
MESSY CONTRACTS

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This Article is the first to empirically examine whether firms draft well-organized online contracts that consumers can easily read, navigate, and analyze. “Messy Contracts,” as this Article dubs them, are contracts that lack organizational signals in the form of a table of contents and informative headings. Analyzing the sign-in-wrap agreements employed by the most popular 100 websites—such as Google, Facebook, LinkedIn, TikTok, Walmart, Twitter, Instagram, YouTube, and Amazon—this Article finds that businesses routinely draft messy contracts.

The importance of this finding goes beyond what initially meets the eye. Messy contracts (1) reduce consumers’ comprehension; (2) impose excessive cognitive costs on consumers, consumer advocates, watchdog organizations, and adjudicators who wish to read or navigate the contract or part of it; (3) undermine consumers’ ability to remember the contracts’ content, and (4) deter consumers from reading contracts. Furthermore, messy contracts indicate that competition over contract terms is lacking and that firms can utilize the features of the online environment to draft consumer contracts without accounting for consumers’ needs more generally. Alarming, messy contracts may also denote that term ignorance may drive consumers’ assent. In all, messy contracts facilitate exploitation, often harming the most vulnerable consumers.

Part II of this Article provides the theoretical background to messy contracts. It contextualizes the problem of messy contracts, linking them to the ‘no-reading’ problem and delineating their social costs. Part III contains the empirical test of this Article. It discusses the sample contracts, the empirical methodology, and our results. Against this background, Part IV considers the normative implications of messy contracts, suggesting ex ante regulatory measures and ex post judicial scrutiny. It also acknowledges the limitations of our proposals and replies to key critiques.

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I. INTRODUCTION

Consumer standard form contracts have been the most prevalent type of contracts for decades.¹ Coupled with their unprecedented proliferation online, consumer form contracts affect numerous aspects of our modern lives.² Among other things, consumers encounter standardized terms and conditions online

1. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (noting, more than half a century ago, that “[s]tandard form contracts probably account for more than ninety-nine percent of all of the contracts now made”).

2. See generally David Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367 (2023) (detailing how the internet contributed considerably to the spread of form contracts and arguing that portable devices facilitate “our swelling empire of forms”).

when signing up for social media accounts,³ shopping and playing online,⁴ booking flights, restaurants, and hotels,⁵ interacting with financial institutions,⁶ or joining a rewards program or a gym.⁷

Whereas standard form consumer contracts reduce transaction costs and streamline commerce, they depart from conventional contracts in many ways.⁸ Firms unilaterally draft standard form contracts and offer them to consumers on a take-it-or-leave-it basis.⁹ Hence, the literature criticizes the conceptual foundations of consumer contracts, arguing that these contracts often include one-sided, unfair terms to which consumers do not genuinely assent.¹⁰ Scholars also point

3. See, e.g., *Terms of Service*, TIKTOK, <https://www.tiktok.com/legal/page/row/terms-of-service/en> (Feb. 2021) [<https://perma.cc/98BD-CHR9>] (TikTok's terms and conditions); *User Agreement*, LINKEDIN, <https://www.linkedin.com/legal/user-agreement> (Feb. 1, 2022) [<https://perma.cc/3MZA-D7BB>] (LinkedIn's standard form contract).

4. See, e.g., *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM> (Sept. 14, 2022) [<https://perma.cc/329M-EENS>] (Amazon's terms and conditions); *PlayStation Network Terms of Service and User Agreement*, SONY, <https://www.playstation.com/en-us/legal/psn-terms-of-service/> (Aug. 2023) [<https://perma.cc/VXW2-7GVB>] (Sony PlayStation's terms and conditions).

5. *Terms of Service*, EAT, <https://restaurant.eatapp.co/terms> (Oct. 19, 2023) [<https://perma.cc/5W65-R4TA>] (terms and conditions of a restaurant reservation app); *General Terms and Conditions of Holiday Inn Bern Westside*, HOLIDAY INN, <https://www.ihg.com/holidayinn/content/gb/en/deals/hotel-offers/meeting-rooms/tc> (May 2015) [<https://perma.cc/TXY9-W9KA>] (Holiday Inn's terms and conditions).

6. See, e.g., *Terms & Conditions*, JPMORGAN, <https://www.jpmorganchase.com/about/terms-and-conditions> (last visited Jan. 16, 2024) [<https://perma.cc/4CGG-YV2Z>] (detailing the standardized terms of JPMorgan Chase).

7. See, e.g., *Hilton Honors Terms & Conditions*, HILTON, <https://www.hilton.com/en/hilton-honors/terms/> (Aug. 16, 2023) [<https://perma.cc/C7BH-53LQ>]; *Membership Terms & Conditions*, ANYTIME FITNESS, <https://www.anytimefitness.co.nz/terms-conditions/> (last visited Jan. 16, 2024) [<https://perma.cc/N7JA-FA5H>] (providing terms and conditions for different types of gym membership).

8. See generally Omri Ben-Shahar, *Foreword to Boilerplate: Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821 (2006) (discussing key aspects in which consumer form contracts generate a major divide within contract law and concluding that boilerplate is a different legal phenomenon from contract); Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 748 (2009) (explaining that form contracts and the conventional paradigm of contract law "seem to have nothing in common").

9. This led academics to criticize form contracts and view them skeptically. For some of the earlier influential accounts, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUM. L. REV. 629 (1943) (employing the term "contracts of adhesion" and explaining the ways in which standard form contracts—which are an inherent byproduct of the mass-production economy—deviate from fundamental assumptions of traditional contract law); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362–71 (1960) (using the metaphor of laying one's head into a lion's mouth to illustrate the risks that standard form contracts pose to unsuspecting consumers); Slawson, *supra* note 1 (arguing that the utilization of standard form contracts that govern contractual relationships with numerous consumers grant firms with unchecked and unbalanced lawmaking power).

10. The literature here is voluminous. For a few persuasive examples, see Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1162 (1976) (opining that form contract terms "are candidates for nonenforcement"); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970) (opining that contracts of adhesion are drafted by one party only and are not a result of a negotiation process between collaborating parties); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 3–52 (2013) (detailing the ways in which consumer form contracts undercut fundamental consumer rights and the imperative need to better police these contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction*, 96 HARV. L. REV. 1173, 1175 (1983) (noting there is little consensus on how to

out that consumers typically do not read consumer contracts before accepting them, thus aggravating contractual information asymmetries and exacerbating consumers' inferior bargaining position.¹¹

Yet, the literature neglects to consider the role that contractual structure and organization (or lack thereof) play in the long-lasting puzzle of consumer contracts. This failure is particularly essential to address given the promise and perils of online contracting. On the one hand, firms can easily use digital tools—such as hyperlinks, dynamic design features, and a hyperlinked table of contents—to improve their contracts' form, design, functionality, and structure. Such tools can advance the market for contract terms and make consumer contracts easier to read, navigate, and understand.

On the other hand, firms can take advantage of the online environment to blur and mask inconsiderate, unethical, or even illegal practices.¹² As the term “Dark Patterns” suggests, the online environment provides businesses ample opportunities to manipulate and exploit consumers' vulnerabilities.¹³ In the context of consumer contracts, online contracting makes it easier and cheaper than ever before to draft lengthy contracts, design them in non-user-friendly ways, incorporate unfair or illegal terms, and obscure consumer access to them by, for example, hiding them in inconspicuous links.¹⁴ Such contracting practices, in turn,

approach consumer form contract and relating this to the fact that “contracts of adhesion can be understood only as a collection of disparate deviations from the paradigm of ‘ordinary’ contract law”).

11. Of course, there are different reasons that lead consumers to not read contracts, which highlight the importance of approaching the issue from multiple perspectives. *See, e.g.*, Robert A. Hillman & Jeffery J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 432 (2002) (delineating economic, psychological, and social factors that contribute to non-readership); Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contracts*, 47 STAN. L. REV. 211, 243 (1995) (employing the one-shot transactions vs repeat transactions contrast to explain why consumers (as one-shot players) do not accord much attention to standardized terms); Melvin A. Eisenberg, Comment, *Text Anxiety*, 59 S. CAL. L. REV. 305, 305 (1986) (opining that information overload and language complexity create anxiety toward form contracts and deter consumers from reading them); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 593 (2014) (criticizing the efforts to encourage consumers to read form contracts and suggesting instead that firms engage in “term substantiation”).

12. *See* David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1599 (2016) (suggesting that firms may discriminate among consumers based on their different views regarding online contract formation and enforceability of online contracts); David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 J. EMPIRICAL LEGAL STUD. 90, 91 (2021) (suggesting that the online contracting environment may facilitate the proliferation of unenforceable terms in leases).

13. *See* Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2019, at 1 (using the term “[d]ark patterns” to refer to online interface design choices that manipulate users); *see also* OECD, DARK COMMERCIAL PATTERNS (Oct. 2022), <https://www.oecd-ilibrary.org/docserver/44f5e846-en.pdf?expires=1705463916&id=id&acname=guest&checksum=99E52084BFE241703EBD1C81CF5BD7C6> [<https://perma.cc/T9LK-EXMM>] (defining dark commercial patterns, documenting their prevalence and harms, and identifying possible policy and regulatory responses to counter them).

14. *See* sources cited *supra* note 12; *see also* Shmuel I. Becher & Uri Benoliel, *Hidden Contracts*, 49 BYU L. REV. 307, 317 (2023) (documenting firm's tendency to amend online contracts and subsequently remove the amended version from their websites despite consumers' need to access them); Tim R. Samples, Katherine Ireland & Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKELEY TECH. L.J. 47, 53–67 (noting the increased length of social media contracts and describing the profound ways in which contracting has changed during the digital era).

can undercut the capacity of policymakers, regulators, academics, and courts to respond properly to the challenges that consumer form contracts raise.

This Article is the first to empirically examine whether online firms draft messy contracts, which consumers find hard and intimidating to decipher and navigate. Messy contracts, as this Article defines them, are consumer standard form contracts that fail to include two key organizational signals: (1) a table of contents, and (2) informative headings.¹⁵ Such writing devices emphasize and clarify the structure of the contract subject matters.¹⁶

Messy contracts, which lack these organizational devices, hinder comprehension, increase reading and search costs, and hamper readers' ability to recall the text.¹⁷ Alarming, messy contracts challenge consumers' willingness to read their agreements even once a dispute or a problem arises.¹⁸ That is, even if most consumers routinely enter into contracts without reading them, organizational signals can help ex post, once consumers wish to challenge the firm or determine whether their disappointment may give rise to a valid legal claim. Moreover, messy contracts can harm intermediaries, the media, watchdogs, and consumer organizations that may wish to study, benchmark, and report on consumer contracts and related trends.

More profoundly, messy contracts can denote that term ignorance and contractual confusion may drive consumers' assent. This is particularly worrying because, as courts repeatedly state, "[m]utual manifestation of assent . . . is the touchstone of contract."¹⁹ Indeed, courts are somewhat erratically—and perhaps often unconsciously—acknowledging the role of form, formatting, and appearance of legal texts.²⁰ In the context of consumer contracts, fair notice and the opportunity to read one's contract play a central role in judicial decision-making.²¹ Following this logic, courts often examine what may seem like small

15. See discussion *infra* Section II.B (defining and discussing the features of messy contracts). Importantly, there is no one agreed-upon definition of "messy" texts, and different readers may have different intuitions as to what a messy contract is. Our characterization of messy contracts is more of a starting point and a call for reflection than an attempt to provide a well-agreed, encompassing, or scientific definition.

16. See discussion *infra* Section II.B.

17. See discussion *infra* Subsections II.C.1–II.C.3 (discussing the harmful consequences of messy contracts).

18. See discussion *infra* Subsection II.C.4 (explaining the negative impact of messy contracts on consumers' propensity to read form contracts).

19. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002).

