THE TRANSPARENCY PARADOX

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I. INTRODUCTION

The vast majority of contracts today contain boilerplate—standard form contractual language prepared in advance and designed to be used over and over again.[1] It is a seemingly perennial feature of boilerplate terms that they lack in clarity.[2] Very often, boilerplate provisions are written in a convoluted or overly technical manner, apt to obscure rather than illuminate their meaning.

For consumers, such contractual opacity carries two risks. Consumers who fail to understand the contract may be tricked into a one-sided bargain that they would not otherwise have concluded.[3] Moreover, unclear boilerplate contracts may make it more difficult for consumers to assert their rights once a conflict has arisen.[4]

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[1] *See, e.g.*, *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 723 (2008) (noting that boilerplate contracts "account for nearly all contractual relationships, including the most significant ones"); Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002) (claiming that '[s]tandard forms govern most contractual relationships."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (asserting that "nearly all commercial and consumer sales contracts are form driven").

[2] *See, e.g.*, Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105 (2006) (noting that "[m]uch of boilerplate is ambiguous or incomprehensible"); Larry A. DiMatteo, *Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 761 n.137 (2010) (noting the ambiguity of boilerplate terms in consumer contracts); Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 8 YALE J. ON REG. 313, 350 (2011) (pointing out that boilerplate terms are frequently incomprehensible to the average consumer); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 841 (2006) (noting "boilerplate's lack of lucidity"); Robert A. Hillman, *Rolling Contracts*, 71 FORDH L. REV. 743, 747 (2002) (noting that, in the case of standard form contracts, "the seller presents a form largely incomprehensible to the consumer"); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 273 (1990) (noting that boilerplate contracts are often "expressed obscurely in legal or technical jargon"); Lewis A. Kornhauser, Comment: *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1163 (1976) (noting that most boilerplate contracts "will be written in obscure legal terms.").

[3] *See, e.g.*, Becher, *supra* note 1, at 745 (expressing concern that consumers who cannot understand standard form contracts may assent to "lopsided" standard form contracts).

[4] [Add Sources].

It is not surprising, therefore, that courts have developed various mechanisms to combat boilerplate opacity. Under the doctrine of *contra proferentem*, the court will interpret unclear terms against the drafter.[5] Moreover, under the doctrine of unconscionability, unclear boilerplate provisions are much more likely to be struck down than clear ones. Indeed, legion are the cases where courts will strike down types of boilerplate provisions unless they are clear and unambiguous. For example, under Missouri law, indemnity provisions in contracts between employers and non-employers are invalid unless they are "clear and unequivocal."[6] The same is true under Texas law for a contractual disclaimer of reliance.[7] And under Arizona law, boilerplate clauses in insurance contracts are void if they "cannot be understood by the reasonably intelligent consumer."[8]

At first glance, these and other mechanisms may seem to provide a reasonable level of protection against the dangers arising from vague boilerplate. However, in this article I argue that the law's approach to vague language in boilerplate contracts is fundamentally flawed. Contrary to what courts and legal scholar suggest, the mere finding that a clause is vague or difficult to understand is no reason for concern. Rather, one has to distinguish.

Vague boilerplate provisions can come in two, not necessarily mutually exclusive, flavors. First, a boilerplate provision may seem more generous to the consumer than it actually is. For example, a car dealer's warranty can be written in such a way that consumers can misunderstand it to be more comprehensive than it really is, leading some consumers to overestimate the benefits they stand to obtain under the contract. I will

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[5] United States v. Seckinger, 397 U.S. 203, 210 (1970) (explaining that the rule contra proferentem is "the general maxim that a contract should be construed most strongly against the drafter."). *See* E. ALLAN FARNSWORTH, CONTRACTS 459 (4th. ed. 2004) (describing the maxim contra proferentem as the principle that if the language of the contract "is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred"). *But see* Federico v. Continental Casualty Co., 1995 U.S. App. LEXIS 9102, 3 (9th Cir. Ariz. Apr. 18, 1995) (pointing out that "Arizona no longer follows the rule that ambiguous insurance contracts should be automatically construed against the insurer");

[6] Burcham v. Procter & Gamble Mfg. Co., 812 F. Supp. 947, 948 (E.D. Mo. 1993).

[7] Bever Props., LLC v. Jerry Huffman Custom Builder, L.L.C., 2015 Tex. App. LEXIS 8089, at 29 (Tex. App. Dallas July 31, 2015); Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 333, 334 (Tex. 2011).

[8] Mann v. New York Life Ins. Co., 83 Fed. Appx. 877, 877, 880 (9th Cir. Ariz. 2003) (applying Arizona law); Anderson v. Country Life Ins. CO., 886 P.2d 1381, 1388 (Ariz. Ct. App. 1994).

refer to such provisions as flytraps since flytraps seem much more attractive (to flies) than they actually are.

Of course, it is also possible that a boilerplate provision looks more burdensome than it really is. For example, a liability waiver can be worded in such way that some consumers will read it to be narrower than it actually is. Or the liability waiver may be void and therefore fail to abrogate the consumer's rights in any way, despite giving the appearance of doing so. In these cases, the boilerplate provision may lead the consumer to underestimate the rights that he enjoys under the contract. I will refer to this second type of vague boilerplate provision as *scarecrows* because, like real scarecrows, they are less dangerous than they may appear.

Both types of contractual opacity, flytraps and scarecrows, are potentially harmful to consumers.

Flytraps may lure the consumer into a contract that later proves excessively burdensome. Moreover, once a contract has arisen, the consumer may be tempted into suing or commencing arbitration proceedings because he overestimates his rights under the contract.

Scarecrows, on the other hand, do not pose a threat at the time the contract is formed, but prove dangerous later on: Once a contract has arisen, a scarecrow provision may deter the consumer from asserting rights that he actually has.

Yet while both types of provisions are ground for concern on a theoretical level, they are not equally important in practice. The reason lies in the drafter's incentives. Drafters of boilerplate contracts have little to gain from using flytraps. By contrast, they will often find it profitable to include scarecrows in their contracts. Therefore, as a matter of legal policy, the law on boilerplate contracts should focus on the dangers of scarecrows rather than flytraps.

However, the law in its present form does not distinguish between scarecrows and flytraps. Rather, it only distinguishes between those boilerplate conditions that are sufficiently clear and those that are not.

To make matters worse, the mechanisms that the law employs in combating contractual opacity have a highly disparate impact. They are rather effective at combating the mostly illusory threat posed by flytraps, while offering only little protection against the very real dangers inherent in scarecrows. In other words, the law focuses on the transparency problem

that it should largely ignore (flytraps) and ignores the transparency problem that it should focus on (scarecrows). This is the transparency paradox.

The structure of this essay is as follows: To lay the groundwork for my analysis, Part I briefly summarizes some of the insights from the general literature on boilerplate contracts. Part II then analyzes the various types of opaque contractual provisions explains why flytraps are much less dangerous than scarecrows. Part III focuses on the various legal mechanisms that are meant to protect consumers against unclear boilerplate and shows that these protections offer substantial protection against flytraps while doing little to protect consumers against scarecrows. Part IV discusses possible ways of remedying the situation. Part V summarizes and concludes.

