationship between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. Inst. & Theoretical Econ. 124, 132 (2012) (finding that nearly a third of study participants failed to review online contracts at all, and the mean time spent reviewing the contract among the remaining participants was under two minutes); 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 (2014); Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (2014).. [↑](#footnote-ref-2)
3. Agatah Blaszczak-Boxe, *Give Up Firstborn for Free Wi-Fi? Some Click ‘I Agree,’* CNET (Sept. 30, 2014),http://www.cnet.com/news/give-up-firstborn-for-free-wi-fi-some-click-i-agree/;Fox News Staff, *7,500 Online Shoppers Unknowingly Sold Their Souls*, Fox News (Apr. 15, 2010), http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls.html.. [↑](#footnote-ref-3)
4. Meirav Furth-Matzkin, *On the Unexpected Use of Enforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Legal Analysis 1 (2017) [hereinafter Furth-Matzkin 2017]; *see also, e.g.*, Alleecia M. McDonald & Lorrie F. Cranor, *The Cost of Reading Privacy Policies*, 4 J.L. & Pol’y for Info. Soc’y 543, 563–64 (2008) (estimating that it would take people 244 hours per year, on average, to read privacy policies if they actually attempted to do so for every contract they sign or click through). [↑](#footnote-ref-4)
5. Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 656–58 (2009). [↑](#footnote-ref-5)
6. Furth-Matzkin 2017, *supra* note 3. [↑](#footnote-ref-6)
7. *See* David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 Mich. L. Rev. 983, 984 (2006); *see also* Edith Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 Seattle U. L. Rev. 469, 515 (2007) (observing that one-sided terms are often covertly inserted by drafting parties into their boilerplates); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203, 1206 (2003) (noting that drafting parties often exploirt consumers’ cognitive biases); Meirav Furth-Matzkin, *Bargaining in the Shadow of the Contract*, 4 Ala. L. Rev. (2019) [hereinafter Furth-Matzkin 2019]. [↑](#footnote-ref-7)
8. Margaret J. Radin, Margaret, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013).. [↑](#footnote-ref-8)
9. Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012); Korobkin, *supra* note 6; Melvin Eisenberg, Behavioral Economics and Contract Law (Eyal Zamir & Doron Teichman eds., 2014). [↑](#footnote-ref-9)
10. *See*, *e.g.*, Gilo & Porat, *supra* note 6, at 985 (noting that “there is a risk that the supplier will extract payment from the consumer without the latter being aware of the fact that the payment does not reflect the reduction of value due to the harsh clause”); *see also* Thomas J. Miceli & Kathleen Segerson, *Liability versus Regulation for Dangerous Products when Consumers Vary in their Susceptibility to Harm and May Misperceive Risk*,9 Rev. L. & Econ. 341 (2013) (arguing that strict product liability is prefereable when consumers misperceive risk, in order that the price of the product may then accurately reflect the associated risk). [↑](#footnote-ref-10)
11. Bar-Gill, *supra* note 8, at 15–16; Michael S. Barr, Sendhil Mullaintahan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 12 (2008). [↑](#footnote-ref-11)
12. *Id*. [↑](#footnote-ref-12)
13. *See, e.g.*, Magnusson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (1976) (prohibiting sellers from disclaiming the Uniform Commercial Code’s implied warranty provisions); Credit Card Accountability Responsibility and Disclosure Act, 12 C.F.R. §§ 226.18, 226.5a (2009) (instituting price caps and other prohibitions, as well as heightened disclosure obligations). [↑](#footnote-ref-13)
14. Ben-Shahar & Schneider, *supra* note 1. [↑](#footnote-ref-14)
15. *Id.*. [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *See* Restatement of Consumer Contracts (Preliminary Draft No. 3, October 26, 2017), at 4; *see also* Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 Jerusalem Rev. Legal Stud. 137, 162–67; Margaret J. Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 218–32 (2013) [↑](#footnote-ref-17)
