FLYTRAPS, SCARECROWS, AND THE TRANSPARENCY PARADOX: THE CASE FOR REDESIGNING THE LAW ON VAGUE BOILERPLATE CONTRACTS

*Jens Dammann**

The vast majority of contracts today contain "boilerplate"—standard form contractual language prepared in advance and designed to be used over and over again. In practice, such boilerplate provisions are often written in such a way that few consumers can understand them. Therefore, courts and legislatures have developed various mechanisms to protect consumers against vague boilerplate provisions. For example, under the contra proferentem *doctrine, ambiguous contractual provisions are interpreted against the drafter. In this Article, however, I argue that the existing law on boilerplate contracts fundamentally misunderstands the dangers inherent in vague boilerplate provisions. Moreover, I show that relatively modest changes to existing legal doctrines would go a long way in improving the protection of consumers.*

TABLE OF CONTENTS

* William Stamps Farish Professor in Law, the University of Texas School of Law. For comments on an earlier draft, I am grateful to Ronen Avraham, David Gilo, Ariel Porat & Ariel Procaccia, as well as to workshop participants at the University of Texas School of Law and at the Buchmann Faculty of Law, Tel Aviv University.

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] A seemingly perennial feature of boilerplate terms is that they lack clarity.[2] Often, boilerplate provisions are written in a convoluted or overly technical manner, apt to obscure, rather than illuminate, their meaning.

Traditional law and economics analysis views this lack of clarity as an obstacle to the formation of efficient contracts: consumers who misunderstand the contract may be tricked into a one-sided bargain that they would not other-

1. *See, e.g.*, Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 723 (2008) (Boilerplate contracts "account for nearly all contractual relationships, including the most significant ones."); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002) ("[S]tandard forms govern contractual relationships."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) ("[N]early 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) ("[M]uch of boilerplate is ambiguous or incomprehensible."); Larry A. DiMatteo, *Strategic Contracting*: *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); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 840–41 (2006) (noting "boilerplate's lack of lucidity"); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002) (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) (Boilerplate contracts are often "expressed obscurely or in legal or technical jargon . . . ."); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1163 (1976) (Boilerplate contracts "will be written in obscure legal terms."); Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 350 (2011) (pointing out that boilerplate terms are frequently incomprehensible to the average consumer).

wise have concluded.[3] Moreover, even if consumers realize they do not understand the content of the boilerplate provision, the drafter still has an incentive to use inefficiently one-sided terms. As long as consumers are consciously or unconsciously uninformed about the content of boilerplate, rational sellers may see no reason to make their boilerplate more consumer friendly than necessary, even if the resulting terms are inefficient.[4]

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 so-called unconscionability doctrine, unclear boilerplate provisions are much more likely to be struck down than clear ones.[6] Indeed, legion are the instances where courts will strike down unclear or ambiguous boilerplate provisions.[7] For example, under Missouri law, indemnity provisions in contracts between employers and non-employers are invalid unless they are "clear and unequivocal."[8] The same is true under Texas law for contractual disclaimers of reliance.[9] And under Arizona law, boilerplate clauses in insurance contracts are void if they "cannot be understood by the reasonably intelligent consumer."[10]

At first glance, these and other mechanisms may seem to provide a reasonable level of protection against the dangers arising from vague boilerplate. In this Article, however, I argue that the law's approach to vague language in boilerplate contracts is fundamentally flawed. Contrary to what courts and legal scholars suggest, the mere finding that a clause is vague or difficult to understand is not always a reason for concern. Rather, one has to distinguish between two—not necessarily mutually exclusive—types of contractual opacity.

---

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). The German Bundesgerichtshof, Germany's highest court in civil law matters, has embraced this reasoning as well. *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] July 10, 1990, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2383, 2383 (1990) (noting that the consumer cannot protect his own interests if the standard form contract is not sufficiently clear).

4. *See, e.g.*, Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243–44 (1995) (pointing out that competition to undercut activity charges and interest rates forces other sellers to provide low-quality terms in their contracts); James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 212–13 (2013) (explaining the lemons problem of decreasing the quality of the nonsalient features and using savings to make the salient features more attractive); Andrew Tutt, *On the Invalidation of Terms in Contracts of Adhesion*, 30 YALE J. ON REG. 439, 460 (2013) (describing the "market for lemons" problem).

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. Cont'l Casualty Co., No. 93-16683, 1995 U.S. App. LEXIS 9102, at *3 (9th Cir. Apr. 18, 1995) ("Arizona no longer follows the rule that ambiguous insurance contracts should be automatically construed against the insurer.").

6. Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Potential Elements*, N.Y. ST. BAR J., Feb. 2000, at 26.

7. *See infra* note 57.

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

9. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 333–34 (Tex. 2011); Bever Props., LLC v. Jerry Huffman Custom Builder, L.L.C., No. 05-13-01519-CV, 2015 Tex. App. LEXIS 8089, at *29 (Tex. Ct. App. July 31, 2015).

10. Mann v. N.Y. Life Ins. Co., 83 F. App'x. 877, 880 (9th Cir. 2003) (applying Arizona law); Anderson v. Country Life Ins. Co., 886 P.2d 1381, 1388 (Ariz. Ct. App. 1994).

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

Of course, it is also possible for a boilerplate provision to look more burdensome than it really is. For example, a liability waiver can be worded in such a way that some consumers will read it to be broader than it actually is. Alternatively, 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 vague boilerplate provisions of this second type as *scarecrows* because, like real scarecrows, they are less dangerous than they appear (to birds).

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 conflict has arisen, the consumer may be tempted to sue or commence 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 conflict has arisen, the consumer may be deterred from asserting rights that he actually has because he underestimates his rights under the contract.[11]

While both types of provisions are grounds 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.