I. BACKGROUND

Before delving into the complex issue of transparency, it is helpful to revisit the general challenge arising from boilerplate contracts. Because boilerplate is difficult to understand and time-consuming to read, consumers (and indeed many merchants) generally fail to read it.[9] As a result, an informational asymmetry arises between the drafting party and the non-drafting party. The former knows and understands the content of the contract while the latter does not.

A word on the terminology: for the sake of simplicity, I will generally refer to the drafting party as the "merchant" and the non-drafting

[9] *See, e.g.*, Becher, *supra* note 1, at 724 (pointing out that "typical consumers do not read" standard form contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1179 (1983) (noting that "[v]irtually every scholar who has written about contracts of adhesion has accepted" that "the adhering party is in practice unlikely to have read the standard terms before signing the document."); Omri Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 EUR. REV. CONTRACT L. 1, 2 (2009) ("Real people don't read standard form contracts."); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1975) (noting that "in the usual case, the consumer never even reads the form"); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 294 (1990) (arguing that even in the presence of a strict duty to read, the non-drafting party will generally lack the incentive to read boilerplate contracts). *But see* Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REVIEW 819, 826 (1992) (claiming that "consumers probably are familiar with the aspects of contracts that relate to product failure"). For an assessment of recent empirical scholarship on this issue see *infra* Part III.

party as the "consumer." This reflects the fact that informational asymmetries of the type at issue are particularly frequent in transactions between merchants and consumers, although they are, of course, also possible in transactions between two merchants or between consumers. Moreover, I will refer to consumer-friendly boilerplate contracts as "good" boilerplate, whereas I will use the term "bad" to describe boilerplate that is drafter-friendly. In other words, "good" means "good for the consumer," and "bad" means "bad for the consumer."

The informational asymmetry between merchants and consumers leads to a so-called "lemon problem."[10] Consumers are perfectly aware that they do not know the content of the contract. In other words, they know that the contract may either contain good or bad boilerplate provisions. Accordingly, they will base the price they are willing to pay on the *expected*—rather than the actual—quality of the contract's boilerplate provisions. Merchants know this and understand that they will not be able to obtain a higher price for offering good boilerplate.[11] Moreover, because bad boilerplate is cheaper from the merchant's perspective, merchants will find it in their interest to offer bad boilerplate only.[12] In the end, then, the market will contain only merchants using bad boilerplate. Consumers will adjust their expectations accordingly.[13] The final result is a market in which merchants use only bad boilerplate, consumers expect to get bad boilerplate, and consumers are only willing to pay prices that are based on the assumption that they are getting bad boilerplate. Hence, we end up with an equilibrium, but an inefficient one.

To be clear: the inefficiency of a lemon market is not that consumers overpay. They do not. Rather, they expect bad boilerplate and pay a price reflecting that expectation. The problem is that only bad boilerplate is offered despite the fact that, in a world without informational asymmetry, both parties might prefer that the contract include better boilerplate at a higher price. In other words, a deadweight loss results from the fact that the parties cannot conclude a mutually beneficial transaction involving high

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[10] The terminology and underlying insight go back to George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

[11] Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 485 (1974); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995) (pointing out this problem with respect to boilerplate used by banks).

[12] Goldberg, *supra* note 11, at 485.

[13] *Id.*

prices and good boilerplate and instead have to settle with a less beneficial transaction involving bad boilerplate and low prices.

How should the law react to the lemon problem? The traditional answer has been to subject boilerplate to some form of quality control—be it by imposing certain mandatory terms ex ante or by allowing courts to invalidate particularly onerous terms ex post.[14] The idea is that if the parties cannot successfully bargain for good boilerplate then the law should step in and correct this market failure by imposing minimum quality standards for boilerplate.

Obviously, this somewhat paternalistic approach is not perfect. It gives rise to two main objections. First, some scholars have questioned whether boilerplate contracts truly give rise to a lemon problem. Second, even if the market for boilerplate contract is in fact a lemon market, a reasonable concern that arises is that the cure could be worse than the disease. In other words, despite the market failure, judicial intervention might lead to even worse outcomes.

A. The Existence of a Lemon Problem

Some law and economics scholars have argued that despite the unwillingness of consumers to read boilerplate before entering into contracts, a lemon market is unlikely to emerge.[15]

1. The Informed Minority

Perhaps the most well-known argument against the existence of a lemon problem in the context of boilerplate contracts involves the so-called "informed minority." Some scholars argue that a minority of consumers are informed about the content of boilerplate.[16] Because sellers do not want to lose these informed consumers as customers, they offer them reasonably

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[14] On the relative merits of these two strategies see, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1247-54 (2003).

[15] Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information*, 127 U. PA. L. REV. 630, XXXX (1979); R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 663 (1996) (arguing that at least in some markets, reputational constraints will deter drafters from using overly one-sided terms).

[16] Schwartz & Wilde, *supra* note 15, at XXX.

"good" boilerplate contracts. Furthermore, as long as sellers cannot distinguish between informed and uninformed consumers, they have to offer the same good boilerplate contracts to all other consumers as well. Accordingly, the "informed minority" functions as a guardian of the interests of all consumers.[17]

To what extent this line of reasoning succeeds is ultimately an empirical question, and one that may have different answers for different markets. However, there are at least two good reasons to believe that the informed-majority argument rarely works in practice. For one, the obstacles to reading and understanding boilerplate contracts are so formidable that the existence of a sufficiently large informed minority is usually highly unlikely.[18] An empirical study on the behavior of online retail software shoppers confirms this view.[19] The study finds that "only about one or two in one thousand shoppers accesses a product's [end user license agreement] for at least one second."[20] Moreover, "the very few shoppers that do access it do not, on average, spend enough time on it to have digested more than a fraction of its content."[21] Unsurprisingly, the study's authors conclude that these numbers are hard to reconcile with the informed-minority argument.[22]

The second major challenge facing the informed-minority argument concerns the potential for discrimination. The existence of an informed minority will protect uninformed consumers only to the extent that sellers cannot discriminate between informed and uninformed consumers. [23]

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[17] *See, e.g.*, Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 936 (2006) (noting that as long as the market "works effectively," the unsophisticated buyer "benefits from the presence of other, more sophisticated buyers"); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of 2-207*, 68 VA. L. REV. 1217, 1257 (1982) (arguing that at least some buyers will read standard form contracts and the seller's rational self-interest will therefore be to design terms that are "in the mutual interest of the parties").

[18] *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 738 (2008) (noting that "[a]n informed minority is a questionable assumption").

[19] Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, 43 J. LEGAL STUDIES 9, XXX (2014).

[20] *Id.* at XXX.

[21] *Id.* at XXX.

[22] *Id.* at XXX.

[23] R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 672 (1996). *See* Schwartz & Wilde, *supra* note 16, at 663-66 (conceding that "discrimination is

Where such discrimination is feasible, sellers can retain informed consumers as customers by offering them above-average terms while continuing to offer bad boilerplate to uninformed consumers. Given that merchants, online and offline, increasingly have the means to collect information about their customers, the assumption that they are unable to distinguish between informed and uninformed customers will often be problematic. In sum, the so-called informed-majority argument is unpersuasive outside narrowly defined circumstances.