20. See discussion *infra* Section IV.A (detailing regulatory rules around text appearance in various domains).

21. See, e.g., *Selden v. Airbnb, Inc.*, 4 F.4th 148, 157–58 (D.C. Cir. 2021) (observing which red text was "set off from the surrounding black text"); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) (examining the user interface to "conclude that the design of the screen and language used render the notice provided reasonable"); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990) (requiring conspicuous indemnity language in insurance contracts); *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 681 (11th Cir., 2018) (highlighting the all-capped words "IMPORTANT" and "READ CAREFULLY BEFORE OPENING [THE] BUNDLE" in finding a mandatory arbitration clause in a shrinkwrap contract binding).

technical contractual aspects. These include interface design, text font face, text size and color, the use of all-caps or bold, and conspicuousness.²²

Beyond driving ill-informed assent, messy contracts may indicate something even deeper: that competition is lacking, and that firms can exploit the online environment to draft consumer contracts without adequately attending to consumers' needs and preferences. Messy contracts are not user-centric. As such, they are likely to increase transaction costs,²³ decrease certainty, exploit consumers, and often harm the most vulnerable ones.²⁴ Thus, the end result of messy contracts may be low-quality and inefficient contracts that rest on doubtful consumer assent. They may also prevent consumers from realizing their rights and obligations, undermining their ability to make informed decisions in cases of contractual breaches or disputes.

To illustrate the relevance of messy contracts and the issues they raise, imagine it is February 2023. Super Bowl LVII is fast-approaching, and you decide to upgrade your TV viewing experience.²⁵ You purchase online a new home theater system. It is a massive 65-inch LED TV that promises to deliver crisper fields of vision and ever-deeper soundscapes that will make listening to Rihanna's halftime performance an unforgettable event.²⁶ Excited, you invite family and friends over to watch the Super Bowl together.²⁷

Disappointingly, the system does not arrive by the guaranteed delivery date.²⁸ You contact the retailer, who acknowledges the problem and promises

22. See cases cited *supra* note 21.

23. For a general discussion of how firms benefit from excessive transaction costs, see Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1663 (2006) (examining why, when, and how firms unduly benefit from inflated transaction costs and the law could respond).

24. See, e.g., Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 827 (2022) (finding selective enforcement patterns where mortgage servicers choose to impose a disproportionate rate of foreclosures on borrowers in poor neighborhoods); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 313 (2012) (suggesting that assertive and vocal consumers who make requests and complaints are likely to be wealthy and well-educated); see also Meirav Furth-Matzkin, *Discriminatory Enforcement of Consumer Contracts: Evidence from the Retail Market* 23 (N.Y.U. Sch. L., Working Paper, 2021) (on file with authors) (finding that pro-consumer deviations from the legal framework that governs business-to-consumers is more likely to occur vis-à-vis while white consumers in comparison to African-Americans).

25. Many online websites suggest this is a good time to purchase a new TV. See, e.g., PopSci Staff, *Right Before the Super Bowl is a Good Time to Buy a Fancy New TV*, POPULAR SCI. (Jan. 29, 2021, 4:01 PM), <https://www.popsci.com/super-bowl-tv-deals/> [<https://perma.cc/Y7Z7-ZC5B>]; Jennifer Jolly, *Is It Stupid to Buy a TV Right Before the Super Bowl?*, USA TODAY, <https://www.usatoday.com/story/tech/columnist/2017/01/29/stupid-buy-tv-right-before-stupid-bowl/97098590/> (Feb. 13, 2017) [<https://perma.cc/V6HQ-D7BK>].

26. On fans' high expectations of this event, see Chloe Barth, *Rihanna Is Hosting the 2023 Super Bowl Halftime Show*, Her Campus (Nov. 18, 2022), <https://www.hercampus.com/school/manhattan/rihanna-is-hosting-the-2023-super-bowl-halftime-show/> [<https://perma.cc/EQS7-ANPD>].

27. According to Wikipedia, 30 of the 32 most-watched broadcasts are Super Bowls. *List of Most Watched Television Broadcasts in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_most_watched_television_broadcasts_in_the_United_States (Oct. 5, 2023, 12:30 AM) [<https://perma.cc/G8HB-G5TR>].

28. Delays in delivery became rather prevalent recently, and the internet offers numerous articles advising businesses on how to deal with delays and the corresponding negative impact on consumer trust and satisfaction. See, e.g., Lydia Saad, *Most U.S. Consumers Have Felt Supply Chain Problems*, GALLUP (Aug. 11, 2021), <https://news.gallup.com/poll/353312/consumers-felt-supply-chain-problems.aspx> [<https://perma.cc/3SRL-38DY>].

delivery “within 48 hours.” Three more days pass, and you still have not received the home theatre system. The Super Bowl is now just two days away. Frustrated, you purchase the home theatre system from a local brick-and-mortar store, albeit at a higher price. You then inform the online retailer that you want to cancel the transaction. The retailer refuses.

Irritated, you decide to investigate your legal rights and options. After consulting with a friend who studies law, you realize that the consumer standard form contract that governs your relationship with the online retailer is of paramount importance. Thus, you wish to read the contract you accepted online before purchasing the system.

Now assume you can read one of the following two contract versions: the first is well-structured. It includes essential organizational signals, such as a table of contents and informative headings. The second version has identical content to the first agreement; however, it is unstructured and has no organizational signals. Naturally, you would prefer to read the well-structured version of the contract.

But what if the retailer had only offered you the disorganized version of the agreement? In that world, many consumers—particularly vulnerable ones—would likely find the messy contract impenetrable, experience text anxiety, and give up reading the contract.²⁹ Naturally, consumers who face messy contracts would also be more likely to forgo their rights and avoid confronting the online retailer. Importantly, the harm of messy contracts goes beyond the individual consumer. Messy contracts deter consumers from reading contracts and enforcing their rights, thus facilitating the incorporation of imbalanced, unfair, and even illegal terms.³⁰

Despite the potential negative consequences of messy contracts, the literature on this topic is scant. Specifically, there is no empirical work systematically testing whether consumer contracts are indeed messy, and—if so—in what aspects. This Article empirically examines whether the consumer standard form contracts offered by 100 giant global online businesses, such as Google,

(reporting on survey that found that 57% of American adults experienced considerable delays in product delivery); Josué C. Velázquez & Ken Cottrill, *How to Get Consumers to Accept Slower Deliveries on Online Orders*, WALL ST. J. (July 21, 2022, 11:00 AM), <https://www.wsj.com/articles/consumers-slower-deliveries-orders-11658150259> [<https://perma.cc/Y55A-4CVQ>] (quoting research that suggests communicating to consumers the environmental benefit of longer delivery times would appease them); see also Jules, *How to Deal With Shipping Delays (and Keep Your Customers Happy)*, EASYSHIP (Apr. 13, 2022), <https://www.easyship.com/blog/shipping-delays-tips> [<https://perma.cc/UMD5-F326>]; Holly Stanley, *What Causes Shipping Delays? How They Impact Retailers and How to Deal With Them*, SHOPIFY (June 10, 2022), <https://www.shopify.com/retail/shipping-delays> [<https://perma.cc/9ECL-77T7>] (discussing, among other things, changing in shipping strategies aimed at reducing the impact of global shipping delays).

29. Many vulnerable consumers are less educated and are thus also less likely to read and understand their contracts and identify issues with firms' behavior. Cf. Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 728–29 (1977) (“At the problem perception stage, individuals of low socioeconomic status notice fewer problems.”).

30. See discussion *infra* Subsection II.C.4.

Facebook, and Amazon, are well-organized or disorganized (“messy”).³¹ The focus on the consumer contracts of the most popular 100 websites reveals to what type of contracts billions of consumers worldwide are subordinated.³²

Notably, our empirical study offers lessons that go beyond the specifics of messy contracts. It elucidates that to fully understand contracts and anticipate or influence consumers’ responses to them, it is necessary to examine contracts holistically. That is, one cannot merely focus on specific contract terms and study them in isolation. Accordingly, a key feature of such a holistic view is moving beyond the individual contractual clauses and examining the contract’s form and presentation. We opine that the legal community should recognize that firms not only make conscious decisions about drafting the contract’s content, but also about its design. Correspondingly, this Article also highlights that regulators, courts, and contract law scholarship should accord more attention to contracts’ formatting and appearance.³³ It further supplements this call with a suite of concrete proposals for regulators and courts.³⁴

The remainder of this Article proceeds in three steps. Part II provides the theoretical context for the empirical test of this study.³⁵ It discusses prior empirical studies on consumer contract readability and the contribution of this paper to the existing literature.³⁶ Subsequently, it defines messy contracts and examines their social costs.³⁷ It further explains that consumers are not the only victims of messy contracts, and that such contracts also impose excessive reading costs on other stakeholders.³⁸ Against this background, Part III presents the empirical test of this study.³⁹ It reviews the data that underlines the test and discusses its methodology.⁴⁰ It then details the results of this study’s testing, which indicate that standard form contracts of big global firms are often too messy.⁴¹ Finally, Part IV discusses policy and legal implications.⁴² It suggests ex ante preventative

31. See discussion *infra* Part III.

32. For example, the mega social networks Facebook, YouTube, Instagram, and TikTok have approximately 7.8 billion active users (2.9, 2.5, 1.4, and 1 billion, respectively). See Stacy Jo Dixon, *Most Popular Social Networks Worldwide as of July 2023, Ranked by Number of Monthly Active Users*, STATISTA, <https://www-statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (Oct. 11, 2023) [<https://perma.cc/BVF5-HA5C>]. Likewise, the popular online retailers Amazon, eBay, and Walmart have over 4.2 billion monthly visits (3.1 billion, 596 million, and 571 million, respectively). See Stephanie Chevalier, *Most Visited Online Retail Websites Worldwide in 2022, by Average Monthly Traffic*, STATISTA, <https://www-statista.com/statistics/274708/online-retail-and-auction-ranked-by-worldwide-audiences/> (Oct. 11, 2022) [<https://perma.cc/SR2P-N38S>].

33. See also Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862, 863 (2020) (“Contract scholarship tends to pay relatively little attention to contract formatting and appearance.”).

34. See discussion *infra* Section IV.A (recommending introducing a duty to organize contracts); Section IV.B (highlighting various judicial tools to tackle messy contracts).

35. See discussion *infra* Part II.

36. See *infra* Section II.A.

37. See *infra* Section II.C.

38. See discussion *infra* Section II.C.

39. See *infra* Part III.

40. See *infra* Part III.

41. See *infra* Section III.C.

42. See *infra* Part IV.

regulatory measures and ex post judicial scrutiny of messy contracts.⁴³ It also addresses key critiques.⁴⁴

II. THEORETICAL BACKGROUND

This Part provides the theoretical conceptualization of messy contracts. Section A places the topic in a broader empirical context, namely the (un)readability of consumer contracts and contract design.⁴⁵ Thereafter, Section B defines the features of what this Article dubs “messy contracts.”⁴⁶ Finally, Section C delineates the four key social costs of messy contracts.⁴⁷

A. *Prior Research*

Previous scholarship examines various features that make ordinary contracts inaccessible, impenetrable, inconsiderate, or dysfunctional. One such stream of research focuses on the readability of consumer contracts—that is, the ease with which consumers can read and understand the written text.⁴⁸ This line of research adopts a linguistic perspective to assess how difficult it is for consumers to read and understand the content of form contracts. To that end, the studies typically employ formulas that calculate the average syllable-count in each word and the average word count in each sentence.⁴⁹

Applying this methodology, one important study measured the readability level of online End User License Agreements (“EULAs”) provided with software products, finding (among other things) that EULAs were generally difficult to read.⁵⁰ Another study examined the readability level of the Terms of Use (“TOUs”) of U.S. and foreign social media websites.⁵¹ The authors found that the TOUs were written at a reading level beyond the comprehension of the average American.⁵² Yet another study examined the readability of a heterogeneous

43. See *infra* Sections IV.A–B.

44. See *infra* Section IV.C.

45. See *infra* Section II.A.

46. See *infra* Section II.B.

47. See *infra* Section II.C.

48. See Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 253 (2013) (examining EULAs); Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1446 (2014) (studying social media user contracts); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2258 (2019) (investigating the readability of popular online consumer contracts).