The law in its present form, however, 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 to combat 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.

11. In particular, the merchant may try to dissuade the consumer from litigation by invoking vague or misleading contractual provisions. *See infra* Part II. *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] July 9, 1992, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3158, 3161 (1992) (arguing that misleading contractual clauses may enable the drafter to attempt to frustrate the consumer's attempts to enjoy his rights under the contract).

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

II. BACKGROUND

Before delving into the complex issue of transparency, it is helpful to revisit the general challenge arising from boilerplate contracts. Boilerplate is difficult to understand and time-consuming to read; thus, consumers generally fail to read it.[12] As a result, an informational asymmetry arises between the drafting party and the nondrafting party. The former knows and understands the content of the contract while the latter does not.[13]

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

12. *See, e.g.*, Becher, *supra* note 1, at 724 ("[T]ypical consumers do not read" standard form contracts.); Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 2 (2009) ("Real people don't read standard form contracts."); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 984 (2006) ("[M]ost consumers do not read boilerplate provisions . . . ."); Katz, *supra* note 2, at 294 (arguing that, even in the presence of a strict duty to read, the nondrafting party will generally lack the incentive to read boilerplate contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) ("Virtually 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 . . . ."); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) ("[I]n the usual case, the consumer never even reads the form . . . ."). *But see* Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819, 826 (1992) ("[C]onsumers probably are familiar with the aspects of contracts that relate to product failure.").

13. As shown by David Gilo and Ariel Porat, competition between different merchants may help to reduce this informational asymmetry: a merchant who knows that some of his competitors use bad boilerplate may want to point this fact out to consumers. David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 WM. & MARY L. REV. 133, 164–65 (2010). Each producer's incentive to publicize bad boilerplate used by competitors depends on the circumstances, however, and there will often be equilibria in which no merchant has a sufficient incentive to do so. For example, if there are numerous producers that use myriad different types of bad boilerplate, then the benefits that any single firm derives from educating consumers about a particular bad provision used by a particular competitor may be marginal and may end up being outweighed by the costs of doing so. This problem is reinforced by the fact that the users of bad boilerplate may be able to adjust their own boilerplate very quickly and thereby frustrate efforts to educate consumers. *Cf. id.* at 170–78 (discussing various reasons why competition may be insufficient to close the information gap).

The informational asymmetry between merchants and consumers leads to a so-called "lemon problem."[14] Consumers are perfectly aware that they do not know the content of the contract. In other words, they know that the contract may contain either 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.[15] Merchants know this and understand that they will not be able to obtain a higher price for offering good boilerplate.[16] Moreover, because bad boilerplate is cheaper from the merchant's perspective, merchants will find it in their interest to offer only bad boilerplate. In the end, then, the market will contain only merchants using bad boilerplate. Consumers will adjust their expectations accordingly. The final result is a market in which merchants use only bad boilerplate, consumers expect to get bad boilerplate, and consumers are willing to pay only prices that are based on the assumption that the contract they are agreeing to contains bad boilerplate. Hence, we end up with an equilibrium, but an inefficient one.

To be clear, the inefficiency of a lemon market does not result from the fact that consumers overpay. They do not.[17] Rather, they expect bad boilerplate and pay a lower price reflecting that expectation.[18] 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 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*.[19] The idea is that if the parties cannot successfully bargain for good boilerplate, then the law should intervene 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 lead to a lemon problem.[20] Second, even if the market for boilerplate contracts 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.

14. 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, 489–90 (1970).

15. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995).

16. *Id.* at 244 (pointing out this problem with respect to boilerplate used by banks); Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 485 (1974).

17. *See generally* Akerlof, *supra* note 14 (explaining the inefficiencies caused by a lemon market, despite consumer knowledge of the product).

18. *Id.*

19. On the relative merits of these two strategies, see, for example, Korobkin, *supra* note 1, at 1247–54.

20. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 655 (1979).

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.[21]

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.[22] Because sellers do not want to lose these informed consumers as customers, they offer them reasonably "good" boilerplate contracts.[23] 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.[24] Accordingly, the "informed minority" functions as a guardian of the interests of all consumers.[25]

To what extent this line of reasoning succeeds is ultimately an empirical question, and one that may have different answers for different markets. There are at least two good reasons, however, to believe that the informed-minority 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.[26] An empirical study on the behavior of online retail software shoppers confirms this view.[27] The study found that "only one or two in 1,000 shoppers accesses a product's [end user license agreements] for at least one second."[28] Moreover, "most of the few shoppers who do access [it] do not, on average, spend enough time doing so to have digested more than a fraction of [its] content."[29] Unsurprisingly, the study's authors concluded that these numbers are hard to reconcile with the informed-minority argument.[30]

The second major challenge facing the informed-minority argument concerns the potential for discrimination. The existence of an informed minority

21. R. Ted Cruz & Jeffrey 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); Schwartz & Wilde, *supra* note 18, at 648–56.

22. Schwartz & Wilde, *supra* note 20, at 648–56.

23. *Id.* at 650.

24. *Id.* at 638.

25. *See, e.g.*, Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 936 (2006) ("When the market works effectively, however, [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").

26. *See* Becher, *supra* note 1, at 738 ("An informed minority is a questionable assumption.").

27. Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 4 (2014).

28. *Id.* at 3.

29. *Id.* at 32.