2. Reputational Concerns

The question remains whether reputational constraints can prevent the emergence of a lemon market.[24] Once a conflict has arisen, parties are much more likely to read the contract. If the contract then turns out to be excessively one-sided, parties may feel cheated, and the word may get out, ultimately damaging the merchant's reputation in the marketplace. Concern about such reputational damage may dissuade the drafter from using excessively one-sided boilerplate in the first place.

Of course, reputational arguments of this type face some significant limitations. Perhaps most importantly, reputation is a very coarse and unreliable disciplinary mechanism.[25] The public at large may never learn that the merchant invoked a one-sided provision.[26] This is true even in those markets that would seem to be particularly conducive to transparency.

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a potentially serious concern"); Becher, *supra* note 18, at 746 (noting that "Sellers can and do discriminate between informed and noninformed buyers").

[24] *Cf.* R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 663 (1996) (arguing that at least in some markets, reputational constraints will deter drafters from using overly one-sided terms); Becher, *supra* note 18, at 750 (discussing the possibility that "firms might draft efficient standardized terms in order to maintain or establish a good reputation among consumers").

[25] Some scholars have argued that the seller's desire to preserve his reputation imposes only weak constraints because many boilerplate provisions concern relatively rare contingencies. Becher, *supra* note 18, at 751. I do not follow this argument. Sure enough, if a one-sided provision rarely becomes relevant, then the damage to the drafter's reputation will be limited. However, if the relevant provision applies only rarely, then it does not impose much of a burden on the consumer and therefore the damage to the seller's reputation *ought to be* limited. Or, differently put, since the provision applies rarely, the seller has little to gain from using it, and hence even a limited reputational damage will be sufficient to deter him from using it.

[26] Becher, *supra* note 18, at 751

Consider online shopping on websites such as Amazon.com, where customer can leave written comments and rate the seller. Even here, boilerplate may not translate into reputational damage. In part, that is because people complaining about bad boilerplate may be a relatively small portion of a sea of reviewers who offer praise or complain for all kinds of persuasive and unpersuasive reasons. Moreover, online ratings are notoriously unreliable.[27] Some sellers simply write their own reviews[28] or bribe customers with rebates or freebies into writing favorable reviews; others simply purchase good reviews in bulk from so-called review factories.[29] It is hardly surprising, therefore, that a recent empirical study of Amazon ratings failed to find a positive correlation between the quality of boilerplate and the seller's rating.[30]

Third, once a conflict has arisen, merchants can often work their way around reputational concerns by discriminating between different types of customers.[31] If a customer is likely to complain in a public fashion, the merchant can pacify the customer by ceding to his demands. By contrast, when dealing with more acquiescent types of consumers, merchants can be more assertive and insist on the implementation of their boilerplates. None of this implies that reputational concerns are always insignificant. They are bound to constraint merchants at least to some extent in at least some types of cases. However, in most cases, it is not clear that reputational concerns impose more than a relatively weak constraint.

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[27] David Streitfeld, *His Biggest Fan Was Himself*, The New York Times Blogs (Bits), Sept. 4, 2012 (citing testimony according to which up to a third of all reviews are suspect) [hereinafter Streitfeld, *Biggest Fan*].

[28] Streitfeld, *Biggest Fan*, *supra* note 27 (citing the example of a writer who favorably reviewed his own book).

[29] David Streitfeld, *In a Race to Out-Rave Rivals, 5-Star Web Reviews Go for $5*, N.Y.Times, August 20, 2011, A1 (reporting that an "industry of fibbers and promoters has sprung up to buy and sell raves for a pittance" and citing the case of "a freelance writer who was hired by a review factory this spring to pump out Amazon reviews for $10 each"); David Streitfeld, *For $2 a Star, an Online Retailer Gets 5-Star Product Reviews, N.Y.Times*, Jan. 27, 2012, A1 (describing firms' practice of giving away free items in exchange for reviews).

[30] Nishanth V. Chari, *Note, Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U.L. REV. 1618, 1643 (2010) (finding a negative, rather than a positive correlation between a pro-consumer bias and online ratings).

[31] Becher, *supra* note 18, at 747–48 (noting that sellers, eager to preserve their reputation, will discriminate ex post based on a customer's assertiveness);

B. Will Courts Make Things Worse?

Assuming one believes in the existence of a lemon-problem, one may still try to argue that judicial intervention may make things worse: Courts may police boilerplate contracts too aggressively, resulting in the invalidation of boilerplate provisions would be preferred by most consumers even in the absence of informational asymmetry. In that case the law still avoids an inefficient low-quality equilibrium in which consumers pay low prices and get bad boilerplate. But instead of making things better, we may obtain an equally or even more inefficient outcome in which consumers pay very high prices for very high quality boilerplate, even though, in the absence of information asymmetries, market participants would prefer medium quality boilerplate and medium prices.

This line of reasoning, however, is not an objection against judicial policing as such. Rather, it concerns the mode of judicial policing: prudent courts will invalidate only those boilerplate provisions that they are reasonably sure would be rejected by most contracting parties in the absence of informational asymmetries. In other words, the argument that courts will make things worse becomes unpersuasive if the law embraces a minimum-standards approach under which courts limit themselves to policing contractual provisions that are grossly unfair.

II. BOILERPLATE OPACITY

How does contractual opacity fit into the boilerplate picture? Law and economics scholars have traditionally observed that boilerplate opacity exacerbates the informational asymmetry between merchants and consumers and thereby contributes to the emergence of a the lemon market described above.[32] After all, boilerplate contracts are notoriously difficult to understand,[33] and that is one reason why consumers do not read boilerplate contracts.

Against this background, one might begin by asking whether the fight against boilerplate opacity might help to overcome the lemon market. Can we, by making boilerplate more readable, ensure that consumers start reading contracts? Would this, perhaps, eliminate the informational

[32] Sources cited *supra* note XXX.

[33] *See* the sources cited *supra* note XXX.

asymmetry between merchants and consumers and with it the need for any substantive control of boilerplate provisions?

Alas, to all but the most radical Panglossians, it must be obvious that such hopes are in vain. For the vast majority of consumers, reading pages full of legal provisions before signing contracts is entirely unrealistic even the relevant provisions are designed with the utmost care and written as unambiguously as possible.[34] Moreover, some jurisdictions already impose a general requirement that boilerplate provisions be written in a clear and understandable fashion. Most notably, European Union law demands that boilerplate terms in consumer contracts "must always be drafted in plain, intelligible language."[35] And in at least some European countries, such as Germany, courts enforce this requirement very strictly.[36] Yet even there, consumers almost never read boilerplate contracts.[37] In other words, it is safe to say that imposing a clarity requirement for boilerplate provisions makes no meaningful contribution to overcoming the lemon market problem.

Hence, if the fight against boilerplate opacity is to be justified, it needs some other *raison d'être* other than the unrealistic hope of eliminating the lemon problem. And in fact, courts and scholars name other considerations.

First and foremost, they voice concern that consumers who read but misunderstand the contract may be tricked into a one-sided bargain that they would not otherwise have concluded.[38] It is worth noting that this situation is very different from the one that gives rise to the lemon market. In case of a lemon market, the consumer knows that he does not know the quality of the merchant's boilerplate (conscious ignorance). Hence, the consumer

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[34] *Cf.* OMRI BEN-SHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE xxx (2014).

