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Administrative Control and Consumer Exploitation in Standard Form Contracts

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A standard form contract—or contract of adhesion—is the most prevalent type of contract that consumers enter. Consumers routinely enter such contracts, which govern most business-to-consumer relationships. Consumers presumably accept the terms and conditions of multiple standard form contracts whenever they purchase, rent, subscribe, or otherwise use a product or a service a business offers.

Legislators, policymakers, courts, lawyers, and legal scholars have long been concerned about consumer standard form contracts. They recognized that these contracts—mostly offered on a take-it-or-leave-it basis—are prone to be one-sided and undermine consumers' rights and interests. This imbalance is especially pronounced over non-negotiable and non-salient terms, which consumers do not read, understand, or factor into their decision-making.

For example, many consumer contracts limit consumers' right to fair compensation in case of a breach and routinely limit consumers' access to justice. These contracts also allow businesses to unilaterally and non-transparently change a contract or end it. Indeed, empirical research establishes that many form contracts include legally invalid provisions.

In a recent article, we compared these hidden exploitative terms to viruses. We argued that, much like viruses, these potentially harmful terms are everywhere yet may seem benign or dormant much of the time. Consumers can easily find themselves agreeing to exploitative terms without ever being fully aware of the legal risks such terms entail. Just like a nasty virus, exploitative terms in consumer contracts are hard for consumers to detect, control, fight, and contain.

Currently, courts scrutinize consumer contracts mainly via the doctrine of unconscionability. This doctrine is an insufficient method to discipline sellers. Most consumers—particularly marginalized ones—do not challenge exploitative terms and do not have the resources or the confidence to litigate unfair terms. Furthermore, unconscionability is only a defense against highly abusive terms, so consumers cannot actively use it to challenge exploitative terms.

For these reasons, we argue that it is time to better wield the law as a preventative tool to protect consumers. As in many other contexts, "an ounce of prevention is worth a pound of cure." Instead of expecting uninformed consumers to challenge exploitative terms ex post, the law should prevent this type of exploitation to begin with.

Just like in the fight against an evasive virus, the best tactic to confront exploitative terms is not to chase them after the fact. A conscious preventative approach is more effective than allowing harmful boilerplate terms to flood consumer markets until consumers or regulatory bodies act. Accordingly, regulators and policymakers should seriously consider the idea of ex ante administrative oversight of consumer contracts.

Although regulating consumer contracts may seem complicated to enforce, the challenge should not be exaggerated. Public agencies—equipped with trained legal and economic personnel and sophisticated machine-learning language technologies—can shrewdly and cost-effectively monitor consumer contracts. Furthermore, agencies are better positioned than courts to protect consumers from exploitative terms. These agencies can detect, analyze, deter, and respond to the use of exploitative boilerplate before these terms harm consumers.

To make any regulation effective, the devil is in the details. We envision that the scrutinizing agency could systematically collect and analyze samples of widely distributed boilerplate across various economic sectors. The agency would then review these contracts, searching for exploitative boilerplate. When the agency finds evidence of serious and widespread danger to consumers, it would inform the drafting business of its findings. The agency would then

request the business to remove, revise, or justify the use of the suspect term.

If the agency does not reach a consensus with the drafting business, it should be vested with the authority to issue an order restraining further use of any exploitative provisions. Such an order should carry a civil or administrative penalty. In addition, the agency should publish these actions and penalties, so to encourage other market participants to improve their contracts. This will further amplify the system's overall effectiveness.

To be sure, the agency responsible for carrying out the scrutineering system would face serious challenges. It will need to avoid regulatory capture, build public trust in a newly established system, navigate political storms, and coordinate with other enforcement agencies. Another challenge is to carefully design the formal legal basis for the agency's authority to act and impose sanctions.
Tackling these challenges will require persistence, courage, resources, and vision. But given the enduring failures of the current system to protect consumers from exploitative boilerplate, the time is ripe to consider a conceptual shift.

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