In light of the growing realization that consumer markets are subject to, and often suffer from, both traditional and behavioral market failures, there is a developing worldwide trend toward broader substantive regulation of consumer contracts. Yet recent empirical findings show that sellers and landlords routinely contravene the law by inserting unenforceable clauses into contracts. What role do such clauses play in post-contract negotiations, and how do landlords and tenants negotiate disputes in the shadow of such dubious lease terms?

While previous literature has typically focused on negotiations that take place before an agreement between contracting parties is reached, this paper sheds light on negotiations occurring after a contract has been signed, and in its shadow. It explores, through experimental means, how tenants and landlords settle rent disputes, and focuses on two main questions: what effect do unenforceable clauses have on the likelihood that post-contract negotiations will take place at all; and, in cases where the parties do choose to negotiate, how do unenforceable clauses affect the nature of the negotiations and any resulting agreement?

It is already conventional wisdom that consumers seldom read or pay attention to the fine print, and that as a result sellers often cram one-sided and egregious terms into their boilerplates.[[1]](#footnote-1) Scholars and commentators have consistently called for stronger and more substantive intervention in the content of these standardized agreements.[[2]](#footnote-2) In turn, legislatures and courts have adopted substantive regulation that prohibits sellers and landlords from using certain terms deemed unfavorable to the non-drafting parties in their contracts.[[3]](#footnote-3) Substantive regulation has been adopted in many consumer market sectors, including the rental, credit card, and insurance markets.[[4]](#footnote-4)

1. Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s 'Principles of the Law of Software Contracts',* 78 U. Chi. L. Rev. 165 [add page cited] (2011); Ian Ayres & Alan Schwartz, *The No-Reading Problem In Consumer Contract Law,* 66 Stanf. L. Rev. 545 [add page cited] (2014); Bakos *et al*., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts,* 43 J. Legal Stud. 1 [add page cited] (2014); Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure [add pages cited](2014);Todd D. Rakoff, *Contracts of Adhesion:* *An Essay in Reconstruction*, 96 Harv. L. Rev. 1174 [add page cited] (1983); Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, And The Rule Of Law [add pages cited] (2013); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 [add page cited] (2003); Oren Bar-Gill (2010) [Bar-Gill has several publications in 2010 so I can't tell which this is & the specific one is not on the reference list - JP]. [↑](#footnote-ref-1)
2. Radin, *supra* note 1 at [add page no]; Korobkin, *supra* note 1, at [add page number]. [↑](#footnote-ref-2)
3. *See, e.g.,* Ben-Shahar 2010 [this author has 2 publications for 2010 so I can't tell which this is], at 228; Jean Braucher, *The Sacred & Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 Suffolk U.L. Rev. 101 [add page cited] (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, 15 U.S.C. §1637 (2009); Oren Bar Gill, Seduction by Contract [add pages cited] (2012). [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)