[35] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Art. 5, O.J. L 95, April 21, 1993, p. 29.

[36] Even before the enactment of Council Directive 93/13/EEC, German law has long required boilerplate contracts to be clear in order to be valid, and this transparency principle is now explicitly enshrined in the German Civil Code. BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, Bundesgesetzblatt [BGBl.], § 307 (1) (2) (Ger.).

[37] E.g., Thomas Pfeiffer, *Einleitung* [*Introduction*], in Wolf/Lindacher/Pfeiffer: AGB-Recht (Thomas Pfeiffer et al. eds., 6th ed. 2013)

[38] *See, e.g.*, Becher, *supra* note 1, at 745 (expressing concern that consumers who cannot understand standard form contracts may assent to "lopsided" standard form contracts).

refuses to pay a higher price than the one that is adequate for the *expected* quality of the merchant's boilerplate. By contrast, when courts and scholars worry that consumers may be tricked into a one-sided bargain, they are assuming that the consumer has read the boilerplate, but has incorrect ideas about their meaning.

Some courts and scholars also mention a another problem, namely that that unclear boilerplate contracts may make it more difficult for consumers to assert their rights once a conflict has arisen.[39]

Interestingly, courts and scholars mentioning these dangers inherent in unclear boilerplate provisions rely on an essentially binary distinction between clear and unclear clauses. On this view, unclear boilerplate are undesirable because they can lead to the problems described above, whereas clear boilerplate avoid these risks. However, this approach is too simplistic. Instead, it is helpful to distinguish between two basic types of unclear boilerplate provisions. On the one hand, a contractual provision may seem more generous to the consumer than it is ("flytrap"). On the other hand, it may seem more burdensome than it actually is ("scarecrow").

On a theoretical level, both types of provisions can be harmful to the consumer. Flytraps may lead the consumer to enter into an undesirable contract because he overestimates the contract's benefits. Moreover, once a dispute has arisen, there is a chance that the consumer overestimates his rights and commences a lawsuit or arbitration proceedings which ultimately prove unsuccessful. Scarecrows may prevent the consumer from asserting his rights once a dispute has arisen. However, while both types of clauses are theoretically dangerous, in practice, scarecrows are a much greater threat to the interests of consumers.

A. Flytraps

Despite the attention that the literature lavishes on the danger inherent in flytrap boilerplate provisions,[40] they pose relatively little risk to consumers. The vast majority of consumers do not read boilerplate before

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[39] [Add Sources]. *Cf.* Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contracts Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, xxx (1997) (presenting empirical evidence that exculpation clauses deter litigation).

[40] *Supra* note

entering into contracts.[41] Accordingly, the risk that vague or misleading boilerplate provisions will prompt consumers to enter into contracts that they would not otherwise have concluded is virtually nonexistent.

What about the risk that consumers who misinterpret boilerplate provisions in their own favor are lured into costly litigation or arbitration which they ultimately sue. This risk, too, seems minimal. Once the consumer contacts the merchant to complain, the latter, eager to avoid the hassle of a lawsuit, will do his best to convince the consumer that the consumer's interpretation is incorrect. In many, if not all cases, this will allow the consumer to arrive at a more informed decision. If the consumer does not believe the merchant, he may end up consulting an attorney, which, again, may lead to the consumer's misunderstanding being resolved. Finally, given that most consumers are risk averse and rather unlikely to commence litigation and arbitration except in rare cases,[42] the existence of an ambiguous boilerplate provision is very unlikely to prompt litigation or arbitration.

Moreover, merchants have little incentive to use boilerplate flytrap provisions in the first place. What should a merchant stand to gain from the use of such provisions? Given that almost no consumers read boilerplates them before entering into a contract, the merchant has no reason to believe that using flytraps will win him additional customers.

What is more, the use of flytraps has obvious costs for the merchant. These costs come in two flavors. First, there is the chance, however slim, that the non-drafting party, because she misunderstands the contract, may actually sue or initiate arbitration proceedings.[43] As a result, the merchant incurs the costs of arbitration or litigation.

Second, and more importantly, flytrap provisions are a disaster from a customer relations point of view. Denying a customer a right that the customer believes the contract grants her is bound to lead to dissatisfaction, a result that the merchant can easily avoid by foregoing use of the flytrap.

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[41] *See* the sources cited *supra* note 9.

[42] [Sources]

[43] Obviously, some customers will consult an attorney before suing, and the attorney may be better at interpreting the contract than the consumer. However, not all attorneys are good lawyers, and they face an obvious conflict of interest. They may be tempted to initiate litigation in order to earn the relevant fees rather than inform the consumer that her claim is doomed to fail.

In sum, flytrap boilerplate provisions are harmful in theory, but there is no reason to believe that they pose much of a problem in practice.

B. Scarecrows

While flytraps are no reason for concern, scarecrow provisions are a different story. Scarecrows may prevent the consumer from asserting his rights once a dispute has arisen. This can occur in essentially two ways.

To begin, once a contract has arisen, the consumer is much more likely to read the contracts. He may stumble across the scarecrow provision and, as a result, underestimate the rights that he has under the contract and abstain from pursuing the matter further. Alternatively, the merchant may invoke the relevant provision once the consumer has contacted him. Either way, the relevant provision may lead the consumer to abstain from pursuing his rights further.

The case New York case of *Spatz v. Axelrod Management* may serve to illustrate this point. There, an explicitly mandatory state law rule required that landlords of residential buildings must compensate their tenants for damage caused by water leaks.[44] In clear violation of the relevant statute, the lease agreement included boilerplate language excluding the landlord's liability for such damage.[45] It is obvious that this type of clause has the potential to deter tenants from asserting their claims. Once a leak has occurred, some tenants may read the contract first and abstain from talking to their landlord in the first place. Others may contract the landlord and give in once he invokes the liability waiver.

1. A Typology of Scarecrows

In practice, scarecrow provisions tend to come in different flavors. Some simply use language that is open to very burdensome, though ultimately incorrect, interpretations. However, there are two special types of scarecrow provisions that stand out.

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[44] Spatz v. Axelrod Management Co., 165 Misc. 2d 759, 765 (N.Y. City Ct. 1995)
[45] *Id.*

a) Zombies

To begin, there are provisions that are actually void but that firms keep using anyway. I will refer to such provisions as zombie provisions. Zombie provisions are the most radical type of scarecrow. They may look burdensome, but, because they are void, they really do not impose any burden at all. However, the merchant may still be able to use the invalid provision to deter the consumer from asserting his rights.

The practical importance of zombie provisions is significant. Cases involving provisions that very clearly violate existing limitations on the use of boilerplates are legion. [46]

b) Cautionary Language

Another special case involves provisions that would violate the law but for cautionary language declaring that the provision shall not apply where this would lead to illegality. Such clauses do not have to be misleading, but they can be, depending on the circumstances.