49. See sources cited *supra* note 48.

50. See Marotta-Wurgler & Taylor, *supra* note 48, at 243, 250–51, 253 (examining in depth the EULA, an “important type of online standard-form contract”).

51. See Rustad & Koenig, *supra* note 48, at 1437.

52. *Id.* at 1456 (“Our empirical study confirms that . . . social media providers are drafting onerous rights-foreclosure clauses at a reading level substantially beyond the comprehension of the average consumer.”). Another study, conducted by the Consumer Financial Protection Bureau, showed that arbitration clauses in a sample of consumer financial agreements are difficult to read. See CONSUMER FIN. PROT. BUREAU, ARB. STUDY, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A)

sample of popular online contracts,⁵³ finding virtually all of them unreadable for the average consumer.⁵⁴ It thus comes as a little surprise that consumers generally do not read their form contracts (aka the “no-reading” problem).⁵⁵

Another stream of research, more universal in nature, considers how contract design can benefit (or harm) the contracting parties and their ability to understand and use contractual information.⁵⁶ In the context of consumer form contracts, one study indicated the all-caps letters in consumer contracts fail to enhance the quality of consumer consent to contractual terms,⁵⁷ and may even harm older consumers.⁵⁸ Additionally, the literature generally explores how contract drafters can use different design patterns and tools—such as timelines, icons, and comics—to make contracts more readable, user-friendly, and accessible.⁵⁹

This Article adds to these studies by moving beyond linguistics and design and empirically considering structure and organization in consumer contracts. Its key contribution lies in its novel perspective: focusing on organizational signals—such as a table of contents and informative headings—which impact the ability, willingness, and cost of reading and comprehending the consumer contract.⁶⁰ Whereas scholars have generally noted the importance of drafting

27–29 (2015) (asserting that arbitration clauses were generally “more complex” than the contract’s remaining clauses).

53. See generally Benoliel & Becher, *supra* note 48.

54. *Id.* at 2277–79.

55. See generally sources cited *supra* note 11.

56. See, e.g., Ruth Filik, Kevin Purdy, Alastair Gale & David Gerrett, *Drug Name Confusion: Evaluating the Effectiveness of Capital (“Tall Man”) Letters Using Eye Movement Data*, 59 SOC. SCI. & MED. 2597, 2597 (2004).

57. Arbel & Toler, *supra* note 33, at 865 (“The evidence shows that all-caps fails to improve consumer consent in any appreciable manner.”).

58. *Id.*

59. See, e.g., Helena Haapio & Stefania Passera, *Contracts as Interface: Visual Representation Patterns in Contract Design*, in LEGAL INFORMATICS 213, 226 (Daniel Martin Katz, Ron Dolin & Michael J. Bommarito eds., 2021) (“Timelines help to explain complex processes by illustrating which steps need to be taken, when they need to be taken, and in what order.”); Arianna Rossi et al., *When Design Met Law: Design Patterns for Information Transparency*, DROIT DE LA CONSOMMATION 79, 108 (2019) (companion icons “can attract attention, efficiently support information finding, especially in long texts, and understanding, also bolstering memorization”); Robert Waller, Jenny Waller & Sandi Morrisseau, *Cooperation Through Clarity: Designing Simplified Contracts*, 21 J. STRATEGIC CONTRACTING & NEGOT. 48, 65, tbl.I (2016) (topic icons “provide graphics that break up the text, and highlight particular topics”); Arianna Rossi & Gabriele Lenzini, *Transparency by Design in Data-informed Research: A Collection of Information Design Patterns*, 37 COMPUT. L. & SEC. REV. 1, 11 (2020) (comics can “motivate young people, people with low (scientific) literacy, and non-native speakers to read”); ROB WALLER, CONTRACT DESIGN FOR HUMANS: PREVENTING COGNITIVE ACCIDENTS 24–25 (Marcelo Corrales, Helena Haapio & Mark Fenwick eds., 2020) (contract explanations “may be best done with diagrams, pictures, comic strips or video clips”).

60. See discussion *infra* Section II.C.

contracts in a user-friendly way,⁶¹ no empirical studies systematically examine how “messy” consumer contracts actually are.⁶²

B. *The Features of Messy Contracts*

This Article defines messy contracts as standard form agreements that fail to consistently or effectively include contractual organizational signals. As we employ the term here, contractual organizational signals are writing devices that a contract drafter incorporates in the text to emphasize and clarify the structure of the contract subject matters.⁶³ These signals include two major basic writing devices: (1) a table of contents,⁶⁴ and (2) informative headings.⁶⁵

As in many other types of documents, a contract’s table of contents is a linear list of the major legal subjects covered by the agreement.⁶⁶ It is normally placed at the beginning of the contract.⁶⁷ The table of contents organizes the

61. See generally sources cited *supra* note 59; RESEARCH HANDBOOK ON CONTRACT DESIGN (Marcelo Corrales Compagnucci, Helena Haapio & Mark Fenwick eds., 2022).

62. Cf. Arbel & Toler, *supra* note 33, at 872–73 (“While we know that many consumer contracts are liberal with their use of polysyllabic words and difficult, tortured grammatical constructions, we know very little about their formatting.”).

63. See, e.g., Robert F. Lorch, Jr. & Elizabeth Puzles Lorch, *Effects of Organizational Signals on Text-Processing Strategies*, 87 J. EDUC. PSYCH. 537, 537 (1995) [hereinafter *Effects of Organizational Signals on Text-Processing Strategies*] (“Organizational signals are writing devices that emphasize the topics of a text and their organization”); Robert F. Lorch, Jr. & Elizabeth Puzles Lorch, *Effects of Organizational Signals on Free Recall of Expository Text*, 88 J. EDUC. PSYCH. 38, 38 (1996) [hereinafter *Effects of Organizational Signals on Free Recall of Expository Text*] (“Organizational signals include a variety of writing devices designed to emphasize the structure of an expository text.”); CarolAnne M. Kardash & L. Kent Noel, *How Organizational Signals, Need for Cognition, and Verbal Ability Affect Text Recall and Recognition*, 25 CONTEMP. EDUC. PSYCH. 317, 317 (2000) (“[W]e define organizational signals as any writing devices that emphasize the topics of a text and their organization”); Robert F. Lorch, Jr. & Elizabeth Puzles Lorch, *Effects of Headings on Text Recall and Summarization*, 21 CONTEMP. EDUC. PSYCH. 261, 261–62 (1996) [hereinafter *Effects of Headings on Text Recall and Summarization*] (“Writers use [organizational signals] . . . to emphasize the organization of topics in the text.”).

64. Salomé Cojean & Eric Jamet, *Does an Interactive Table of Contents Promote Learning from Videos? A Study of Consultation Strategies and Learning Outcomes*, 2021 BR. J. EDUC. TECH. 1, 4 (using the title “Tables of contents as organizational signals”).

65. *Effects of Organizational Signals on Text-Processing Strategies*, *supra* note 63, at 537 (“Examples of organizational signals include headings”); *Effects of Organizational Signals on Free Recall of Expository Text*, *supra* note 63, at 38 (organizational signals “include headings”); *Effects of Headings on Text Recall and Summarization*, *supra* note 63, at 261 (organizational signals include headings); Kristin Ritchey, Jonathan Schuster & Jaryn Allen, *How the Relationship Between Text and Headings Influences Readers’ Memory*, 33 CONTEMP. EDUC. PSYCH. 859, 860 (2008) (“[O]rganizational signals [include] headings, which direct readers’ attention to the overall organization, or hierarchical structure, of the text.”).

66. See, e.g., Lee Petherbridge & Christopher A. Cotropia, *Should Your Law Review Article Have an Abstract and Table of Contents?: An Empirical Analysis*, 85 MISS. L.J. 295, 298 (2016) (“A table of contents is a list of the parts of a document arranged in the order in which they appear.”); Philippe Salembier et al., *Description Schemes for Video Programs, Users and Devices*, 16 SIGNAL PROCESSING: IMAGE COMM’N 211, 213 (2000) (under a table of contents “[t]he order in which the items are presented follows the linear structure of the book itself”).

67. *Table of Contents in Legal Contracts*, LAWRIINA, <https://lawrina.com/blog/table-of-contents-in-legal-contracts/> (last visited Jan. 14, 2024) [<https://perma.cc/38FD-86VT>] (“Normally the Table of Contents will be at the start of your document”).

contract topics—as reflected in the contract headings—into a hierarchical overview.⁶⁸ It splits the contract into elementary pieces, such as clauses and sub-clauses.⁶⁹ These pieces are organized in the table of contents in the order in which they appear in the agreement.⁷⁰ Figure 1 below depicts the illustrative contract table of contents of LinkedIn’s user agreement.⁷¹ A contract table of contents serves as an important organizational signal, yet messy contracts fail to include this significant writing device.

FIGURE 1: ILLUSTRATIVE TABLE OF CONTENTS OF A USER AGREEMENT

Table of Contents:	
1.	Introduction
2.	Obligations
3.	Rights and Limits
4.	Disclaimer and Limit of Liability
5.	Termination
6.	Governing Law and Dispute Resolution
7.	General Terms
8.	LinkedIn "Dos and Don'ts"
9.	Complaints Regarding Content
10.	How To Contact Us

Another organizational signal that messy contracts fail to include consistently is informative headings. These headings may consist of a single word, a phrase, or a sentence describing the topic of the following contractual clause or subclause.⁷² Informative headings, as opposed to uninformative ones, identify the specific contents of the contract clauses that follow relatively clearly.⁷³ To

68. See, e.g., Liang-Yi Li, Wen-Lung Huang & Chin-Chung Tsai, *Development and Evaluation of a Video Playing Interface with Headings and Table of Contents*, 28 INTERACTIVE LEARNING ENV'TS 948, 949 (2020) (“A table of contents organizes the headings into a hierarchical overview.”).

69. Salembier et al., *supra* note 66, at 213 (“The Table of Contents is a hierarchical representation that splits the document into elementary pieces . . .”).

70. *Id.*

71. See generally LINKEDIN, *supra* note 3.

72. Robert F. Lorch, Jr., *Text-Signaling Devices and Their Effects on Reading and Memory Processes*, 1 EDUC. PSYCH. REV. 209, 216 (1989) (“A heading may consist of a single word or phrase naming the topic of the subsequent subsection . . .”).

73. Cf. Robert F. Lorch, Jr., Julie Lemarié & Russell A. Grant, *Three Information Functions of Headings: A Test of the SARA Theory of Signaling*, 48 DISCOURSE PROCESSES 139, 141 (2011) (“A heading that identifies the topic of a text section provides the reader with potentially important contextual information for understanding the content of the subsection.”); Ritchey et al., *supra* note 65, at 866 (a heading can be “related (i.e., shared argument overlap) to one of the subtopics and unrelated (i.e., shared no argument overlap) to the other subtopic in the following paragraph.”); Marie Lippmann, Neil H. Schwartz, Neil G. Jacobson & Susanne Narciss, *The Concreteness of Titles Affects Metacognition and Study Motivation*, 47 INSTR. SCI. 257, 260 (2019) (“[C]oncrete titles are easier to comprehend than abstract titles . . .”).

illustrate, the heading used in Airbnb's consumer agreement, titled "Limitations on Liability," is fairly informative.⁷⁴ It signals to potential contract readers that the clause that follows the heading may limit the liability of the contracting parties or third parties to certain types of damages.