30. *Id.* at 27.

will protect uninformed consumers only to the extent that sellers cannot discriminate between informed and uninformed consumers.[31] 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 both online and offline merchants increasingly have the means to collect information about their customers,[32] the assumption that they are unable to distinguish between informed and uninformed customers will often be problematic. In sum, the 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.[33] Once a conflict has arisen, consumers are much more likely to read the contract. If the contract then turns out to be excessively one-sided, consumers 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.[34] The public at large may never learn that the merchant invoked a one-sided provision.[35] This is true even in those markets that would seem to be particularly conducive to transparency. Consider online shopping on websites such as Amazon.com, where customers can leave written comments and rate the seller. Even here, the use of bad 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.[36] Some sellers write their own reviews[37] or bribe customers into writing favorable reviews with re-

31. Cruz & Hinck, *supra* note 21, at 672; *see* Becher, *supra* note 1, at 746 ("Sellers can and do discriminate between informed and noninformed buyers."); Schwartz & Wilde, *supra* note 20, at 654, 663–66 (noting that the analysis becomes much more difficult in the presence of discrimination, which the authors concede "is a potentially serious concern").

32. Schwartz & Wilde, *supra* note 20, at 666.

33. *Cf.* Becher, *supra* note 1, at 750 ("[F]irms might draft efficient standardized terms in order to maintain or establish a good reputation among consumers."); Cruz & Hinck, *supra* note 21, at 663 (arguing that, at least in some markets, reputational constraints will deter drafters from using overly one-sided terms).

34. 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. *See* Becher, *supra* note 1, 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. If the relevant provision applies only rarely, however, 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. Put differently, since the provision applies rarely, the seller has little to gain from using it, and hence, even limited reputational damage will be sufficient to deter him from using it.

35. Becher, *supra* note 1, at 751.

36. David Streitfeld, *His Biggest Fan Was Himself*, N.Y. TIMES: BITS (Sept. 4, 2012 10:42 AM), https://bits.blogs.nytimes.com/2012/09/04/his-biggest-fan-was-himself/ (citing testimony according to which up to a third of all reviews are suspect).

37. *Id.* (citing an example of a writer who favorably reviewed his own book).

bates or freebies;[38] others simply purchase good reviews in bulk from "review factories."[39] 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.[40]

Third, once a conflict has arisen, merchants can often work their way around reputational concerns by discriminating between different types of customers.[41] 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 implementing their boilerplates. None of this implies that reputational concerns are always insignificant. They are bound to constrain merchants at least to some extent in at least some scenarios. In most cases, however, it is not clear that reputational concerns impose more than a relatively weak constraint.[42]

B. Will Courts Make Things Worse?

Assuming one believes in the existence of a lemon problem, one may still argue that judicial intervention may make things worse: courts may police boilerplate contracts too aggressively, resulting in the invalidation of boilerplate provisions that would be preferred by most consumers even in the absence of informational asymmetry. Although this prevents an inefficient low-quality equilibrium in which consumers pay low prices and get bad boilerplate, it may yield an even more inefficient outcome in which consumers pay high prices for high-quality boilerplate even though they would prefer medium-quality boilerplate at a medium price.

This line of reasoning, however, is not an objection against judicial policing as such. Rather, it concerns the mode and extent of judicial policing: prudent courts will invalidate only those boilerplate provisions that they are rea-

38. David Streitfield, *Give Yourself 5 Stars? Online, It Might Cost You*, N.Y. TIMES (Sept. 22, 2013), http://www.nytimes.com/2013/09/23/technology/give-yourself-4-stars-online-it-might-cost-you.html?mcubz=3.

39. David Streitfeld, *For $2 a Star, an Online Retailer Gets 5-Star Product Reviews*, N.Y. TIMES (Jan. 26, 2012), http://www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html (describing firms' practice of giving away free items and discounts in exchange for reviews); David Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for $5*, N.Y. TIMES (Aug. 19, 2011), http://www.nytimes.com/2011/08/20/technology/finding-fake-reviews-online.html ("As online retailers increasingly depend on reviews as a sales tool, an industry of fibbers and promoters has sprung up to buy and sell raves for a pittance."). Streitfeld cited the case of "a freelance writer who was hired by a review factory this spring to pump out Amazon reviews for $10 each . . . ." *Id.*

40. 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).

41. Becher, *supra* note 1, at 747–48 (noting that sellers, eager to preserve their reputation, will discriminate *ex post* based on a customer's assertiveness). The problem at issue here—namely that merchants can avoid adverse reputational consequences by discriminating between consumers—must be distinguished from another problem raised by David Gilo and Ariel Porat. As Gilo and Porat point out, merchants may be able to use boilerplate provisions as a vehicle for discriminating between customers since they know that some customers are more likely to read boilerplate provisions that others. Gilo & Porat, *supra* note 12, at 986.

42. *Cf.* Korobkin, *supra* note 1, at 1240 (arguing that reputational concerns are unlikely to be effective constraints with respect to nonsalient terms).

sonably sure would be rejected by most contracting parties in the absence of informational asymmetry. 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.[43]

III. 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 the lemon market described above.[44] After all, boilerplate contracts are notoriously difficult to understand,[45] and that is one reason why consumers do not read them.

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 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 if the relevant provisions are designed with the utmost care and written as unambiguously as possible.[46] Moreover, some jurisdictions already impose a general requirement that boilerplate provisions be written in a clear and understandable fashion.[47] Most notably, European Union law demands that boilerplate terms in consumer contracts "must always be drafted in plain, intelligible language."[48] In at least some European countries, such as Germany, courts enforce this requirement very strictly.[49] Yet even there, consumers almost never read boilerplate contracts.[50] In other words, it is safe to say that imposing a clarity requirement for boilerplate provisions makes no meaningful contribution to

43. *Cf.* Gilo & Porat, *supra* note 12, at 984 ("Most law and economics scholars agree that striking down harsh clauses included in boilerplate language could be justified when there is asymmetry of information—either factual or legal—between the supplier and consumers with respect to the harsh clause, which precludes consumers from fully understanding the effects of the clause on their legal rights.").