A somewhat extreme case can be found in Massachusetts case of *Leardi v. Brown.*[47] Under Massachusetts landlord and tenant law, there exists an implied warranty that premises are "fit for human occupation."[48] However, in *Leardi*, the landlord used a standard lease agreement according to which "there is no implied warranty the premises are fit for human occupation (Habitability) except so far as governmental regulation, legislation or judicial enactment otherwise requires."[49] Technically, this clause was inapplicable. However, there is no question that it could mislead all but the most sophisticated tenants into underestimating their rights under the contract.

2. The Threat Posed by Scarecrows

Unlike flytraps, which pose little threat to consumers, scarecrows have the potential to be quite damaging. Once a dispute arises, there is a

[46] *E.g.*, Burcham v. Procter & Gamble Mfg. Co., 812 F. Supp. 947 (E.D. Mo. 1993) (declaring an indemnity provision unenforceable that clearly violated the pertinent legal standards under Missouri law).

[47] Leardi v. Brown, 474 N.E.2d 1094 (Mass. 1985).

[48] *Id.*

[49] *Id.* at 1099.

good chance that the consumer will actually read the scarecrow, either on his own or, more likely, because the merchant invokes the provision.

Moreover, as long as the law does nothing to deter the use of scarecrows, merchants can have strong incentives to use scarecrow provisions. This is particularly obvious in the case of zombie provisions and clauses using cautionary language. Such provisions deter consumers from suing or commencing arbitration proceedings, thereby enriching merchants at the expense of consumers.

Ordinary scarecrows present a slightly more complicated case. As previously noted, an ordinary scarecrow is a valid but ambiguous provision, which can be misunderstood to have a more sinister meaning than it actually does. Needless to say, a consumer who misinterprets the provision to his detriment may be deterred from asserting his rights, which enriches the merchant at the consumer's expense. However, that begs the question whether the merchant would not be better off writing the more sinister meaning into the contract in the first place. For example, assume that the scarecrow really means X, but can be misunderstood to have the more sinister meaning Y? Why should a merchant use the scarecrow provision instead of simply using a provision that clearly means Y?

The answer is that the law imposes limits on how far the content of a clause can go. These limits can be contained in rules, such as legislation banning certain types of clauses in residential leases, or they can come in the shape of standards like the general unconscionability doctrine. Either way, merchants are restrained in how burdensome their boilerplate provisions can be. The beauty of scarecrows is that they can remain within the limits set by the law, while misleading the consumer into thinking that the contract is worse than it actually is. Thus, they allow the merchant to circumvent the minimum quality standards that govern boilerplate contracts.

The California case of *Wilden v. Washington National Insurance*[50] may serve to illustrate this problem. There, the plaintiff had entered into an accident and disability insurance contract. Said contract promised certain benefits in case of injuries that "totally and continuously disable the Insured within 30 days of the date of the accident. . ." The plaintiff was subsequently injured in an automobile accident.[51] The trauma suffered in that accident precipitated the plaintiff's multiple sclerosis, and within a few

[50] Willden v. Washington Nat'l Ins. Co., 557 P.2d 501 (Cal. 1976)
[51] *Id.* 634

years after the accident, the plaintiff became totally disabled.[52] However, the insurance refused to pay on the ground that total disability had not occurred within 30 days of the accident.[53]

In the ensuing litigation, the plaintiff's lawyers argued that the strict 30-day was unduly burdensome and therefore unconscionable. The court, however, rejected that argument, reasoning that the 30-day-clause had to be interpreted more narrowly than its wording suggested. Under the so-called process-of-nature rule previously applied to similar clauses in insurance contracts, the disability resulting from an accident was immediate (and hence within the 30-day-limit) as long as the "disability follows from an accidental injury within such time as the processes of nature consume in bringing the affected person to the state of total disability."[54] Because the clause had to be interpreted in this narrow fashion, it escaped the verdict of unconscionability.[55]

In *Wilden*, the insurance company could have written a written a clause into the contract according to which the disability itself and not just the processes leading to the disability, had to occur within 30 days. But, as indicated by the court, that would have made the clause unconscionable. Instead it used a provision that stayed within the limits of the law, but could easily be misunderstood to impose a strict 30-day limit. That way, the clause remained valid, and the insurance company still had a chance that many insurance-takers would think their claims to be precluded. Incidentally, this strategy proved highly successful in *Wilden*. The plaintiff, presumably because he and his attorneys were unaware of the process-of-nature rule, did not insist on this rule being mentioned in the jury instructions. As a rsult, the jury found that the disability had not occurred within 30 days. The plaintiff appealed, but the court of appeals refused to set aside the jury's finding on the ground that it was the plaintiff's responsibility to seek more accurate jury instructions.[56] Had the insurance company used a less misleading clause that explicitly explained the process-of-nature clause, the outcome would likely have been a different one.

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[52] *Id.* 633.

[53] *Id.* 635.

[54] *Id.* 635

[55] *Id.* at 636 (pointing out that existing case law "clearly indicate[s] that similar provisions, *if* interpreted in accord with the process of nature rule, are not unconscionable."

[56] *Id.* at 636.

III. THE LAW ON BOILERPLATE OPACITY

Our results so far are quite clear. Flytrap provisions pose little threat to consumers. By contrast, scarecrow provisions can do substantial harm. They deter consumers from asserting their contractual rights and allow merchants to circumvent minimum quality standards for boilerplate contracts.

It makes sense, then, for consumer protection law to focus on scarecrows rather than flytraps. Paradoxically, though, the opposite is true. While the legal system has developed various mechanisms to protect consumers from contractual opacity, these mechanisms invariably target flytraps. By contrast, the law offers very little protection against scarecrows.

1. Contra Proferentem

Consider first the doctrine of contra proferentem under which courts will interpret contracts against the drafter.[57] The legal literature praises this rule for incentivizing the drafter to strive for clarity.[58] However, this assessment turns out to be simplistic.

With respect to flytraps, the contra proferentem rule works quite well. Recall that, in theory, flytraps pose a threat to economic efficiency because they lead consumers to overestimate the benefits of the contract. To the extent that the contra proferentem doctrine applies, it eliminates this danger. The contractual ambiguity is resolved against the merchant and in favor of the consumer. This means that such ambiguity no longer leads the consumer to overestimate the benefits of the contract.

By contrast, the contra proferentem doctrine offers no help against scarecrows. Scarecrows are dangerous because they deter consumers from suing or commencing arbitration proceedings. Obviously, the vast majority of consumers have never heard of the contra proferentem doctrine. Accordingly, they typically do not know that an ambiguous provision must be interpreted against the drafter. It follows that the contra proferentem doctrine usually does not help consumers to avoid the risks inherent in scarecrows.

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[57] *Supra* note 5.
[58] *Supra* note xxx.

2. The Unconscionability Doctrine

The unconscionability doctrine may also impose a burden on merchants using opaque boilerplate. However, while it offers at least some protection against flytraps, it does little to protect consumers against scarecrows.

a) A Brief Introduction to the Unconscionability Doctrine

In applying the unconscionability doctrine, courts generally distinguish between procedural and substantive unconscionability.