Conversely, messy contracts with no consistent, informative headings may fail to include any heading above a contract text. To illustrate, the contract provided by Discord, an online communication platform, has text with no heading. The text includes various topics, such as: (1) an explanation of the definition of various seminal contract terms; (2) the incorporation of various policies, including Discord's privacy policy, into its binding terms; and (3) a statement that the contract includes a class action waiver clause.⁷⁵ An organized contract would utilize several distinct informative headings, such as "Definition of Contract Terms," "Supplemental Contractual Policies," and "Class Action Waiver" to distinguish among the various contract sections and provisions. Discord, however, chose to include all these subjects under a single text with no heading(s).

Instead of failing to include any headings above a contract's text, messy contracts may alternatively contain general non-informative headings. To illustrate, consider the heading used in eBay's consumer contract, titled 'General'⁷⁶—a heading that is broad, vague, and uninformative. In fact, eBay's 'General' clause addresses various important issues, including, for example, eBay's discretion and ability to amend and terminate the agreement and how a consumer shall file a complaint. Here too, the contract could have tackled these issues under several distinct informative headings, such as 'Contract Termination,' 'Contract Amendment,' and 'Filing Complaints.' Nonetheless, eBay chose to bundle all these various issues under a broad and uninformative heading.

In sum, we use the term 'messy contracts' to refer to agreements with two features: the lack of a table of contents, and the failure to systematically employ informative headings. We next explain why messy contracts are problematic and merit legal scrutiny.

C. *The Social Costs of Messy Contracts*

Clear and well-organized standard form contracts have multiple benefits. First, some consumers may wish to read standard form contracts *ex ante* (that is, before signing them)—especially if these contracts were well-organized and easy to comprehend—to better assess the costs, risks, and benefits involved before entering into the agreement.⁷⁷ Messy contracts make such reading costlier and

74. *Terms of Service, art. 19*, AIRBNB, <https://www.airbnb.com/help/article/2908/terms-of-service> (Jan. 25, 2023) [<https://perma.cc/HCA6-4XLE>].

75. *Discord's Terms of Service*, DISCORD, <https://discord.com/terms> (Feb. 24, 2023) [<https://perma.cc/EDC9-LZ3B>] (the contract text within the table of contents and the first heading, "Who we are," lacks a heading).

76. *User Agreement, art. 19*, EBAY, <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259> (Oct. 28, 2023) [<https://perma.cc/CE9H-6Z2X>].

77. *Cf. Trust and Privacy—Digital Consumer Trends 2020*, DELOITTE, <https://www2.deloitte.com/ie/en/pages/technology-media-and-telecommunications/articles/digital-consumer-trends/digital-consumer-trends->

more daunting. Potentially, therefore, clear and systematically organized agreements may assist consumers in better understanding the parties' rights and obligations *ex ante*.

We acknowledge that most consumers do not read their contracts *ex ante*, and that organized contracts may not solve this problem.⁷⁸ Nonetheless, many consumers may wish to read the contracts *ex post* after signing them and once a contractual problem arises (e.g., delivery delay or product defect, as in the example above).⁷⁹ In such a case, a well-structured contract, with a detailed table of contents and informative headings, may assist consumers in better understanding their contractual rights and duties.⁸⁰

For instance, a clear and well-ordered contract, as opposed to a messy contract, could help a consumer who bought a product from an online retailer to understand better who bears the contractual risk of loss for the product upon its delivery to the carrier—the retailer or the consumer. Similarly, an organized contract may help consumers better understand in which state or court they can file a lawsuit against a supplier who breaches the contract.⁸¹ Additionally, once a legal dispute between consumers and suppliers arises, adjudicators may be required to read these contracts to resolve the conflict effectively.⁸²

Clear and well-organized standard form contracts may not only benefit consumers and adjudicators who wish to read the contract *ex post*. Consumer lawyers and watchdog organizations may sometimes wish to read standard form contracts to understand how to protect and advance consumers' rights and interests.⁸³ Similarly, the media may choose to read such contracts, monitor firms' behavior, and report on how firms use their power *vis-à-vis* consumers.⁸⁴

trust-and-privacy.html (last visited Jan. 16, 2024) [<https://perma.cc/5D5L-BCKQ>] (“Over 80% of respondents accept terms and conditions ‘always,’ ‘almost always’ and ‘sometimes’ without reading them”, indicating a considerable minority who may wish to sometimes, at least selectively, read their contracts). *But see* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1 (finding that only “one or two of every 1,000 retail software shoppers access the license agreement and that most of those who do access it read no more than a small portion”).

78. We return to this issue in detail *infra* Section III.C.

79. Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 216 (2010) (“[M]ost potential consumers report a clear tendency to read SFCs [standard form contracts] as a first reaction once a legal dispute arises.”).

80. See discussion *infra* Subsection II.C.1.

81. *Fteja v. Facebook*, 841 F. Supp. 2d 829, 831 (S.D.N.Y. 2012) (ruling that according to Facebook’s standard form contract, the plaintiff should bring his case against Facebook in California, not New York).

82. See, e.g., *King v. Facebook, Inc.*, 572 F. Supp. 3d 776, 787–90 (N.D. Cal. 2021) (ruling, based on the contract text, that Facebook breached the implied covenant of good faith).

83. See, e.g., *Breach of Contract Lawyers in Washington D.C.*, HKM, <https://hkm.com/washingtondc/breach-of-contract/> (last visited Jan. 16, 2024) [<https://perma.cc/M99X-UGUB>] (“The first thing your lawyer will do [before filing a breach of contract lawsuit] is review the contract so that they can understand each party’s terms and obligations.”).

84. See Shmuel I. Becher & Tal Z. Zarsky, *Online Consumer Contracts: No One Reads, but Does Anyone Care?*, 12 JERUSALEM REV. LEGAL STUD. 105, 109–10 (2010) (discussing the importance and relevance of press and media interest in consumer form contracts). For some concrete media examples, see Khadeeja Safdar & Laura Stevens, *Banned from Amazon: The Shoppers Who Make Too Many Returns*, WALL ST. J. (May 22, 2018, 5:30 AM), <https://www.wsj.com/articles/banned-from-amazon-the-shoppers-who-make-too-many-returns->

In our analysis below, we employ the term “contract readers” to refer not only to consumers, but also to all other potential stakeholders who may wish to occasionally read consumer form contracts: lawyers, judges, consumer organizations, policymakers, regulators, and the media.

Whereas structured and well-organized standard form contracts have the potential to benefit contract readers, messy contracts generate undesirable costs to readers. These costs are of four major types: (1) comprehension difficulty; (2) increased reading and search times; (3) memory obstruction; and (4) reading deterrence. We next explain each of these costs.

1. *The Reading Stage: Comprehension Inhibition*

Readers of messy contracts comprehend less than readers of structured contracts. By neglecting to reveal the organization of their complex text,⁸⁵ messy contracts fail to provide powerful structural cues that (1) help readers anticipate content, and (2) aid them in forming mental models of information.⁸⁶ Consequently, messy contracts increase the cognitive overload associated with complex contracts,⁸⁷ thereby undermining the readers’ cognitive attention and ability to comprehend and dissect the text.⁸⁸

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01 [<https://perma.cc/B6GJ-5KWM>] (reporting on Amazon’s practice to ban users without explanation for returning a large number of orders); Michael Corkery, *Amazon Ends Use of Arbitration for Customer Dispute*, N.Y. TIMES, <https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html> (Sept. 28, 2021) [<https://perma.cc/4LVH-8GLV>] (discussing Amazon’s switch from arbitration to litigating consumer disputes); Jacob Goldstein & Alexi Horowitz-Ghazi, *Terms of Service*, NPR (Mar. 4, 2020, 7:11 PM), <https://www.npr.org/2020/03/04/812264543/episode-976-terms-of-service> [<https://perma.cc/5QY3-7TT9>] (a podcast on an incident relating to a bad review and terms of service); Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That’s Exempt.*, WALL ST. J. (Sept. 13, 2021, 10:21 AM), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353> [<https://perma.cc/P8VN-4Q7N>] (claiming that Facebook discriminates among its users with respect to moderation of user content posting); Stephanie Strom, *General Mills Reverses Itself on Consumers’ Right to Sue*, N.Y. TIMES (Apr. 20, 2014), <http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html> [<https://perma.cc/U3BC-EC2S>] (reporting on the firm’s attempt to introduce unilaterally mandatory arbitration).

85. Elisabeth Cuddihy & Jan H. Spyridakis, *The Effect of Visual and Placement of Intra-Article Navigation Schemes on Reading Comprehension and Website User Perceptions*, 28 COMPUTS. HUM. BEHAV. 1399, 1401 (2012) (“Tables of contents that correspond to the heading structure on web pages provide one kind of mechanism for revealing the organization of complex information . . .”); David T. Daly, *Five Easy Ways to Make a Contract More Understandable: A Lesson from the Mackinac Bridge*, 1999 MICH. BAR J. 462, 464 (1999) (a table of contents “can help the reader to quickly understand a contract’s organization . . .”).

86. Cf. Cuddihy & Spyridakis, *supra* note 85, at 1399–1400 (an intra-article navigation scheme on a website, which provides a table of contents for an article, “can provide powerful structural cues that help readers anticipate the information in the article and aid them in forming mental models of information”).

87. *Id.* at 1401 (“Tables of contents . . . provide one kind of mechanism for . . . reducing cognitive overload . . .”). Cognitive overload occurs where the quantity and presentation of information saturate the consumer’s processing ability. See, e.g., Jonathan M. Landers & Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 722 (1979) (explaining that disclosures can “overwhelm [] [the information receiver] by the aggregate mass of words and figures” and thus cause the information recipient to ignore the disclosure).

88. Cuddihy & Spyridakis, *supra* note 85, at 1402 (“Mechanisms that reduce cognitive overload during reading can allow readers to focus more of their attention on the act of comprehension.”).

In addition, messy contracts fail to identify the contract topics effectively.⁸⁹ This failure may prevent contract readers from consciously using—before reading the substantive content of the contract—any prior knowledge they possess that may be useful in understanding the agreement’s content.⁹⁰ At the same time, well-organized contracts enable a selective, self-directed, and active reading style.⁹¹ Organized contracts are particularly helpful for supporting more vulnerable consumers, such as those with lower literacy or language proficiency levels.

Empirical studies support the contention that messy texts hinder readers’ comprehension. One study examined the effects of a distinct table of contents, provided under an online intra-article navigation scheme, on website users’ reading comprehension of the article itself.⁹² The participants of the study were first required to read an online article.⁹³ They were then required to answer multiple-choice questions that tested both factual and inferential knowledge about the article.⁹⁴ The study found that the comprehension of the article was 10% higher among participants who read a version of the article that included a graphically distinct table of contents.⁹⁵

Another study examined the impact of textually and visually optimizing terms and conditions.⁹⁶ The textually improved version included headings (which did not exist in the original text), spaces between contract clauses, bold text emphasizing keywords, and linguistically optimized text.⁹⁷ The study found that improving language and formatting enhanced consumer understanding.⁹⁸ Furthermore, the study also found that this improvement reduced reading time,⁹⁹ to which we now turn.

89. Robert F. Lorch, Hung-Tao Chen & Julie Lemarié, *Communicating Headings and Preview Sentences in Text and Speech*, 18 J. EXP. PSYCH. APPL. 265, 267 (2012) (“[E]ach heading identifies the topic of the text section it heads.”).

90. *Id.* (headings allow “readers to activate any prior knowledge they possess that may be useful in understanding the content of the text section”).

91. *Cf.* Robert Waller, *Typographic Access Structures for Educational Texts*, in *PROCESSING OF VISIBLE LANGUAGE* 175 (Paul A. Kolers, Merald E. Wrolstad & Herman Bouma eds., 1979) (using the term “access structures” to refer to organizational signals that enable a selective, self-directed, and active reading style).

92. Cuddihy & Spyridakis, *supra* note 85, at 1407.

93. *Id.* at 1403 (“The article spanned eight web pages and contained approximately 8,500 words.”).