44. *See supra* note 2.

45. *Id.*

46. *Cf.* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 121 (2014).

47. Council Directive 93/13/EEC, art. 5, 1993 O.J. (L 95) 29 (EC) [hereinafter Council Directive]; BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 307, para. 1–2, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0934 (Ger.).

48. Council Directive, *supra* note 47.

49. 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], § 307, para. 1–2, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0934 (Ger.).

50. *E.g.*, Thomas Pfeiffer, *Einleitung* [*Introduction*], in WOLF/LINDACHER/PFEIFFER: AGB-RECHT (Thomas Pfeiffer et al. eds., 6th ed. 2013).

reducing the informational asymmetry and thereby overcoming the lemon market problem.

Hence, if the fight against boilerplate opacity is to be justified, it needs some *raison d'être* other than the unrealistic hope of eliminating the lemon problem. And in fact, the literature offers another clear reason for why vague boilerplate provisions are harmful: consumers who read but misunderstand unclear boilerplate provisions may be tricked into a one-sided bargain they would not otherwise have concluded.[51]

It is worth noting that this situation is very different from the one that gives rise to the lemon market. In the case of a lemon market, the consumer is aware that he does not know the quality of the boilerplate (conscious ignorance). Hence, the consumer refuses to pay a higher price than the one that is adequate for the *expected* quality of the boilerplate. By contrast, those who fear that the consumer may be tricked into a one-sided bargain assume that the consumer has read the boilerplate contract but has incorrect ideas about its meaning. In this case, the consumer believes he knows the quality of the boilerplate, but in fact, he is mistaken.

The view that vague boilerplate provisions are to be condemned because they trick consumers into assenting to undesirable contracts may seem theoretically satisfying. The threat posed by vague boilerplate provisions, however, is in fact more complex. To understand this threat, 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 really is ("flytrap"). On the other hand, it may seem more burdensome than it really 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 proceeding which ultimately proves unsuccessful. Scarecrows may prevent the consumer from asserting his rights once a dispute has arisen. But while both types of clauses are theoretically dangerous, scarecrows are a much greater threat to the interests of consumers in practice.

A. Flytraps

Despite the attention that the literature lavishes on the danger inherent in flytrap boilerplate provisions,[52] they pose relatively little risk to consumers. The vast majority of consumers do not read boilerplate before entering into contracts.[53] Accordingly, the risk that vague or misleading boilerplate provisions will prompt consumers to enter into contracts they would not otherwise have concluded is virtually nonexistent.

51. *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).

52. *E.g.*, *id.* at 747.

53. *See supra* note 11 and accompanying text.

What about the risk that consumers who misinterpret boilerplate provisions in their own favor are lured into costly litigation or arbitration proceedings which they ultimately lose? 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. In any case, given that most consumers are risk averse[54] and rather unlikely to commence litigation and arbitration except in rare cases,[55] the existence of an ambiguous boilerplate provision is very unlikely to prompt litigation or arbitration.

Moreover, merchants have little incentive to use flytrap boilerplate 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 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 nondrafting party, because he misunderstands the contract, may actually sue or initiate arbitration proceedings.[56] 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. Even if the conflict never escalates to a lawsuit or arbitration, denying a customer a right that he believes the contract grants him inevitably leads to customer dissatisfaction. The merchant can easily avoid this altogether by foregoing use of the flytrap. 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.

54. *See, e.g.*, Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029, 1065 (1991) ("[T]hese countermeasures must overcome the general risk averse attitude of consumers."); Jacob Nussim, *On a Passé Defense: Unjust Enrichment and the Recovery of Overpaid Taxes*, 18 SUP. CT. ECON. REV. 233, 248 (2010) ("Consumers . . . are typically believed to be risk-averse . . . ."); Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1066 (1984) ("[I]n the real world . . . consumers are more risk-averse than producers . . . ."); Stephen F. Williams, Commentary, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932, 938 (1993) ("Because we can assume consumers are risk-averse . . . .").

55. *See, e.g.*, Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 833 (2006) (noting that few consumers tend to be "willing and able to sue").

56. Obviously, some customers will consult an attorney before suing, and the attorney may be better at interpreting the contract than the consumer. Not all attorneys are good lawyers, however, and they face an obvious conflict of interest. They may be tempted to initiate litigation to earn the related fees rather than inform the consumer that her claim is doomed to fail.

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 contractual dispute has arisen, the consumer is much more likely to read the contract. 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, even if the consumer does not read the contract, once he contacts the merchant about the dispute, the merchant may invoke the relevant provision against the consumer. Either way, the relevant provision may lead the consumer to abstain from pursuing his rights further.

The New York case of *Spatz v. Axelrod Management*[57] may illustrate this point. There, an explicitly mandatory state law rule required that landlords of residential buildings compensate their tenants for damage caused by water leaks.[58] In clear violation of the relevant statute, the lease agreement between the plaintiff and the defendant contained boilerplate language excluding the landlord's liability for such damage.[59] 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 contact the landlord but give in once he invokes the liability waiver.

1. A Typology of Scarecrows

In practice, scarecrow provisions tend to come in different styles. Ordinary scarecrows are vague provisions that can be misinterpreted to be unfavorable for the consumer. Many simply use language that is open to very burdensome, though ultimately incorrect, interpretations. But there are two special types of scarecrow provisions that stand out.

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. The merchant may still be able to use the invalid provision, however, 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.[60]

57. Spatz v. Axelrod Mgmt. Co., 630 N.Y.S.2d 461 (City Ct. 1995).

58. *Id.* at 465.