Substantive unconscionability exists where the terms are "overly harsh and one-sided."[59] A mere imbalance is not enough, however. Rather, the contract must be "so one-sided as to 'shock the conscience."[60]

Procedural unconscionability concerns imperfections in the bargaining process.[61] Courts differ, though, on the question of what exactly procedural unconscionability requires. Some courts have gone so far as to hold that the mere use of boilerplate is enough to constitute an imperfection in the bargaining process.[62] Other courts have applied much more exacting standards. For example, some courts deny unconscionabiliy as long as the consumer had the ability to get the product or service from this or another provider without agreeing to the relevant clause[63] and put the burden of proof on the customer.[64]

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[59] Pinnacle Museum Tower Assn. v. Pinnacle Market Development, 282 P.3d 1217, 1232 (Cal. 2013). Other courts use similar wordings. *Ex parte Foster*, 758 So. 2d 516, 520 n.4 (Ala. 1999) (citing 8 Richard A. Lord, Williston on Contracts § 18:10 (4th ed. 1998) for the proposition that „those terms are unreasonably favorable to the more powerful party")); accord Blue Cross Blue Shield v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005).

[60] Pinnacle Museum Tower Assn. v. Pinnacle Market Development, 282 P.3d 1217, 1232 (Cal. 2013).

[61] *E.g.*, *Ex parte Foster*, 758 So. 2d 516, 520 n.4 (Ala. 1999) (citing 8 Richard A. Lord, Williston on Contracts § 18:14 (4th ed. 1998) for the proposition that „ procedural unconscionability, is that a deficiency in the contract-formation process")); accord Blue Cross Blue Shield v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005); Cheshire Mortg. Serv. v. Montes, 612 A.2d 1130, 1134 n.14 (Conn. 1992);

Nec Techs. v. Nelson, 478 S.E.2d 769, 771 (Ga. 2012).

[62] Sources.

[63] Blue Cross Blue Shield v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005). *See* Leeman v. Cook's Pest Control, Inc., 902 So. 2d 641, 648 (Ala. 2004) (no procedural unconscionability because buyer failed to shop around).

[64] Blue Cross Blue Shield v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005).

However, for the purpose of this essay, it is important to note that most courts agree that the opaque nature of a clause may suffice to constitute procedural unconscionability.[65]

The question remains whether contractual opacity alone can be sufficient to render a boilerplate provision unconscionable or whether such opacity can only prompt the verdict of unconscionability if the relevant provision is also unduly harsh and one-sided. This question depends on how one views the relationship between procedural and substantive unconscionability.

In some jurisdictions, both substantive and procedural unconscionability must be present for a clause to be unconscionable.[66] However, courts following this approach often note that where one element is particularly strong, the other may be weaker.[67]

In other jurisdictions, substantive unconscionability alone is sufficient to apply the unconscionability doctrine.[68] Whether mere procedural unconscionability may also suffice in these jurisdictions is often less clear. Some opinions are worded in such a way as to leave open the possibility that mere procedural unconscionability might also suffice.[69]

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[65] Sources.

[66] Blue Cross Blue Shield v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005) (noting that "in order to avoid an arbitration provision on the ground of unconscionability, the party objecting to the provision must show both procedural and substantive unconscionability"); Urban Invest., Inc. v. Branham, 464 A.2d 93; SA-PG Sun City Ctr., LLC v. Kennedy, 79 So. 3d 916, 921 (Fla. 2012) ("And because we find no procedural unconscionability, we do not need to reach the issue of substantive unconscionability.")

[67] *E.g.*, Pinnacle Museum Tower Assn. v. Pinnacle Market Development, 282 P.3d 1217, 1232 (Cal. 2013).

[68] Maxwell v. Fidelity Fin. Servs., 907 P.2d 51, 59 (Ariz. 1995) (holding that substantive unconscionability alone can be sufficient); Smith v. Mitsubishi Motors Credit of Am., 721 A.2d 1187, 1192 (Conn. 1998) (holding that substantive unconscionability could be sufficient); Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 534 N.E.2d 824, 829, 537 N.Y.S.2d 787 (N.Y. 1988) (noting that while unconscionability typically requires both procedural and substantive unconscionability, "there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.") (citing State v. Wolowitz, 96 A.D.2d 47, 468 N.Y.S.2d 131 (N.Y. 1983)); Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1043 (Utah 1985) (holding that substantive unconscionability alone can make a clause unconscionable).

[69] Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 409-10 (Ill. App. 1980) (holding that "[u]nconscionability can be either procedural or substantive or a combination of both"). Some courts have explicitly left open the question of whether procedural unconscionability alone is sufficient. *E.g.*, Maxwell v. Fidelity Fin. Servs., 907

However, one searches in vain for cases in which a clause was deemed unconscionable on the basis of mere procedural unconscionability.[70]

b) Unconscionability and Flytraps

The unconscionability doctrine offers at least partial protection against flytraps. To see this, it is important to note that flytrap provisions can come into flavors.

To begin, the flytrap can impose a burden on the consumer—for example, fees for late payment. In line with our definition of what constitutes a flytrap, the provision must be ambiguous in the sense that the consumer may underestimate the burden he incurs. To stick with our example of a fee schedule, assume that the fee schedule calls for certain fees to apply cumulatively but that this is unlikely to be clear to all readers. In this case, the consumer who misunderstood the contract may be able to invoke the unconscionability doctrine, arguing that the combination of burdensome fees with a potentially misleading wording of the provision renders the provision unconscionable.

Alternatively, the clause may merely offer a benefit. For example, consider the case of a credit card agreement that includes certain insurance benefits. In order for such a clause to be flytrap, the clause must be ambiguous in the sense that the consumer may overestimate the benefits that the clause promises. In this type of scenario, the unconscionability doctrine does not help. That is because most courts believe that a clause cannot be unconscionable unless it is substantively unconscionable, and substantive unconscionability requires that the clause be unduly burdensome. However, clauses that mere grant benefits are not burdensome to begin with.

In sum, the unconscionability doctrine offers some protection against flytraps, but only if the flytrap provision imposes a burden, not when it confers a benefit.

P.2d 51, 59 (Ariz. 1995); Smith v. Mitsubishi Motors Credit of Am., 721 A.2d 1187, 1192 n.10 (Conn. 1998).

[70] *Cf.* FARNSWORTH, *supra* note 5, at 560 (noting that "Courts have resisted applying the doctrine where there is only procedural unconscionability without substantive unfairness").

c) Unconscionability and Scarecrows

Whereas the unconscionability doctrine offers at least some protection against the risks inherent in flytraps, it is relatively useless with respect to scarecrows. The reasons are twofold.

First, as with flytraps, some types of scarecrows do not even violate the unconscionability doctrine. Recall that according to the prevailing view, unconscionability always requires substantive unconscionability. Hence, as long as scarecrow provisions stay within the limit of what is substantively acceptable, they avoid falling afoul of the unconscionability doctrine.

Second, even to the extent that the unconscionability doctrine applies, this may not help consumers. Because few consumers have the expertise to evaluate the validity of boilerplate provisions, scarecrows retain their deterrent effect even they are invalid. Indeed, zombie provisions are invalid by definition.