94. *Id.* at 1404 (“Reading comprehension was measured using multiple-choice questions that tested both factual and inferential knowledge.”).

95. *Cf. id.* at 1406–07 (“Total comprehension significantly differed . . . for the participants who saw the visually distinct table of contents in the left-hand menu . . . over those who were exposed to the original full-site navigation design . . . , and indicates an average increase of 10% As hypothesized, the comprehension results reveal that comprehension significantly improved when the intra-article navigation menu was presented as a unified table of contents distinct from the global navigation.”).

96. Alexander J. Wulf & Ognyan Seizov, *How to Improve Consumers’ Understanding of Online Legal Information: Insights from a Behavioral Experiment*, *EUR. J.L. & ECON.* 1, 1 (2022).

97. *Id.* at 8 (describing this version as “linguistically optimized and neatly structured text-only”).

98. *Id.* at 15 (finding that respondents who read the optimized disclosures were better able to answer questions pertaining to the relevant text).

99. *Id.* at 13, 15 (finding that the mean and median reading times for the textually optimized text was lower than for the reference text).

2. *Inflated Transaction Costs: Search and Reading Times*

Messy contracts increase the time contract readers may have to spend to find relevant information within the contract text, both *ex ante* (if a consumer wishes to read her contract for certain provisions of concern before accepting it) or *ex post* (once a consumer experiences an issue with the product or the service and seeks relevant details).¹⁰⁰ First, these agreements may lack a table of contents. The inability to glance through a table of contents makes it harder for contract readers to become familiar with its scope, subjects, and structure.¹⁰¹ In neglecting to include a table of contents, messy contracts thereby require the reader to review the entire agreement—which may often be lengthy—to understand how it is organized and what type of legal information it includes.¹⁰²

Likewise, our attention span and cognitive abilities are limited, and readers endeavor to minimize processing effort by actively seeking their desired or relevant information. By extension, readers pay less attention to the information they perceive as not (or less) relevant. This natural processing strategy can harm consumers who enter into messy contracts, precluding them from noticing and understanding the information they value. Slightly restated, a lack of informative headings prevents a contract reader from quickly evaluating whether a specific contract provision contains the relevant information for which the reader is searching.¹⁰³ The lack of informative headings may force the reader to devote time to reading text just to explore its topic—rather than channeling one’s attention to the issue at stake.¹⁰⁴ This makes consumers less likely to attend to important information while increasing search and reading times.

To illustrate, assume that a contract includes a vague and general heading, such as “Miscellaneous.” Presume, furthermore, that a contract reader is specifically interested in knowing whether the contract contains a clause that allows the supplier to modify the agreement unilaterally. In such a case, the reader may have to waste time reading the substantive text of the entire clause, titled by an uninformative heading, to ascertain whether it includes relevant information

100. Cf. Lorch et al., *supra* note 73, at 143 (“[T]he presence of topic identifying headings should support an efficient strategy that effectively reduces the search space and so should speed up the location of target information.”); Jean-Francois Rouet, Eduardo Vidal-Abarca, Alain B. Erboull & Victor Millogo, *Effects of Information Search Tasks on the Comprehension of Instructional Text*, 31 DISCOURSE PROCESSES 163, 168 (2001) (a structured overview “could help students locate information . . .”); Daly, *supra* note 85, at 464 (a table of contents “helps if the reader can quickly find the answer to the specific question at hand and skip over information”).

101. Diana Dee-Lucas & Jill H. Larkin, *Learning from Electronic Texts: Effects of Interactive Overviews for Information Access*, 13 COGNITION & INSTRUCTION 431, 437 (1995) (“The structured overview may particularly facilitate text review because the organization of the units provides guidance about units that might usefully be reread (e.g., by indicating clusters of units relating to a particular topic).”).

102. Cf. PLAIN ENGLISH DISCLOSURE, RELEASE NO. 1113 15, SEC (Oct. 1, 1998), (“[I]f you deliver a [corporate] prospectus to investors electronically, you must include the table of contents immediately after the cover page. This placement will benefit investors because they will not have to scroll to the end of the prospectus to see how it is organized.”).

103. Lorch et al., *supra* note 73, at 143 (“headings that do not identify text topics do not allow participants” to evaluate the probability that the sections under the headings contain the searched-for data).

104. *Id.* (when headings are uninformative “each text section must be evaluated based on its content”).

about the supplier's right to modify the agreement. Of course, it may well be that reading the entire clause was futile and that the clause does not address the relevant issue. The process then repeats with the next uninformative, vague heading and the text under it.

Obviously, if the messy contract is available in a digital format, the reader could presumably digitally search for the term 'modification' in the entire contract to locate the relevant clause.¹⁰⁵ However, this search may be inefficient, time-consuming, or ineffective for three major reasons. First, the contract may employ terms other than contract 'modification,' such as 'contract change,' 'alteration,' 'amendment,' 'adjustment,' or 'update.'¹⁰⁶ This entails the need to perform multiple searches, though the average reader may not envisage the possible usage of these and may not know the full compendium of legal synonyms and similar terms. Second, the term 'modification' may appear in the contract at various times in contexts unrelated to the firm's right to modify the agreement.¹⁰⁷ Third, many consumers—especially the vulnerable, elderly, less tech-savvy, or less educated—may be unfamiliar with or unaware of the ability to search online texts. Therefore, the possibility of searching within a digitized contract version is not a panacea and does not eliminate the excessive search costs that messy contracts impose.

Whereas messy contracts with no informative headings may hamper the consumer's ability to find a relevant legal topic, a well-organized agreement explicitly identifies the topics of the contract clauses with concrete labels, such as 'Contract Modification,' 'Contract Termination,' or 'Product Warranty.'¹⁰⁸ These headings allow contract readers to effectively evaluate the probability that a corresponding clause under a specific heading contains the sought information, economizing the reader's scarce attention and time.¹⁰⁹ In particular, when the contents of an accurate, informative heading are not related to the searched information, readers can skip the clause under the heading, thereby saving time spent searching in the text.¹¹⁰ For example, if a contract reader searches for

105. For that purpose, consumers may use the function Ctrl+F. See *Ctrl+F*, COMP. HOPE, <https://www.computerhope.com/jargon/c/ctrl-f.htm> (May 1, 2023) [<https://perma.cc/BV45-YM8X>].

106. See, e.g., *Terms of Service*, art. 4.1, FACEBOOK, <https://www.facebook.com/terms.php?ref=pf> (July 26, 2022) [<https://perma.cc/4DZ2-WE7S>] (Facebook uses the verbs "update" and "change" and not modify).

107. See, e.g., *Google Terms of Service*, GOOGLE, <https://policies.google.com/terms?hl=en-US> (Jan. 5, 2022) [<https://perma.cc/TM2S-XZRS>] (providing that Google's terms of service include the verb "modify" in contexts unrelated to a contract change).

108. See, e.g., Robert F. Lorch Jr. & Julie Lemarié, *Improving Communication of Visual Signals by Text-to-Speech Software*, in UNIVERSAL ACCESS IN HUMAN-COMPUTER INTERACTION, APPLICATIONS AND SERVICES FOR QUALITY OF LIFE 364, 366 (Constantine Stephanidis & Margherita Antona eds., 2013); Jukka Hyönä & Robert F. Lorch, *Effects of Topic Headings on Text Processing: Evidence from Adult Readers' Eye*, 14 LEARNING & INSTRUCTION 131, 147 (2004) ("Headings are salient and unambiguous signals of new topics so they facilitate topic identification.").

109. Lorch et al., *supra* note 73, at 143 ("When headings identify text topics, participants should be able to use each heading to evaluate the likelihood that the corresponding section contains the searched-for information.").

110. *Id.* ("When the heading seems unrelated to the question, participants can skip the section and go to the next heading.").

information about a product warranty, they can skip the contract clause titled ‘Mandatory Arbitration’ and search for a more relevant heading, such as ‘Warranty.’

Indeed, empirical studies in linguistics and psychology indicate that messy texts increase the searching time of readers. For example, an experimental study examined whether informative headings within a text reduce the time needed by readers to locate answers to questions about the text.¹¹¹ The results indicated that the time to find answers to questions about the given text was 48.8% slower when the text headings were not topic-identifying.¹¹²

3. *Post Reading: Memory Obstruction*

Messy contracts not only make it harder for readers to find the relevant text but also hinder the ability of readers to recall relevant parts of the agreement after reading it. Unorganized contracts, which lack a table of contents and informative headings, may prevent readers from systematically chunking the contractual information they read into cognitive units that are more readily stored and later recalled.¹¹³ Instead, disorganized agreements may cause readers to cognitively retrieve and store the contractual data in a random, non-structured manner.¹¹⁴

From a cognitive perspective, the lack of informative headings above a contract text may deemphasize the importance of the text, thereby distracting the reader’s attention.¹¹⁵ By diverting attention, messy contracts weaken readers’ ability to concentrate on the subject of the agreement or the term.¹¹⁶ The lack of cognitive focus on the subject may result in an incomplete recollection of the text.¹¹⁷

Empirical studies in educational psychology indicate that messy texts hinder the ability of readers to recall information. To illustrate, one study examined

111. *Id.*

112. *Cf. id.* at 148 tbl.1 (demonstrating when the topics were not identified it took, on average, 69.68 seconds to answer a question. However, when the topics were identified it took, on average, 41.47 seconds to answer a question). For another study showing that a table of contents may reduce the text searching time, see Rouet et al., *supra* note 100, at 178 (empirically finding that an “explicit overview . . . tended to reduce the search time . . .”).

113. *Cf.* Cindy D. Jones, Sarah K. Clark, & Ray D. Reutzel, *Teaching Text Structure: Examining the Affordances of Children’s Informational Texts*, 117 *ELEM. SCH. J.* 143, 144 (2018) (“Readers who are aware of the text’s structure organize the information presented in the text as they read, chunking the information into thought units that are more readily stored and later recalled.”).

114. *Id.* (“[I]f the text structure is difficult to recognize, readers retrieve and store information in a ‘seemingly random way’ . . .”).

115. Ritchey et al., *supra* note 65, at 861 (“[T]he unsignaled topics would be deemphasized in comparison to the signaled topics.”); *Effects of Organizational Signals on Free Recall of Expository Text*, *supra* note 63, at 46 (“[U]nsignaled content is relatively less important and thus less likely to be included in the reader’s topic structure representation.”).

116. *Cf.* Julie Lemarié, Robert F. Lorch & Marie-Paule Péry-Woodley, *Understanding How Headings Influence Text Processing*, 10 *DISCOURSE 1*, 5 (2021) (“[H]eadings attract the attention of readers as they read, causing them to alter their processing strategies so as to focus more on the text’s topics . . .”).

117. *Id.* (“At recall, the topic structure representation is available to guide the retrieval of topics and their associated content, resulting in more complete recall of the text content.”).

the effects of outlines prefacing text and headings inserted in the text on readers' ability to recall the text.¹¹⁸ The study required participants to write everything they could remember from a textbook chapter after reading it.¹¹⁹ The participants were required to read and recall two versions of the chapter, one prefaced by an outline listing the text headings and another containing neither an outline nor headings.¹²⁰ Subjects given the textbook chapter version with an outline and headings recalled significantly more content than subjects who had neither.¹²¹ The difference was stark: whereas participants in the first group (with outline and headings) recalled an average of 27.07 idea units, participants in the second group (without either) recalled only 10.40 idea units.¹²² Whereas consumer contracts are not primarily a means to transport details and knowledge into the reader's memory, it seems straightforward to conclude that messy contracts undermine consumers' ability to recall key information and increase the risks that consumers will misremember the contractual content.