59. *Id.*

60. *E.g.*, Burcham v. Procter & Gamble Mfg. Co., 812 F. Supp. 948 (E.D. Mo. 1993) (declaring unenforceable an indemnity provision that clearly violated the pertinent legal standards under Missouri law); Clement v. Farmers Ins. Exch., 766 P.2d 768, 780 (Idaho 1988) (finding a termination provision in an insurance

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 example can be found in the Massachusetts case *Leardi v. Brown*.[61] Under Massachusetts landlord and tenant law, there exists an implied warranty that premises are "fit for human occupation."[62] 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."[63] Technically, this clause was inapplicable because it violated state law. There is no question, however, 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 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 special cases 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.

Compared to zombies and cautionary language, 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. This 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?

contract to be "clearly unconscionable and exorbitant"); Graves v. Cupic, 272 P.2d 1020, 1025 (Idaho 1954) (finding damages provision to be "clearly unconscionable"); Ultrashmere House, Ltd. v. 38 Town Assoc., 473 N.Y.S.2d 120, 122 (N.Y. Sup. Ct. 1984) (A lease provision that "prohibit[ed] the tenant from asserting a 'defense' to any action or summary proceeding" was "clearly unconscionable."); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 280 (W. Va. 2002) (finding a boilerplate arbitration clause to be clearly unconscionable where it applied regardless of retailer's level of wrongdoing).

61. 474 N.E.2d 1094 (Mass. 1985).

62. *Id.* at 1099.

63. *Id.*

The answer is that the law imposes limits on how onerous the content of a clause can be. These limits can be contained in rules, such as legislation banning certain types of clauses in residential leases,[64] 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 appeal of ordinary scarecrows and of scarecrows using cautionary language 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 *Willden v. Washington National Insurance*[65] illustrates this problem. There, the plaintiff had entered into an accident and disability insurance contract, which promised certain benefits in case of injuries that "totally and continuously disable the Insured within 30 days of the date of the accident."[66] The plaintiff was subsequently injured in an automobile accident.[67] The trauma suffered in that accident precipitated the plaintiff's multiple sclerosis, and within a few years after the accident, the plaintiff became totally disabled.[68] The insurance company refused to pay on the grounds that total disability had not occurred within thirty days of the accident.[69]

In the ensuing litigation, the plaintiff's lawyers argued that the strict thirty-day limit was unduly burdensome and therefore unconscionable.[70] The court, however, rejected that argument, reasoning that the thirty-day clause had to be interpreted more narrowly than its wording suggested.[71] 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 thirty-day limit) as long as the "disability follow[ed] from an accidental injury within such time as the processes of nature consume in bringing the affected person to the state of total incapacity."[72] Because the clause had to be interpreted in this narrow fashion, it escaped the verdict of unconscionability.[73]

In *Wilden*, the insurance company could have 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 thirty days. But, as indicated by the court, that would have made the clause unconscionable.[74] Instead, the insurance company used a provision that stayed within the limits of the law, but could easily be misunderstood to impose a strict thirty-day limit. That way, the

64. *E.g.*, ALA. CODE § 35-9A-163 (2017); GA. CODE ANN. § 44-7-2 (2017); MONT. CODE ANN. § 70-24-202 (2017).

65. 557 P.2d 501 (Cal. 1976) (en banc).

66. *Id.* at 502.

67. *Id.*

68. *Id.* at 502–03.

69. *Id.*

70. *Id.* at 504.

71. *Id.* at 504–05.

72. *Id.* at 504.

73. *Id.* ("[Existing case law] clearly indicate[s] that similar provisions, *if* interpreted in accord with the process of nature rule, are not unconscionable.").

74. *Id.* at 504–05.

clause remained valid, and the insurance company still had a chance that their insured would think the clause precluded their claims. 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.[75] As a result, the jury found that the disability had not occurred within thirty days.[76] The plaintiff appealed, but the court of appeals refused to set aside the jury's finding on the grounds that it was the plaintiff's responsibility to seek more accurate jury instructions.[77] Had the insurance company used a less misleading clause that explicitly explained the process-of-nature rule, the outcome would likely have been different.

IV. 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.

A. Contra Proferentem

Consider first the doctrine of *contra proferentem*, under which courts will interpret contracts against the drafter.[78] Courts and scholars praise this rule for incentivizing the drafter to strive for clarity.[79] This assessment turns out to be simplistic, however.

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. Contractual ambiguity is resolved against the merchant and in favor of the consumer.

75. *Id.* at 504.
76. *Id.* at 503.
77. *Id.* at 504–05.
78. FARNSWORTH, *supra* note 5, at 459.
79. Klapp v. United Ins. Grp. Agency, Inc., 663 N.W.2d 447, 461 (Mich. 2003) ("[T]he rule of contra proferentem provides a strong incentive for a party drafting a contract to use clear and unambiguous language."); Econ. Premier Assur. Co. v. W. Nat'l Mut. Ins. Co., 839 N.W.2d 749, 755 (Minn. Ct. App. 2013) (noting that the *contra proferentem* doctrine provides an incentive to avoid ambiguities); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 310 (1985) (noting that the doctrine provides an incentive to avoid poorly drafted terms); David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 438 (2009) (asserting that the *contra proferentem* doctrine incentives drafters to be "precise").

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 doctrine usually does not encourage consumers to initiate a lawsuit or arbitration proceeding, so it does not help consumers avoid the risks inherent in scarecrows.