The picture becomes more complicated once one takes into account class actions, an issue to which I will turn next.

d) The Role of Class Actions

In theory, class actions could be used to overcome at least one of the problems described above, namely the fact that most consumers are unaware of a clause's unconscionability. In principle, plaintiffs, aided by entrepreneurial attorneys, can commence a class action on behalf of consumers hurt by the use of unconscionable or otherwise invalid boilerplate provisions. For example, assume that large cell phone company has been making use of an unconscionable fee schedule to skim consumers. In this case, a plaintiff may begin a class action on behalf of the consumers who have paid the relevant fees.

In practice, however, class actions are unlikely to be an effective tool against unconscionable boilerplate provisions. There are several reasons for this. To begin, in its landmark case *AT&T Mobility v. Concepcion*, the U.S. Supreme Court made it clear that companies are free to combine an arbitration clause with a class waiver in consumer contracts.[71] In other

[71] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 395 (2011) (noting that "[t]he holding in *Concepcion* makes it clear that by incorporating a class-action-waiver within the scope of an arbitration provision, it is possible for companies to avoid not only

words, the mere fact that a clause contains an arbitration agreement with a class waiver does not make that clause invalid.[72]

In practice, such clauses are now standard,[73] making class actions unavailable in many cases. Second, even where class actions are still available, they are only plausible where the number of people in the class is sufficiently large and the potential payoff sufficiently attractive. However, in many cases, these conditions are not fulfilled. For example, many landlords only rent out a very limited number of apartments or houses. Accordingly, class actions cannot be expected to prove an effective bar to the use of scarecrows in consumer contracts.

3. Prohibitions against Unfair and Deceptive Acts and Practices

Another potential remedy against scarecrow boilerplate provisions lies in the prohibitions against unfair and deceptive acts and practices (UDAP). A prohibition of this type is not only contained in Section 5(a) (1)

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class-wide arbitration but also class actions in court"); Brian T. Fitzpatrick, The End of Class Actions?, 57 ARIZ. L. REV. 161, 179-190 (2015) (arguing that companies are now free to avoid class actions by combining arbitration provisions with class action waivers).

[72] Geoorge A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT'L ARB. 551, 569 (2011). Such clauses can still be categorized unconscionable based on their specific design, e.g. because they are written in a confusing manner.

[73] Georgene Vairo, *Is The Class Action Really Dead? Is That Good Or Bad For Class Members?*, 64 EMORY L.J. 476, 493 (2014) (noting the "ubiquity of consumer class arbitration waivers"). The fact that mandatory arbitration clauses are widespread in consumer contracts is widely understood. *E.g.*, Fitzpatrick, *supra* note 71, at 164 (noting that arbitration agreements have become a routine part of the commercial world and that businesses insist on these agreements in their contracts with consumers). The leading empirical study on the use of arbitration clauses in consumer contract remains 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 (2008). That study predates the Conception decision, and the authors do not discuss class waivers. Even then, however, the authors found that roughly three quarters of the consumer contracts in their sample contained mandatory arbitration clauses. *Id.* at 876. More recently, an empirical study of arbitration provisions in franchise agreements finds that *Concepcion* only had a limited impact on the use of arbitration clauses. In the studied sample, the percentage of franchise contracts using arbitration agreements increased from 62.6% before Concepcion to 63.6% after Concepcion. Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The /Use of Arbitration Clauses after Concepcion and Amex*, 67 VAND. L. REV. 955, 1012 (2014). However, as the authors of this study readily concede, franchising agreements are not consumer contracts, and their results cannot be generalized to consumer contracts. *Id.* at 960.

of the Federal Trade Commission Act,[74] but also in state legislation that all U.S. states and the District of Columbia have adopted in some form.[75]

At the core of the relevant acts lies a broad, standard-like prohibition against deceptive acts and practices. For example, Section 5 (a) (1) of the FTC Act declares unlawful any "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." These statutes are relevant to the point at hand because they provide a potential remedy against what I have called zombie provisions—provisions that keep being used in boilerplate despite the fact that they are known to be unconscionable and therefore void.

At least two courts have held that using illegal and unenforceable boilerplate terms amounts to an unfair and deceptive practice.[76] Moreover, some state statutes explicitly provide that using unconscionable terms in contracts constitutes an unfair and deceptive practice within the meaning of the UDAP statutes.[77]

One of these two cases *People v. McCale*,[78] may serve to illustrate this issue. The case concerned boilerplate contracts used by the operator of a park of mobile homes in California, a so-called trailer park. The defendant was the operator of the park. He had required his customers to sign "rules and regulations." These provided, inter alia, that customers with pets had to pay a monthly "pet fee" of $ 3.[79] Furthermore, they specified that customers receiving guests had to pay a monthly charge of $5 for each guest.[80] Both provisions violated California law, which contained a detailed statutory scheme on permissible fees for mobile home parks.[81] In addition,

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[74] 15 U.S.C. § 45(a)(1).

[75] CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (2012) (noting that "[a]ll fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace").

[76] *Cf.* Carter & Sheldon, *supra* note 75, at 323 (noting that the California and Massachusetts Supreme Courts have ruled that a landlord commits an unfair and deceptive practice by including illegal and unenforceable terms in a lease agreement even if the terms are not enforced).

[77] D.C. Code § 28-3904 (r) (making it an unfair and deceptive act or practice to "make or enforce unconscionable terms or provisions of sales or leases").

[78] 602 P.2d 731 (Cal. 1980).

[79] *Id.* at 735 n.2.

[80] *Id.*

[81] *Id.* at 735.

the rules and regulations provided that the operator could at any time close the park's recreation hall and that he was free to exclude any guests or residents from the hall's use.[82] This provision also violated California's rules on mobile home parks.[83] The Court noted that this could amount to an unfair and deceptive practice because "[w]hen a mobile home park operator requires tenants to sign park rules and regulations which the park is prohibited by law from enforcing, those tenants are likely to be deceived."[84]

Unfortunately, the protection offered by legislation against unfair and deceptive acts and practices turns out to be minimal. To begin, only a subset of scarecrow provisions as unfair and deceptive. Ordinary scarecrows, which are vague but not unconscionable, have never been classified as unfair and deceptive within the meaning of the relevant statutes.

Even more importantly, the remedies available under the statutes are insufficient to provide protection against scarecrows. UDAP statutes typically allow some state agency, often the Attorney General, to prohibit businesses from using certain practices as well as to the competent courts to impose fines.[85] However, given the broad scope of application of these statutes and the myriad possible violations, it is farfetched to believe that the relevant state agency will police boilerplate contracts. Therefore, it is up to consumers to ensure that the prohibitions against unfair acts and practices are enforced. Generally, consumers have a right of action. However, in most states, the consumer only has standing to sue if can demonstrate that he was injured by the relevant act or practice. In the case of scarecrow provisions, this requirement amounts to a Catch-22: if the consumer realizes that the scarecrow provision is invalid, then the consumer is not harmed by the provision. Accordingly, he has suffered no injury and therefore cannot sue. By contrast, if the consumer does not realize that the relevant provision is invalid, then the consumer is not aware that the merchant has engaged in an unfair act or practice and therefore fails to bring suit. Class actions might be a possible means to overcome this problem. However, the limitations of class actions have already been described. Moreover, some states explicitly bar class actions with respect to unfair and deceptive acts and practices.