4. *The Macro Level: Reading Deterrence*

Consumer form contracts are often lengthy, linguistically complex, and include unclear legal jargon.¹²³ This undesirable reality may deter consumers from reading these agreements.¹²⁴ Messy contracts are likely to increase the deterrence effect of consumer contracts on reading. First, consumers may perceive messy contracts as harder to search, recall, and comprehend than systematically organized contracts. This reduces the expected value of ex ante reading. Second, consumers may perceive messy contracts with non-informative headings (such as 'General' or 'Miscellaneous') as less relevant and worthwhile to read than contracts with informative headings (such as 'Content Removal' or 'Account Termination'). By reducing the perceived importance and concreteness of the terms,

118. Damon Krug, Byron George, Shawn A. Hannon & John A. Glover, *The Effect of Outlines and Headings on Readers' Recall of Text*, CONTEMP. EDUC. PSYCH. 111 (1989).

119. *Id.*

120. *Id.* at 116. One version of the chapter "contained both an outline prefacing the material and the inserted headings." Another version of the chapter "contained neither the outline nor the headings." *Id.*

121. *Id.* at 116–17 ("[S]ubjects in the combined condition [with both outline and headings] recalled significantly more chapter content than in any of the other conditions.")

122. *Id.* at 115 (see the results of experiment 2 under table 1); for other studies indicating that informative headings improve the text recall, see Ritchey et al., *supra* note 65, at 868 ("There was a significant effect of relatedness of heading for overall recall . . . with information related to headings being recalled more than information that was unrelated to headings."); Hyönä & Lorch, *supra* note 108, at 131 ("The presence of topic headings . . . increased the number of topics mentioned in the text summaries written after reading the texts."); Rebecca Polley Sanchez, Elizabeth Pugzles Lorch & Robert F. Lorch, Jr., *Effects of Headings on Text Processing Strategies*, 26 CONTEMP. EDUC. PSYCH. 418, 418 (2001) ("The results were that participants that who . . . read the text with headings remembered text topics and their organization better than participants who . . . read the text without headings."); Robert F. Lorch, Jr., Julie Lemarié & Hung-Tao Chen, *Signaling Topic Structure via Headings or Preview Sentences*, 19 PSICOLOGIA EDUCATIVA 59, 59 (2013) (Spain) ("Memory for subtopics was better for the text with headings.")

123. Bernard Black, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 256 (1981) (Consumer contracts "often take too much time to read Drafters of form contracts often use technical legal jargon . . .").

124. *Id.* at 255 ("[C]onsumers . . . do not read the contracts they sign.")

messy contracts further discourage consumers from reading them.¹²⁵ Messy contracts, hence, entail that (the non-reading) consumers are less likely to make informed decisions about entering into the contracts.

Here too, experiments in the fields of linguistics and psychology support these concerns. For instance, one experimental study investigated, among other things, how the level of concreteness of a text's titles affected the motivation of readers to read the text.¹²⁶ The study's results revealed that titles significantly affect the motivation to study the text.¹²⁷ Particularly, students who were presented with abstract titles were less motivated to study the text that followed than those who were presented with concrete, informative titles.¹²⁸

Discouraging consumers from reading their form contracts can have a considerable market-wide negative impact. If consumers do not read their contracts, firms are much less likely to have adequate incentive to draft fair and efficient terms. Of course, we should not expect all consumers to read their contracts all the time. Nonetheless, the argument goes, if a sufficient minority reads the contracts, they will discipline sellers who compete over consumers and deter them from incorporating biased terms.¹²⁹ Whereas this informed minority theory has its theoretical and empirical limitations,¹³⁰ encouraging (at least some) consumers to read their contracts may have a macro effect, potentially sustaining competition over contract terms.¹³¹ Curbing messy contracts, in short, would increase the likelihood that some consumers can read some of their contracts.

125. Mark Sadoski, *Resolving the Effects of Concreteness on Interest, Comprehension, and Learning Important Ideas from Text*, 13 *EDUC. PSYCH. REV.* 263, 278 (2001) ("If important expository material is abstract and not connected to adequate concrete examples, it tends to be less interesting."); Mark Sadoski, Ernest T. Goetz & Maximo Rodriguez, *Engaging Texts: Effects of Concreteness on Comprehensibility, Interest, and Recall in Four Text Types*, 92 *J. EDUC. PSYCH.* 85, 93 (2000) (empirically finding a text's "concreteness to be overwhelmingly the best predictor of . . . interestingness").

126. Lippmann et al., *supra* note 73, at 258 ("The aim of the present investigation is thus to determine how the concreteness of titles affects . . . reported study motivation . . .").

127. *Id.* at 267 (the empirical test "revealed a large effect of Titles on MOT [motivation to study the text]").

128. *Id.* ("Students who were presented with concrete titles reported to be more motivated to study the following texts . . . than students presented with abstract titles.").

129. See generally 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 (1979) (developing the informed minority thesis to explain how a relatively small subset of reading consumers can discipline sellers).

130. See, e.g., 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, 635 (1996) (criticizing the informed minority model); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 *AM. BUS. L.J.* 723, 736 (2008) (same, applying economic and behavioral reasoning); Bakos et al., *supra* note 77, at 3 (demonstrating empirically that virtually no consumers read end user license agreements).

131. For developing a similar argument in the context of technological tools that may assist consumers in reading and understanding their contracts, see Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 *GEO. WASH. L. REV.* 83, 115 (2022) (explaining how so-called "Smart Readers" can not only help individual consumers but also kickstart market competition over contract terms).

* * * * *

Messy contracts are undesirable. Such contracts decrease comprehension, increase search and reading times, create memory obstruction, and deter readership. Messy contracts inhibit consumers' ability to make informed decisions. They impede consumers' capacity to stand for their rights. They impose costs on third parties such as consumer organizations, watchdogs, media, and adjudicators. At the macro level, messy contracts also reduce the likelihood that firms will compete by offering consumers readable and balanced agreements. Given these unwarranted consequences, it becomes important to examine whether messy contracts are prevalent.

III. THE EMPIRICAL TEST

This Part discusses the empirical test that stands at the crux of this Article. Section A details our dataset: the 100 sign-in-wrap contracts employed by some of the most popular online website in the United States.¹³² Next, Section B discusses the study's methodology and the key measures it utilizes to empirically examine the phenomenon of messy contracts.¹³³ Subsequently, Section C details the study's results, which support the contention that consumer contracts are too messy.¹³⁴

A. Data

Our sample contains the 100 sign-in-wrap contracts of the most popular websites in the United States that use such agreements.¹³⁵ A sign-in-wrap agreement is a contract that a website requires its customers to agree to before they sign up to use its services.¹³⁶ Under such contracts, the website usually states that the user accepts the agreement by signing up for the website or service.¹³⁷ The

132. See discussion *infra* Section III.A.

133. See discussion *infra* Section III.B.

134. See discussion *infra* Section III.C.

135. In order to identify the most popular U.S. websites that served as a basis for our study, we used DataForSEO top 1,000 websites ranking. See *Top 1000 Websites by Ranking Keywords*, DATAFORSEO, <https://dataforseo.com/top-1000-websites> (last visited Jan. 16, 2024) [<https://perma.cc/344R-4LV7>].

136. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61 n.10 (1st Cir. 2018) (explaining that under a sign-in-wrap agreement, a user agrees to a website's terms simply by registering to use the website); *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at *6 (C.D. Cal. July 17, 2017) (stating that courts commonly refer to agreements in which websites "contain a disclosure statement that indicates if a user signs up for a given service they accept the terms of service" as sign-in-wrap agreements.); *Selden v. Airbnb, Inc.*, No. 16-cv-00933, 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016) (noting that in sign-in-wrap agreements, a consumer "signs up to use an internet product or service"); Beatrice Kelly, *The (Social) Media Is the Message: Theories of Liability for New Media Artists*, 40 COLUM. J.L. & ARTS 503, 514 n.83 (2017) (clarifying that in sign-in-wrap agreements "users assent to the agreement by signing up to use the website").

137. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75-76 (2d Cir. 2017) (stating that sign-in-wrap agreements inform the consumer that he or she assents to terms of use by signing up to use the website); *TopstepTrader, LLC v. OneUpTrader, LLC*, No. 17-C-4412, 2018 WL 1859040, at *3 (N.D. Ill. Apr. 18, 2018) (noting that, amidst

user can normally view the agreement terms by clicking a link, which is positioned next to a sign-up button displayed on the website.¹³⁸ This button is often called ‘Conditions of Use,’ ‘Terms of Service,’ ‘Terms of Use,’ ‘Terms and Conditions,’ or simply ‘Terms.’

Our sample includes multiple well-known web services and platforms like Google, YouTube, Facebook, and Amazon. Appendix A lists all the sample websites, and the readers of this Article will be acquainted with many.¹³⁹ Given the breadth of online contracts and the centrality of the internet in our everyday lives, the contracts that serve as this Article’s sample belong to websites in highly heterogeneous categories, including: accommodation and hotels, computers, electronics and technology, eCommerce and shopping, news and media, social media, search engines, streaming and online TV, dictionaries and encyclopedias, jobs and careers, music, video games, science and education, visual arts and design, and real estate.¹⁴⁰

B. Methodology

Our major empirical examination tested the frequency of the two fundamental variables that characterize messy contracts:¹⁴¹ (1) lack of table of contents and (2) failure to consistently include informative headings.

(1) *Table of contents*. For each sample agreement, we tested whether it included a table of contents. In addition, if the contract did include such a table, we tested whether the table was complete. For that purpose, we examined whether the table incorporates all the agreement’s headings and subheadings.

(2) *Informative headings*. For each contract, we examined the following two major questions:

a) Does the contract include a text with no prior heading, thereby lacking an informative heading?

b) Does the contract include headings with general non-informative titles that fail to specify the concrete topics that follow? Here, we tested whether the contract had heading titles that were clearly general and broad, such as ‘Miscellaneous,’ ‘Other,’ or ‘General.’

To enrich our understanding of the potential impact of the lack of consistent informative headings on contract readers, we tested a few additional qualitative and quantitative issues. From a qualitative perspective, we identified major legal issues in the contract texts that lack informative headings. Such identification may allow a better understanding of what legal issues may be obfuscated from

the registration process, sign-in-wrap agreements often display language to the effect of “[b]y signing up for an account with [website provider], you are accepting the [website]’s terms of service”).

138. *TopstepTrader*, 2018 WL 1859040, at *3 (explaining that sign-in-wrap agreements provide a hyperlink to the terms of service).

139. See *infra* Appendix A.

140. The website categories were identified using the SimilarWeb search engine. See, e.g., SIMILARWEB, <https://www.similarweb.com/> (last visited Jan. 16, 2024) [<https://perma.cc/PDY2-3NDB>].

141. For this Article’s definition of messy contracts, see discussion *supra* Section II.B.

contract readers by a lack of informative headings. From a quantitative perspective, we tested the length of the messy texts; that is, the amount of text with no informative headings.

Also from a quantitative perspective, we examined the readability score of the various texts in our sample contracts that lacked informative headings above them. To that end, we employed the Flesch Reading Ease (FRE) readability test.¹⁴² The FRE test¹⁴³ examines two factors: the average sentence length in a text, and the average number of syllables per word in that text.¹⁴⁴ The test follows the assumption that, on average, less readable texts contain long sentences and words with many syllables.¹⁴⁵ The score produced by the FRE test ranges from 0 to 100;¹⁴⁶ the lower the FRE score, the less readable the text.¹⁴⁷

142. We used Microsoft Word to test the text readability. See *Get Your Document's Readability and Level Statistics*, MICROSOFT, https://support.microsoft.com/en-us/office/get-your-document-s-readability-and-level-statistics-85b4969e-e80a-4777-8dd3-f7fc3c8b3fd2#_toc342546557 (last visited Jan. 16, 2024) [<https://perma.cc/7V92-7YMJ>]. For studies that utilized the FRE test see, for example, Rustad & Koenig, *supra* note 48, at 1459–60 (using the Flesch Reading Ease test to evaluate the educational level needed to understand social media terms of use); Benoliel & Becher, *supra* note 48, at 2271–72; Ian Gallacher, “When Numbers Get Serious”: A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals, 46 SUFFOLK U. L. REV. 451, 462–63 (2013) (using the FRE test to measure the readability of briefs filed in the New York Court of Appeals); Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell & Lisa L. Hazelwood, *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 181 (2007) (applying the FRE test to evaluate the readability of Miranda warnings); Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?*, 12 J. APP. PRAC. & PROCESS 145, 147 (2011) (using the FRE test to analyze the readability of state, federal, and United States Supreme Court briefs).