B. The Unconscionability Doctrine

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

1. A Brief Introduction to the Unconscionability Doctrine

In applying the unconscionability doctrine, courts generally distinguish between substantive and procedural unconscionability. Substantive unconscionability exists where the terms are "overly harsh and one-sided."[80] A mere imbalance is not enough, however. Rather, the contract must be "so one-sided as to 'shock the conscience.'"[81]

Procedural unconscionability concerns imperfections in the bargaining process.[82] Courts differ, though, on the question of what degree of imperfection constitutes procedural unconscionability. 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, provided that the other party is given no chance to renegotiate the terms of the contract.[83] Other courts have applied much more exacting standards for the consumer. For example, some courts deny unconscionability as long as the consumer had the ability to get the product or ser-

80. Pinnacle Museum Tower Assn. v. Pinnacle Market Dev. (US), LLC, 282 P.3d 1217, 1232 (Cal. 2012). Other courts use similar wordings. *See,* e.g., *Ex parte* Foster, 758 So. 2d 516, 520 n.4 (Ala. 1999) (quoting RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1998) ("[Substantive unconscionability] relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party . . . ."); *accord* Blue Cross Blue Shield of Ala. v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005); Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006) ("Substantive unconscionability refers to those terms which are inordinately one-sided in one party's favor."); State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798, 817 n.2 (Mo. 2015) (en banc) ("Substantive unconscionability means an undue harshness in the contract terms.") (alteration from original removed) (quoting State *ex rel.* Vincent v. Schneider 194 S.W.3d 853, 858 (Mo. 2006)).

81. *Pinnacle*, 282 P.3d at 1232.

82. *E.g.*, Ex parte *Foster*, 758 So. 2d at 520 n.4 (proposing that procedural unconscionability is "a deficiency in the contract-formation process"); *accord Blue Cross*, 923 So. 2d at 1087; Cheshire Mortg. Serv. v. Montes, 612 A.2d 1130, 1134–35 n.14 (Conn. 1992); Nec Techs., Inc. v. Nelson, 478 S.E.2d 769, 771 (Ga. 1996).

83. *See* Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 541–42 (N.J. 2016) ("[A] contract of adhesion . . . necessarily involves indicia of procedural unconscionability.").

vice from another provider without agreeing to the relevant clause,[84] placing the burden of proof on the consumer.[85]

Therefore, it is not surprising that courts also differ on the role that a provision's opacity plays in the context of procedural unconscionability. Many courts give at least some weight to the question of whether the consumer could reasonably be expected to understand the contract,[86] and some courts specifically mention the role of vague or complex language in this context.[87] For example, according to the Nevada Supreme Court, "the use of. . . misleading or complicated language. . . indicates procedural unconscionability."[88] In the same vein, the Illinois Supreme Court has defined procedural unconscionability as referring to cases where a contractual provision "is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it."[89]

The question remains whether contractual opacity (procedural unconscionability) alone can be sufficient to render a boilerplate provision unconscionable or whether such opacity can only prompt a verdict of unconscionability if the relevant provision is also unduly harsh and one-sided (substantive unconscionability). The answer depends on how one views the relationship between procedural and substantive unconscionability. In many jurisdictions, both substantive and procedural unconscionability must be present for a clause to be unconscionable.[90] Courts following this approach often note, however, that where one element is particularly strong, the other may be weaker.[91]

In other jurisdictions, substantive unconscionability alone is deemed sufficient to apply the unconscionability doctrine.[92] Whether mere procedural un-

84. *Blue Cross*, 923 So. 2d at 1086; *see* Leeman v. Cook's Pest Control, Inc., 902 So. 2d 641, 648 (Ala. 2004) (stating there was no procedural unconscionability because buyer failed to shop around).

85. *Blue Cross*, 923 So. 2d at 1086.

86. Basulto v. Hialeah Auto., 141 So. 3d 1145, 1157 n.3 (Fla. 2014); Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622–23 (Ill. 2006); *Rodriguez*, 138 A.3d at 541; Hayes v. Oakridge Home, 908 N.E.2d 408, 413 (Ohio 2009); Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 403 (Utah 1998); Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996); Nationstar Mortg., LLC v. West, 785 S.E.2d 634, 645 (W. Va. 2016).

87. *E.g.*, Wattenbarger v. A.G. Edwards & Sons, Inc., 246 P.3d 961, 974 (Idaho 2010); Smith v. Express Check Advance of Miss., LLC, 153 So. 3d 601, 609 (Miss. 2014); MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 177–78 (Miss. 2006); Equifirst Corp. v. Jackson, 920 So. 2d 458, 463 (Miss. 2006); Gonski v. Second Jud. Dist. Ct. of Nev., 245 P.3d 1164, 1169 (Nev. 2010); Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 35 (Or. 2014); Kirby v. Lion Enters, Inc., 756 S.E.2d 493, 500 n.10 (W. Va. 2014).

88. *Gonski*, 245 P.3d at 1169.

89. *Razor*, 854 N.E.2d at 623.

90. *Blue Cross*, 923 So. 2d at 1087; Urban Invs., Inc. v. Branham, 464 A.2d 93, 99 (D.C. 1983); SA-PG Sun City Ctr., LLC v. Kennedy, 79 So. 3d 916, 921 (Fla. Dist. Ct. App. 2012); *Wattenbarger*, 246 P.3d at 974; Machado v. System4 LLC, 28 N.E.3d 401, 414 (Mass. 2015); Henderson v. Watson, No. 64545, 2015 WL 2092073, at *1 (Nev. Apr. 29, 2015); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 924 (N.D. 2005); *Nationstar*, 785 S.E.2d at 645; Pingley v. Perfection Plus Turbo-Dry, LLC, 746 S.E.2d 544, 550 (W. Va. 2013).

91. *E.g.*, Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1232 (Cal. 2013); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); *Gonski*, 245 P.3d at 1169; *Henderson*, 2015 WL 2092073, at *1; *Nationstar*, 785 S.E.2d at 645.