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[82] *Id.* at 735 n.2.

[83] *Id.*

[84] *Id.* at 735.

[85] CAROLYN L. CARTER, A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 6 (2009).

In addition, the relevant legislation creates various other obstacles for consumers trying to fight unfair and deceptive acts and practices. For example, some states—including New York—only allow consumers to bring suit if they can show that the relevant deceptive act or practice has an impact on the public at large.[86] In other states, the consumer has to prove knowledge or intent on the part of the business,[87] a challenge that is extremely difficult to meet when it comes to the invalidity of contractual provisions.

In sum, legislation against unfair and deceptive acts and practices cannot be expected to provide meaningful protection against scarecrows.

4. Summary

It is clear, then, that the law offers only very incomplete protections against scarecrows. Essentially, it offers no protection against ordinary scarecrows; and the same is true for provisions using cautionary language in all but the most extreme cases. With respect to zombie provisions, the situation is slightly better. There, consumers can fight back via class actions, by invoking either the unconscionability doctrine or the so-called UDAP statutes. However, class actions have largely been devalued as a means of consumer protection, since companies are free to combine arbitration clauses with class waivers. In sum, there is now little protection against scarecrows.

IV. POSSIBLE REFORMS

What can be done to improve the protection of consumers against scarecrow provisions and thereby eliminate the transparency paradox?

A. Ordinary Scarecrows

[86] CARTER, *supra* note 85, at 19, 22 (noting that Colorado, Georgia, Minnesota, Nebraska, New York, South Carolina, and Washington fall into this category).

[87] *Id.* at 17 (noting that Colorado, Indiana, Nevada, North Dakota, and Wyoming fall into this category); Anthony Paul Dunbar, *Comment, Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 460 (1985).

The problem with ordinary scarecrows is that their use is actually legal. In principle, nothing prohibits merchants from using vague boilerplate. Hence, to ensure that such boilerplate become less popular, one would have to take two steps. First, one would have to impose some kind of prohibition. Second, one would have to ensure that merchants actually heed that prohibition.

1. Possible Prohibitions Against Opaque Clauses

One possibility would be to impose a far-reaching transparency requirement for boilerplate contracts with the consequence that all boilerplate provisions that fail to conform are void. Such a transparency principle is by no means unheard of. For example, the law of the European Union imposes a general requirement that boilerplate terms in consumer contracts "must always be drafted in plain, intelligible language."[88] To ensure that merchants do their best to observe this prohibition, clauses that fail to satisfy the transparency principle can be declared void.[89] That way, merchants are given a powerful incentive to use clear language in their boilerplate, for otherwise, they "lose" the relevant provision.

However, it is not clear that the benefits of such a provision outweigh its costs. To begin, the transparency principle adds greatly to legal uncertainty, since it is very difficult to say when a clause starts being sufficiently unclear to justify the application of the transparency principle. Moreover, a general transparency principle compounds the mistake of treating flytraps and scarecrows alike, even though the former are typically harmless whereas the latter are not. An obligation to draft boilerplate in a clear and unambiguous manner can impose substantial costs on merchants, especially if the transparency principle is applied strictly. Such a burden is difficult to justify in cases where the ambiguity does not pose a threat to the interests of consumers.

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[88] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Art. 5, O.J. L 95, April 21, 1993, p. 29. German law has long required boilerplate contracts to be clear in order to be valid, and this transparency principle is now explicitly enshrined in the German Civil Code. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, Bundesgesetzblatt [BGBl.], § 307 (1) (2) (Ger.).

[89] Whether article 5 of Council Directive 93/13/EEC requires that clauses failing to satisfy the transparency principle be declared void, is controversial. However, it is worth noting that at least some member states of the European Union have opted for this approach. For example, under German law, any boilerplate provision violating the transparency principle is null and void.

There is, however, a somewhat more gentle solution that avoids the drawbacks of a general transparency principle. One could adjust the unconscionability doctrine in a way that allows courts to better police opaque boilerplate.

What would these adjustments look like? To begin, courts should recognize that mere procedural unconscionability can be sufficient to render a boilerplate clause void. This would hardly be a revolutionary step given that some courts have already hinted that they are willing take that position. Moreover, extending the unconscionability doctrine in this way can be justified with relative ease not only from a policy perspective, but also doctrinally. The key insight is that opacity as such can impose a substantial burden on the consumer, most notably in those cases where such opacity prevents him from exercising his rights. Crucially, applying the unconscionability doctrine would allow courts to distinguish between scarecrows and flytraps. Because the latter are of little danger to consumers, courts can go easy on them. By contrast, with respect to scarecrows, a more rigorous application of the unconscionability doctrine will generally be appropriate.

Moreover, courts should secure the enforcement of the unconscionability doctrine by considering, much more than they currently do, the opacity of one clause in policing other, unrelated clauses. In other words, if a boilerplate has different clauses, some of which are scarecrows, the courts can react by policing other clauses in the same contract much more harshly. Thus, for merchants, using scarecrows would entail the risk of "losing" other provisions in the same contract.

2. Zombie Provisions

The rule that the use of scarecrows triggers a much more intense scrutiny of the contract's other provisions also proves helpful in fighting zombie provisions. Once a merchant has reason to fear that the zombie provisions in his boilerplate contracts will lead other provisions to be declared void, he may reconsider their use.

There are, of course, more far reaching options. Perhaps most obviously, one could try to revive class actions or at least class arbitration by declaring the combination of class waivers and arbitration clauses to be unconscionable. However, unless the U.S. Congress can be persuaded to change the Federal Arbitration Act, which has led the U.S. Supreme Court

to be extremely deferential to arbitration clauses and class waivers, this option is not in the cards.

One could also think about strengthening state statutes against unfair and deceptive acts and practices. In particular, one could allow competitors to sue firms using invalid boilerplate without the need to show actual injury. Such a move might prompt firms to police their competitors. However, the costs of such a rule would likely be substantial. The obvious danger is that firms would use such a rule to harass the competition. In particular, large established firms might bring multiple lawsuits against newer and smaller competitors with less legal expertise. The case of California suggests that such a scenario is not entirely implausible. California had UDAP legislation that essentially allowed firms to sue their competitors for the use of unfair or deceptive acts and practices without showing actual injury. This rule was so unpopular and was considered so hostile to the interests of small businesses that Californians eventually voted for a proposition to remove it.[90] While this does not prove conclusively that the rule's costs outweighed its benefits, the experience suggests that a less drastic approach may be preferable.

V. SUMMARY

Courts go to substantial length to fight boilerplate opacity. But they fail to make a crucial distinction—the distinction between those provisions that seem less burdensome than they are ("flytraps") and those provisions that seem more burdensome than they are ("scarecrows"). As I have shown in this essay, the former are largely harmless, whereas the latter carry substantial risks for consumers.

This insight has profound implications for the law on boilerplate contracts. The legal mechanisms currently used to police opaque boilerplate provisions prove to be ill-designed. They are highly effective at protecting consumers against dangers that are mostly illusory while doing little to combat the real problems.

[90] [Source].

Fortunately, it does not take much to address this imbalance. Relatively modest adjustments to the doctrine of unconscionability likely suffice to make an important step towards better consumer protection.