A developing global trend toward broader substantive regulation of consumer contracts has resulted in a growing realization that consumer markets are prone to both traditional and behavioral market failures. Yet, recent empirical findings reveal that sellers and landlords routinely contravene the law by inserting unenforceable terms into contracts. Two questions thus arise: What role do these clauses play in post-contract negotiations? And how do landlords and tenants negotiate disputes in the shadow of such dubious lease terms?

While the literature typically focuses on negotiations preceding an agreement between the parties, this paper sheds light on negotiations occurring in the shadow of a signed contract. It explores, through experimental means, the ways in which tenants and landlords settle rental disputes involving possibly unenforceable clauses. Specifically, what is the likelihood that negotiations will take place, and if the parties *do* choose to negotiate how will these clauses affect the nature of the negotiations and the resulting agreement?

Conventional wisdom holds that consumers seldom read or pay attention to the fine print, thereby allowing sellers to cram egregiously one-sided terms into their boilerplates.[[1]](#footnote-1) Scholars and commentators have consistently called for stronger, more substantive intervention in the content of these standardized agreements.[[2]](#footnote-2) In turn, legislatures and courts have adopted substantive regulation, prohibiting sellers and landlords from using certain terms deemed unfavorable to the non-drafting parties in their contracts.[[3]](#footnote-3) Such substantive regulation has been adopted in many types of consumer markets, including the rental housing, credit card and insurance industries.[[4]](#footnote-4)

1. Marotta-Wurgler 2011; Ayres & Schwartz 2014; Bakos et al., 2014; Ban Shahar and Schneider 2014.; Rakoff 1983; Radin 2013; Korobkin 2003; Bar-Gill 2010). [↑](#footnote-ref-1)
2. Radin 2013; Korobkin 2003. [↑](#footnote-ref-2)
3. See, e.g., Ben-Shahar 2010, at 228; Braucher 2012; Restatement second of consumer contracts. Add about the markets in which such regulation persists. For example, the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 introduced substantive restrictions (including price caps) alongside heightened disclosure obligations into the Credit Card market (see Credit Card Accountability, Responsibility, and Disclosure Act of 2009; Bar Gill, Seduction by Contract, 2012 (0. 105)). [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)