92. Maxwell v. Fid. Fin. Servs., 907 P.2d 51, 59 (Ariz. 1995); Smith v. Mitsubishi Motors Credit of Am., 721 A.2d 1187, 1192 (Conn. 1998); Cordova v. World Fin. Corp., 208 P.3d 901, 908 (N.M. 2009); Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 829 (N.Y. 1988); Res. Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1043 (Utah 1985); Glassford v. BrickKicker, 35 A.3d 1044, 1049 (Vt. 2011); Adler v. Fred Lind Manor, 103 P.3d 773, 782 (Wash. 2004).

conscionability may also suffice in these jurisdictions is often less clear. Some courts have explicitly left this question open.[93] A handful of courts have stated in *obiter dicta* that procedural unconscionability alone may be enough to void a contractual provision.[94] Even in the latter jurisdictions, however, one generally searches in vain for cases in which contracts were actually found unconscionable based on mere procedural unconscionability alone.[95]

2. 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 in two 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. For such a clause to be a 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. Clauses that merely grant benefits, however, 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 if it confers a benefit.

93. *Maxwell*, 907 P.2d at 59; *Mitsubishi Motors*, 721 A.2d at 1192 n.10.

94. Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 409–10 (Ill. App. Ct. 1st Dist. 1980); Gandee v. LDL Freedom Enters., Inc., 293 P.3d 1197, 1199 (Wash. 2013); Hill v. Garda CL Nw., Inc., 308 P.3d 635, 638 (Wash. 2013).

95. *Cf.* Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998) (stressing that mere procedural unconscionability will "rarely" suffice to render a clause void); Knight Adjustment Bureau v. Lewis, 228 P.3d 754, 757 n.4 (Utah Ct. App. 2010) (noting that a contract will "rarely" be judged to be unconscionable based on mere procedural unconscionability); FARNSWORTH, *supra* note 5, at 302 ("Courts have resisted applying the doctrine where there is only procedural unconscionability without substantive unfairness."). In some cases, where a clause might have been held to be unconscionable based on pure procedural unconscionability alone, the court ultimately denied the presence of procedural unconscionability. *E.g.*, Townsend v. Quadrant Corp., 224 P.3d 818, 828 (Wash. Ct. App. 2009); Tjart v. Smith Barney, Inc., 28 P.3d 823, 830 (Wash. Ct. App. 2001).

3. 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 violate the unconscionability doctrine. Recall that according to the prevailing view, unconscionability always requires at least some degree of substantive unconscionability.[96] Hence, as long as scarecrow provisions stay within the limit of what is substantively acceptable, they avoid falling afoul of the unconscionability doctrine. Second, and more importantly, even to the extent the unconscionability doctrine applies, this may not help consumers. The damage done by scarecrows lies in the fact that they may deter consumers from suing or otherwise asserting their rights; and that the unconscionability doctrine does not change this outcome unless consumers know that the pertinent provision of the contract is invalid. In other words, scarecrows generally retain their deterrent effect even when they are invalid. Indeed, zombie provisions are invalid by definition, yet they still prevent consumers from asserting their rights.

The picture becomes more complicated once one takes into account class actions.

4. 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 class actions on behalf of consumers hurt by the use of unconscionable or otherwise invalid boilerplate provisions. For example, assume that a large cell phone company has been using an unconscionable fee schedule to scam 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*,[97] the U.S. Supreme Court made it clear that companies are free to combine an arbitration clause with a class waiver in consumer contracts.[98] In other words, the mere fact that a clause contains an arbitration agreement with a class waiver does not

96. *See supra* Subsection IV.B.1.

97. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

98. *Id.* at 356–57; *see* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 179–90 (2015) (arguing that companies are now free to avoid class actions by combining arbitration provisions with class action waivers); 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, 388 (2011) ("The 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 class-wide arbitration but also class actions in court.").

make that clause invalid.[99] In practice, such clauses are now standard,[100] 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. In many cases, these conditions are not fulfilled. For example, many landlords only rent out a very limited number of apartments or houses, so the tenants would be unable to form a sufficiently large class. Accordingly, the threat of class actions cannot be expected to be an effective bar to the use of scarecrows in consumer contracts.

C. 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) of the Federal Trade Commission ("FTC") Act,[101] but also in state legislation that all U.S. states and the District of Columbia have adopted in some form.[102]

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."[103] These statutes are relevant to the point at hand because they provide a potential remedy against what I have called zombie provisions—provisions keep being used in boilerplate despite the fact that they are known to be unconscionable and therefore void.

Some state statutes explicitly provide that using unconscionable terms in contracts constitutes an unfair and deceptive practice within the meaning of the

99. George 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.

100. Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477, 494 (2014) (noting the "ubiquity of consumer class arbitration waivers"). The fact that mandatory arbitration clauses are common in consumer contracts is widely understood. *E.g.*, Fitzpatrick, *supra* note 98, at 164 ("[A]rbitration agreements have become a routine part of the commercial world. Businesses insist on these agreements in their contracts with their customers . . . ."). The leading empirical study on the use of arbitration clauses in consumer contract remains Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008). This study predates the *Conception* decision, and the authors do not discuss class waivers. Even then, however, the authors found that over 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. 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). In the studied sample, the percentage of franchise contracts using arbitration agreements increased from 62.6% before *Concepcion* to 63.6% after *Concepcion*. *Id*. As the authors of this study readily concede, however, franchising agreements are not consumer contracts, and their results cannot be generalized to consumer contracts. *Id.* at 960–61.

101. 15 U.S.C. § 45(a)(1) (2012).

102. CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (2012) ("All 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.").

103. 15 U.S.C. § 45(a)(1) (2012).