143. The test was developed by Rudolph Flesch. See, e.g., Pranay Jindal & Joy C. MacDermid, *Assessing Reading Levels of Health Information: Uses and Limitations of Flesch Formula*, 30 EDUC. HEALTH. 84, 85 (2017).

144. Thomas C. McKearney & Richard M. McKearney, *The Quality and Accuracy of Internet Information on the Subject of Ear Tubes*, 77 INT’L J. PEDIATRIC OTORHINOLARYNGOLOGY 894, 895 (2013) (noting how the FRE test “takes into account the average sentence length and average number of syllables per word”).

145. Joseph R. Razek & Randy E. Cone, *Readability of Business Communication Textbooks—An Empirical Study*, 18 J. BUS. COMM’N 33, 35 (1981) (“Complex writing styles employ long sentences with many multisyllable words.”). More specifically, the formula that underlines the FRE test is as follows: $206.835 - (1.015 * \text{average sentence length}) - (84.6 * \text{average number of syllables per word})$. See, e.g., Nicola J. Kalk & David D. Pothier, *Patient Information on Schizophrenia on the Internet*, 32 PSYCHIATRIC BULL. 409, 409 (2008); Marli Terblanche & Lesley Burgess, *Examining the Readability of Patient-Informed Consent Forms*, 2010 OPEN ACCESS J. CLINICAL TRIALS 157, 162; Barbara B. Ott & Thomas L. Hardie, *Readability of Advance Directive Documents*, 29 J. NURSING SCHOLARSHIP 53, 55 (1997); Arthur C. Graesser, Danielle S. McNamara, Max M. Louwerse & Zhiqiang Cai, *Coh-Matrix: Analysis of Text on Cohesion and Language*, 36 BEHAV. RSCH. METHODS, INSTRUMENTS, & COMPUTS. 193, 199 (2004).

146. Donna M. D’Alessandro, Peggy Kingsley & Jill Johnson-West, *The Readability of Pediatric Patient Education Materials on the World Wide Web*, 155 ARCHIVES PEDIATRICS & ADOLESCENT MED. 807, 808 (2001) (“The Flesch Reading Ease ranges from 0 to 100.”); Brittain H. Tulbert, Clint W. Snyder & Robert T. Brodell, *Readability of Patient-Oriented Online Dermatology Resources*, 4 J. CLINICAL & AESTHETIC DERMATOLOGY 27, 28 (2011) (“The Flesch Reading Ease Scale . . . grades readability on a 0-to-100 scale.”); David Kerr, *Information in Diabetes Care: Is There a Need to Dumb Down Even More?*, 24 DIABETIC MED. 561, 562 (2007) (“The Flesch-Reading Ease rates text on a 100-point scale.”); Arthur J. Hanes, Jr., Bert S. Nettles & Leila H. Watson, *The “Plain English” Project of the Alabama Pattern Jury Instructions Committee—Civil*, 68 ALA. LAW. 369, 375 (2007).

147. Kerr, *supra* note 146, at 562 (“The higher the score the easier it is to understand the document.”); Marcello Moccia, Antonio Carotenuto, Marco Massarelli, Roberta Lanzillo & Vincenzo Brescia Morra, *Can*

According to readability literature, an FRE score lower than 60 means that average consumers cannot understand the text.¹⁴⁸ In line with this literature, the statutes of some states impose an FRE test requirement on specific texts, such as tax forms.¹⁴⁹ These require texts to meet a minimum score of 60 to satisfy statutory readability standards.¹⁵⁰ Similarly, U.S. government agencies often use a score of 60 or higher to ensure that documents are readable.¹⁵¹ The same logic and metrics apply to consumer contracts. If a messy contract without informative headings receives an average FRE score lower than 60, its reading burden on consumers may be particularly significant. In such cases, consumers face the challenge of digesting text that lacks informative headings *and* is unreadable.

C. Results

According to our empirical examination, 96% of the sample contracts (n=96) have one of the features of a messy contract: they either lack a table of contents or include text without informative headings. Moreover, 73% (n=73) of our sample contracts have the two cumulative features of messy contracts: they lack a table of contents *and* include text without informative headings. This Section elaborates on our findings.

A total of 74% of the contracts in our sample (n=74) lack a table of contents. Notably, among the minority of contracts (26%, n=26) that do include a table of contents, about 69% (that is, 69% of the 26 contracts, n=18) have an incomplete table that fails to include all the subheadings that appear in the body of the agreement. Combined, this entails that 92% (n=74+18=92) of the contracts in our

People with Multiple Sclerosis Actually Understand What They Read in the Internet Age?, 25 J. CLINICAL NEUROSCIENCE 167, 167 (2016). Cf. Philip M. Linsley & Michael J. Lawrence, *Risk Reporting by the Largest UK Companies: Readability and Lack of Obfuscation*, 20 ACCT., AUDITING & ACCOUNTABILITY J. 620, 621 (2007) (“The higher the reading ease score the more readable the text.”).

148. Rustad & Koenig, *supra* note 48, at 1472 (“[A] score between sixty and sixty-nine is considered the acceptable standard for American consumers.”); *see also, e.g.*, Peter Breese, William Burman, Cornelis Rietmeijer & Dennis Lezotte, *The Health Insurance Portability and Accountability Act and the Informed Consent Process*, 141 ANNALS INTERNAL MED. 888, 897 (2004) (“[W]e defined forms with . . . a Flesch Reading Ease score less than 60 (more complex language than ‘standard English’) as having inappropriately complex language.”); Kalk & Pothier, *supra* note 145, at 410 (a Flesch Reading Ease score of 60 is “the lower limit for ‘plain English’”); Norman E. Plate, *Do As I Say, Not As I Do: A Report Card on Plain Language in the United States Supreme Court*, 13 T.M. COOLEY J. PRAC. & CLINICAL L. 79, 93 (2010) (“[T]o reach a plain-language standard, you need to aim for a minimum score of sixty on the Flesch scale.”); Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain Nonsense?*, 78 LAW LIBR. J. 683, 689 (1986) (defining ‘Plain English’ as a text with a score of 60 or better).

149. *See, e.g.*, OR. REV. STAT. ANN. § 316.364(1) (West 2023) (“The instructions to an individual state income tax return form shall have a total Flesch Reading Ease Score of 60 or higher.”).

150. *Id.*; *see also, e.g.*, Rustad & Koenig, *supra* note 48, at 1458 (“States incorporating the Flesch test will frequently require statutory provisions to meet a score of sixty or greater to satisfy minimum readability standards.”).

151. McKearney & McKearney, *supra* note 144, at 897 (“A score of 60–70 . . . is in fact regularly used by US government agencies, amongst others, to ensure that documents are written to an appropriate level of readability.”); Vishal Narwani, Keerthana Nalamada, Michael Lee, Prasad Kothari & Raj Lakhani, *Readability and Quality Assessment of Internet-Based Patient Education Materials Related to Laryngeal Cancer*, 38 HEAD & NECK 601, 603 (2016) (“A score of 60 to 70 is utilized by U.S. government agencies.”).

sample lacked an adequate table of contents. In other words, only 8% (n=8) of the contracts we examined had a complete table of contents.

Moreover, the vast majority of contracts in our sample—95% of them (n=95)—include text without informative headings. Specifically, 81% of the agreements (n=81) have text with no prior headings at all. Furthermore, 69% of the contracts (n=69) include text preceded by an overly generalized heading, such as ‘General’ or ‘Miscellaneous.’ Among these 69 contracts, the majority (i.e., 65% of the 69 contracts, n=45) also fail to include any subheadings below the general heading that may assist consumers in understanding what subtopics are governed by the general heading. Table 1 below summarizes the central findings discussed in this Section. It details the distribution, among the 100 contracts in our sample, of the major contractual messiness variables.

TABLE 1: DISTRIBUTION OF THE MESSINESS VARIABLES (N=100)

Category	Variable	%
Messy Contract Features	Lacking a table of contents or text without informative headings	96
	Lacking a table of contents and text without informative headings	73
Table of Contents	No table of contents (at all)	74
	Inadequate table of contents (i.e., table lacking items or incomplete)	92
Headings	Text without informative headings (i.e., text with no headings at all, or text preceded by an overly generalized heading)	95
	Text with no prior headings at all	81
	Text preceded by an overly generalized heading	69

The results of this study also indicate that the text of contracts that lack a prior informative heading is typically unreadable. Their average FRE score is 37.99. In more detail, the average FRE score of the text with no prior headings at all, found in 81 of the sample contracts, is 41.21. Even worse, the average FRE score of the text preceded by an overly generalized heading, found in 69 of the sample contracts, is 34.21. Recall that according to readability standards, an FRE score lower than 60 means that an average consumer cannot understand the text.¹⁵² This result means consumers face messy contracts (with no informative headings)¹⁵³ that are *also* unreadable (that is, score low on the FRE test). As

152. See Jindal & MacDermid, *supra* note 143, at 85.

153. See *supra* Subsection II.C.3.

noted, this combination exacerbates the difficulty consumers encounter. Figures 2 and 3 below represent the frequency distribution histogram for the abovementioned FRE scores.

FIGURE 2: FREQUENCY DISTRIBUTION HISTOGRAM FOR FRE SCORES OF TEXTS WITH NO PRIOR HEADINGS AT ALL (N=81)

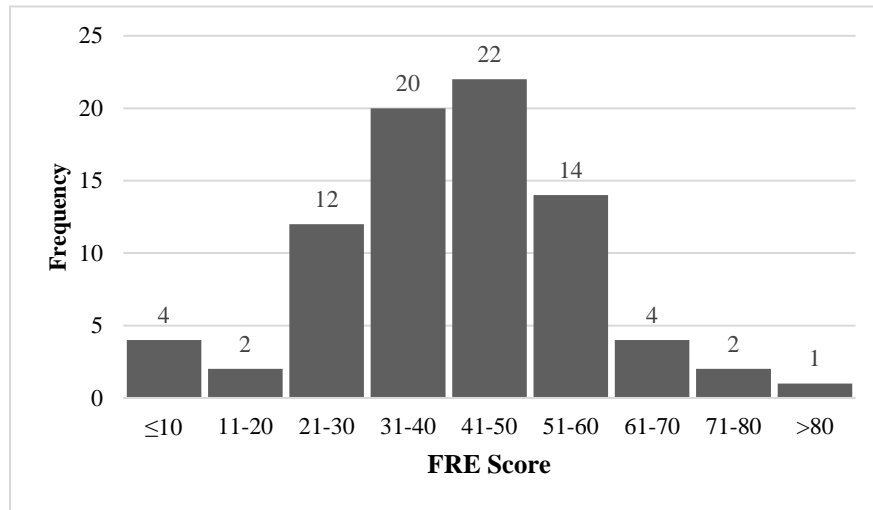
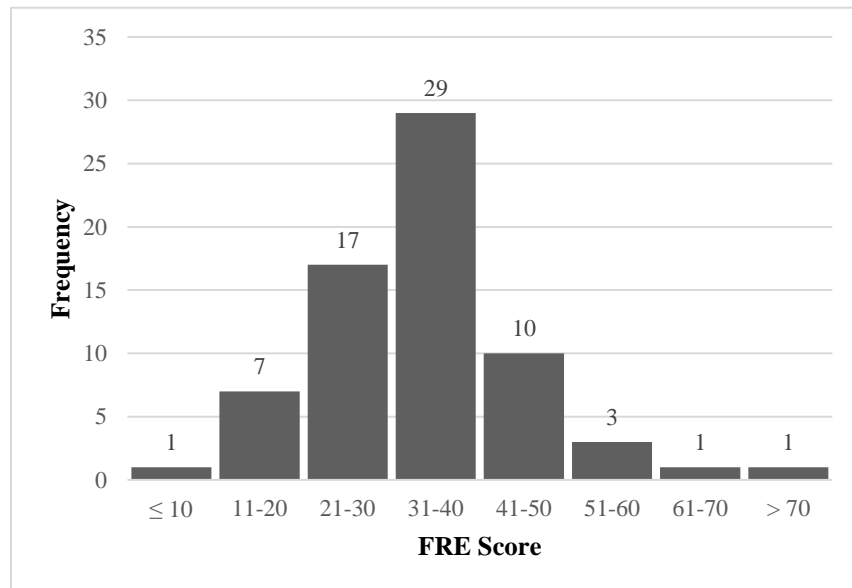


