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

While the literature typically focuses on negotiations taking place before an agreement between parties is reached, this paper sheds light on negotiations occurring after the contract has been signed and in its shadow. It explores, through experimental means, how tenants and landlords settle rental disputes, while focusing on two main questions: what effect do unenforceable clauses have on the likelihood that negotiations will take place, and how will these clauses affect the nature of negotiations and the resulting agreement, provided that the parties choose to negotiate?

It is conventional wisdom that consumers seldom read or pay attention to fine print and that sellers often cram one-sided and egregious terms into their boilerplates as a result.[[1]](#footnote-1) Scholars and commentators have consistently called for stronger, more substantive intervention in standardized agreement content.[[2]](#footnote-2) In turn, legislatures and courts have followed suit and adopted substantive regulation, prohibiting 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 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); Ben-Shahar & Schneider (2014); Rakoff (1984); Radin (2013); Korobkin (2003); Bar-Gill (2010).[Editor’s note: These should be full citations. Then I can edit them.] [↑](#footnote-ref-1)
2. Radin, *supra* note 1 (2013); Korobkin, *supra* note 1 (2003). [↑](#footnote-ref-2)
3. *See* 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)