UDAP statutes.[104] Moreover, even if the relevant statutes do not explicitly mention the use of illegal boilerplate as an example of an unfair and deceptive practice, courts may nonetheless come to the same conclusion. Indeed, at least two courts have held that using illegal and unenforceable boilerplate terms amounts to an unfair and deceptive practice.[105]

One of these cases, *People v. McKale*,[106] 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.[107] The defendant was the operator of the park, and he had required his customers to sign "rules and regulations."[108] These provided, *inter alia*, that customers with pets had to pay a monthly "pet fee" of $3.[109] Furthermore, they specified that customers receiving guests had to pay a monthly charge of $5 for each guest.[110] Both provisions violated California law, which contained a detailed statutory scheme on permissible fees for mobile home parks.[111] In addition, the park's rules and regulations provided that the operator could close the park's recreation hall at any time and that he was free to exclude any guests or residents from the hall's use.[112] This provision also violated California's rules on mobile home parks.[113] 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."[114]

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 are unfair and deceptive. Ordinary scarecrows, which are vague but not unconscionable, are not considered 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 a state agency, often the Attorney General, to prohibit businesses from using certain practices, and they also authorize competent courts to impose fines.[115] Given the broad scope of application of these statutes and the myriad possible violations, however, it is far-fetched to believe that the relevant state

104. D.C. CODE § 28-3904(r) (2017) (making it an unfair and deceptive act or practice to "make or enforce unconscionable terms or provisions of sales or leases").

105. *Cf.* CARTER & SHELDON, *supra* note 102, 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).

106. 602 P.2d 731 (Cal. 1979).

107. *Id.* at 733.

108. *Id.* at 735.

109. *Id.* at 735 n.2.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 736.

115. CAROLYN L. CARTER, A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 6 (2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

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. But in most states, the consumer only has standing to sue if he can demonstrate that he was injured by the relevant act or practice.[116] In the case of scarecrow provisions, this requirement amounts to a catch-22. On the one hand, if the consumer realizes that the scarecrow provision is invalid, then he is not harmed; and if he has suffered no injury, he cannot sue. On the other hand, 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 will not sue. Class actions might be a possible means to overcome this problem, but recall the limitations of class actions described above.[117] Moreover, some states explicitly bar class actions with respect to unfair and deceptive acts and practices.[118]

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.[119] In other states, the consumer has to prove knowledge or intent on the part of the business,[120] 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.

D. Summary

It is clear, then, that the law presently offers only incomplete protections against scarecrows. Essentially, it provides no protection against ordinary scarecrows and only protects against the most extreme cases of clauses using cautionary language. As to zombie provisions, the situation is only slightly better. Consumers can fight back via class actions, invoking either the unconscionability doctrine or the so-called UDAP statutes. Class actions have largely been devalued as a means of consumer protection, however, since companies are free to combine arbitration clauses with class waivers. In sum, there is currently little protection against scarecrows.

116. *Id.* at 3.

117. *See supra* Subsection IV.B.4.

118. Jacques deLisle & Elizabeth Trujillo, *Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135, 158 (2010).

119. CARTER, *supra* note 115, at 22 (noting that Colorado, Georgia, Minnesota, Nebraska, New York, South Carolina, and Washington fall into this category).

120. *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 (1984).

V. POSSIBLE REFORMS

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

A. Reinforcing the Unconscionability Doctrine

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 heeded that prohibition.

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."[121] To ensure that merchants do their best to observe this prohibition, clauses that fail to satisfy the transparency principle can be declared void.[122] That way, merchants are given a powerful incentive to use clear language in their boilerplate, for otherwise they "lose" the relevant provision.

It is not clear, however, 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 becomes 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.

There is, however, a somewhat gentler 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

121. Council Directive, *supra* note 47, art. 5. German law has long required boilerplate contracts to be clear in order to be valid, and this transparency principle is now explicitly enshrined in BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 307(1)–(2), *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0934 (Ger.).

122. Whether article 5 of Council Directive 93/13/EEC requires that clauses failing to satisfy the transparency principle be declared void is controversial. It is worth noting, however, 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. BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 307(1)–(2), *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0934 (Ger.).

courts have already hinted that they are willing to take that position.[123] 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 all boilerplate clauses when questioning the opacity of a specific clause. In other words, if a boilerplate contract 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.

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

B. More Radical Solutions

There are, of course, more far-reaching options. Perhaps most obviously, one could try to revive class actions, or at least class arbitration, by having a court declare the combination of class waivers and arbitration clauses unconscionable. But unless the U.S. Congress can be persuaded to change the Federal Arbitration Act, which has led the Supreme Court to be extremely deferential to arbitration clauses and class waivers,[124] 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 change could be to 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. The costs of such a rule would likely be substantial, however. 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 reaction to California's UDAP statute 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

123. *E.g.*, Lindemann v. Eli Lilly & Co., 816 F.2d 199, 203 (5th Cir. 1987).
124. *Cf.* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013).

practices without showing actual injury.[125] 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.[126] 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.

VI. CONCLUSION

Courts go to substantial lengths 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 Article, the former are largely harmless, whereas the latter carry substantial risks for consumers.

This insight has profound implications for the law on boilerplate contracts: it reveals that the legal mechanisms currently used to police opaque boilerplate provisions are ill-designed. These methods are highly effective at protecting consumers against dangers that are mostly illusory while doing little to combat the real problems. Fortunately, it does not take much to address this imbalance. Relatively modest adjustments to the doctrine of unconscionability would likely suffice to make an important step towards better consumer protection.

125. *E.g.*, Matthew K. Wegner, *The Revitalization of a Valuable Cause of Action for Competitors:* Clayworth v. Pfizer*'s Implications for UCL Standing in Competitor Lawsuits*, J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 14, 15 (2010).

126. *Id.*