18. Furth-Matzkin 2017, *supra* note 3. [↑](#footnote-ref-18)
19. Furth-Matzkin 2019, *supra* note 6. [↑](#footnote-ref-19)
20. Furth-Matzkin 2017, *supra* note 3; Meirav Furth-Matzkin & Roseanna Sommers, *Fool Me Once, Shame on Me: How Consumers and Lawyers Perceive the Fine Print in Deception Cases* 1–55 (Harvard John M. Olin Center for Law, Economics, and Business Fellows’ Discussion Paper Series, Discussion Paper No. 82, 2018), http://www.law.harvard.edu/programs/olin\_center/fellows\_papers/pdf/Furth\_82.pdf;Tess Wilkinson-Ryan, *The Perverse Behavioral Economics of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017) ; Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 Behav. Sci. & L. 83 (1997). [↑](#footnote-ref-20)
21. Furth-Matzkin & Sommers, *supra* note 19. [↑](#footnote-ref-21)
22. Furth-Matzkin 2017, *supra* note 3; *see also, e.g.*, URLTA §1.403(a)(4) (1972). [↑](#footnote-ref-22)
23. Furth-Matzkin 2017, *supra* note 3. [↑](#footnote-ref-23)
24. *Id*. [↑](#footnote-ref-24)
25. Furth-Matzkin 2017, *supra* note 3; Furth-Matzkin 2019, *supra* note 6. [↑](#footnote-ref-25)
26. *See* Furth-Matzkin 2017, *supra* note 3, at 36–40. [↑](#footnote-ref-26)
27. *Id.* [↑](#footnote-ref-27)
28. Furth-Matzkin 2019, *supra* note 6. [↑](#footnote-ref-28)
29. Furth-Matzkin 2019, *supra* note 6. [↑](#footnote-ref-29)
30. Furth-Matzkin 2017, *supra* note 3. [↑](#footnote-ref-30)
31. *Id.* at 26. [↑](#footnote-ref-31)
32. Mateja Djurovic, *The Apple Case: The Commencement of Pan-European Battle Against Unfair Commercial Practices*, 9 Eur. Rev. Cont. L. 253–266 (2013). [↑](#footnote-ref-32)
33. Zack Whittaker, *EU Plans Stronger Consumer Law Enforcement After Apple Warranty Case*, ZD.net (Mar. 19, 2013), https://www.zdnet.com/article/eu-plans-stronger-consumer-law-enforcement-after-apple-warranty-case/. [↑](#footnote-ref-33)
34. Furth-Matzkin & Sommers, *supra* note 19. [↑](#footnote-ref-34)
35. *See* Keith B. Anderson, *Consumer Fraud in the United States: An FTC Survey*, FTC (2004), <https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-unitedstates-ftc-survey/040805confraudrpt.pdf>; Keith B. Anderson, *Consumer Fraud in the United*

*States: The Second FTC Survey*, Ftc Staff Rpt. (2007), https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-secondfederal-trade-commission-survey-staff-report-federal-trade/fraud.pdf. [↑](#footnote-ref-35)
36. *E.g.*, Belleville Nat’l Bank v. Rose, 456 N.E. 2d 281 (Ill. App. Ct. 1983) (discussing a case in which mortgage fraud occurred via legal documentation reflecting different loan terms than promised, with a floating instead of a fixed interest rate); ; *see also* Stark & Choplin, *supra* note 4. [↑](#footnote-ref-36)
37. *See* Furth & Sommers, *supra* note 19, at 8; *see also* Korobkin, *supra* note 6, at 60; Richard A. Posner, Economic Analysis of Law 14–15 (5th ed. 1998). [↑](#footnote-ref-37)
38. See Restatement (Second) of Contracts §§ 164, 1.04 (Am. Law Inst. 1981) (rendering voidable contracts involving justifiable reliance by one contracting party on a fraudulent or material representation by the other party); Restatement of Consumer Contracts (Preliminary Draft No. 3, October 26, 2017), at § 6. [↑](#footnote-ref-38)
39. Carolyn Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, Nat’l Consumer L. Ctr. (2018),http://www.nclc.org/images/pdf/udap/report\_50\_states.pdf. [↑](#footnote-ref-39)
40. Restatement of Consumer Contracts (Preliminary Draft No. 3, October 26, 2017). [↑](#footnote-ref-40)
41. Stark & Choplin, *supra* note 4.. [↑](#footnote-ref-41)
42. Snyder v. Lovercheck, 992 P.2d 1079, 1086 (Wyo. 1999). [↑](#footnote-ref-42)
43. Furth-Matzkin & Sommers, *supra* note 19, at 19–21. [↑](#footnote-ref-43)
44. *Id.* at 16. [↑](#footnote-ref-44)
45. *Id.* at 21. [↑](#footnote-ref-45)
46. *Id.* [↑](#footnote-ref-46)