FIGURE 3: FREQUENCY DISTRIBUTION HISTOGRAM FOR FRE SCORES OF TEXTS PRECEDED BY AN OVERLY GENERALIZED HEADING (N=69)



In addition, we found that the length of the texts with no informative headings was far from trivial. In fact, it amounted to an average of 482.88 words. In more detail, the average length of the text with no prior headings at all, found in 81 of the contracts, is 192.16 words. Worse yet, the average text length preceded by an overly generalized heading, found in 69 of the contracts, is 824.16. In all, this means that messy terms are also relatively unreadable *and* of a considerable length. This renders reading costly, frustrating, confusing, and as a result, unlikely. Figures 4 and 5 below represent the frequency distribution histogram for the length of the aforementioned texts.

FIGURE 4: FREQUENCY DISTRIBUTION HISTOGRAM FOR THE LENGTH OF TEXTS WITH NO PRIOR HEADINGS AT ALL (N=81)

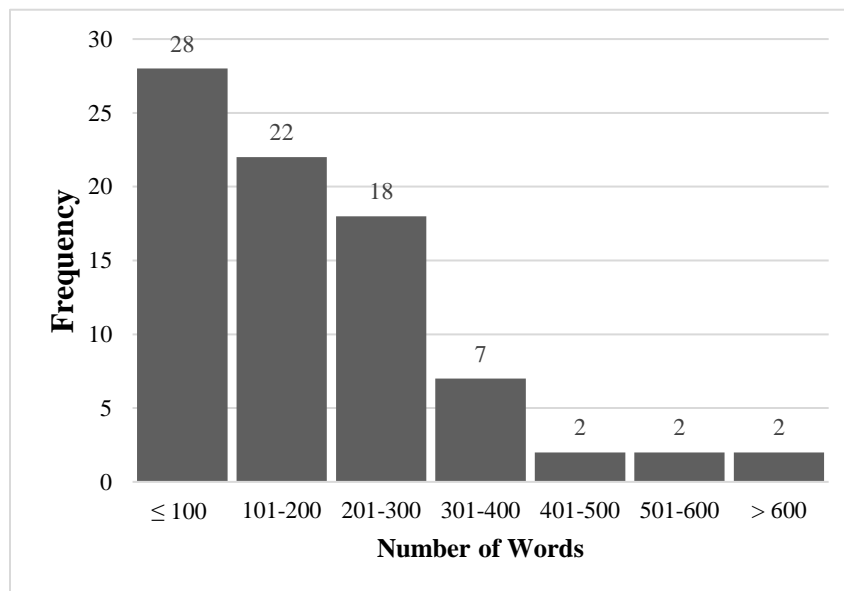
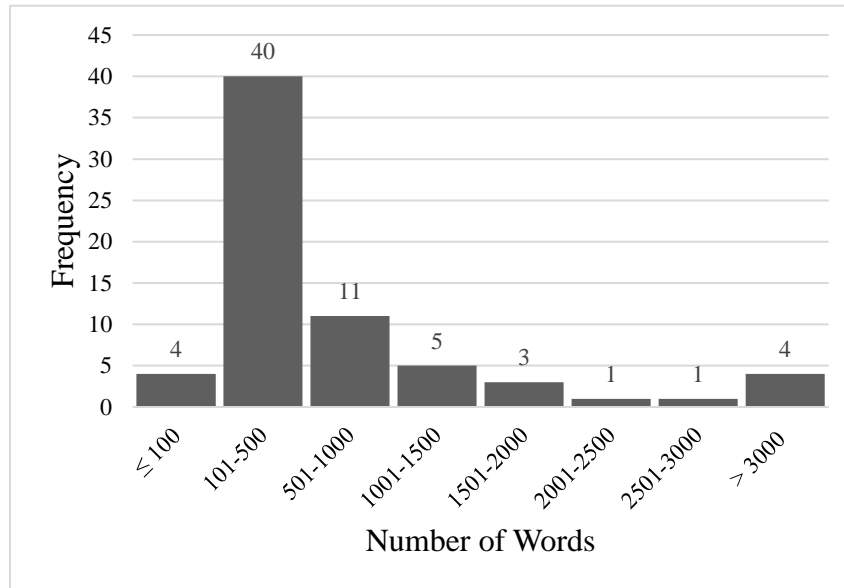


FIGURE 5: FREQUENCY DISTRIBUTION HISTOGRAM FOR THE LENGTH OF TEXTS PRECEDED BY AN OVERLY GENERALIZED HEADING (N=69)



Furthermore, a general review and analysis of the content of these texts reveals that they deal with various substantive legal issues. Often, these messy texts address a host of important legal questions. These include:

- **Prior agreements and pre-contractual representations.** Does the contract supersede prior agreements between the parties?¹⁵⁴ Can the consumer rely on pre-contractual representations?¹⁵⁵
- **Unlawful contract terms.** What are the contractual consequences of an unlawful contract term?¹⁵⁶
- **Contract waiver and consumers' report duties.** Will a failure to enforce a contract term entail a waiver of the term?¹⁵⁷ Is the consumer obliged to report any contract violations to the supplier?¹⁵⁸
- **Unilateral modification.** Can the supplier unilaterally modify the contract?¹⁵⁹

154. See, e.g., *Terms of Service, art. 4.5.1*, FACEBOOK, <https://www.facebook.com/terms.php> (July 26, 2022) [https://perma.cc/4DZ2-WE7S].

155. See, e.g., *Terms of Service, art. 15.C.*, YELP, https://terms.yelp.com/tos/en_us/20200101_en_us/ (Dec. 13, 2019) [https://perma.cc/E6H7-UTXH].

156. See, e.g., *Reddit User Agreement, art. 18*, REDDIT, <https://www.redditinc.com/policies/user-agreement-september-12-2021> (Sept. 12, 2021) [https://perma.cc/CN4Q-UHX6].

157. *Id.*

158. See, e.g., *Terms of Service, art. 13.4.*, N.Y. TIMES, <https://help.nytimes.com/hc/en-us/articles/115014893428-Terms-of-service> (Dec. 27, 2023) [https://perma.cc/NS9P-JXXQ].

159. See, e.g., *User Agreement, art. 19*, EBAY, <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259#19> (Oct. 28, 2023) [https://perma.cc/CE9H-6Z2X].

- **Transfer of rights and succeeding parties.** Can the consumer transfer their contractual rights or duties?¹⁶⁰ Will the contract be binding upon the successors of the consumer or supplier?¹⁶¹
- **Termination and its effect.** Are there contractual clauses that remain in force following the termination of the contract?¹⁶²
- **Choice of law and forum selection.** Which state's laws govern the contracts?¹⁶³ Which (state) courts have jurisdiction over contractual disputes?¹⁶⁴
- **Time bar.** Is the consumer obliged to bring any claim arising from the contract within a specific period?¹⁶⁵
- **Force majeure and other uncontrollable circumstances.** Will the supplier be liable for failure to fulfill its contractual obligations due to forces beyond its control, such as force majeure?¹⁶⁶
- **Binding arbitration.** Must disputes related to the contract be settled by binding arbitration?¹⁶⁷
- **Interpretation.** Shall the contract be construed against or in favor of any party?¹⁶⁸

Ironically, our examination also revealed that some messy contracts state—while using general uninformative headings—that the contract headings are for “convenience only.”¹⁶⁹ We realize, of course, that this is the drafters’ attempt to communicate that the headings have no legal significance and should not be part of the interpretation process. Nonetheless, we find this wording inappropriate. Whereas sloppy headings may be “convenient” for the drafter or the firm that

160. See, e.g., *Walmart.com Terms of Use*, art. 22, WALMART, <https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0> (Nov. 22, 2023) [<https://perma.cc/LH5A-WW3F>].

161. See, e.g., *Terms of Use (For YP Sites)*, art. 8, REAL YELLOW PAGES, <http://tiny.cc/ivr2vz> (last visited Jan. 16, 2024) [<https://perma.cc/2NPG-NJNR>].

162. See, e.g., *Tripadvisor Terms, Conditions and Notices*, TRIPADVISOR, https://tripadvisor.mediaroom.com/us-terms-of-use#OLE_LINK23 (Dec. 15, 2022) [<https://perma.cc/SMP8-2LFY>] (see the text under the heading ‘General Provisions’).

163. See, e.g., *Terms of Service*, art. 6, TWITTER, <https://twitter.com/en/tos> (Sept. 29, 2023) [<https://perma.cc/3WH9-RMQ3>].

164. See, e.g., *Terms of Service*, art. 13.1, N.Y. TIMES, <https://help.nytimes.com/hc/en-us/articles/115014893428-Terms-of-service#12> (Dec. 27, 2023) [<https://perma.cc/NS9P-JXXQ>].

165. See, e.g., *FORBES® Terms of Service*, art. 16.3, FORBES, <https://www.forbes.com/terms-and-conditions/#24931139193f> (Oct. 26, 2023) [<https://perma.cc/429Z-8GQG>] (“Any cause of action or claim you may have with respect to the Website . . . must be commenced within one (1) year after the claim or cause of action arises; otherwise, such claim or cause of action is . . . barred.”).

166. See, e.g., *Terms & Conditions*, TARGET, <https://www.target.com/c/terms-conditions/-/N-4sr7l> (Sept. 28, 2023) [<https://perma.cc/5NL2-N3LL>] (see the text under the heading ‘Miscellaneous’).

167. See, e.g., *Terms and Conditions*, art. 18.10, ALAMY, <https://www.alamy.com/terms/us.aspx#Miscellaneous-terms> (last visited Jan. 16, 2024) [<https://perma.cc/Q5X6-23YC>].

168. See, e.g., *Terms of Use*, art. 12.4, SHUTTERSTOCK, https://www.shutterstock.com/terms#anchor_miscellaneous (last visited Jan. 16, 2024) [<https://perma.cc/D73S-784E>].

169. See, e.g., *Glassdoor Terms of Use*, art. 13, GLASSDOOR, <https://www.glassdoor.com/about/terms.htm> (Dec. 1, 2022) [<https://perma.cc/2D2C-KGJM>].

offers these contracts and free them from further calibrating and tailoring headings to their content, we question whether consumers find them convenient.

Finally, during our systematic examination of the sample contracts, we anecdotally discovered numerous additional types of contract disorganization that exacerbate messiness. Although some of them, when viewed in isolation, may not seem crucial, their accumulation is worth noting and may signal a lack of proper attention to the needs of contract readers. Here are just a few illuminating examples that violate the best practices of contract drafting:

- The contract's table of contents is misleading, including headings that do not appear in the contract text. For example, the heading "introduction" appears in Google's table of contents but not in the contract text.¹⁷⁰
- The headings' text is inaccurate and not identical to the table of contents. This disagreement results in a mismatch between the actual heading and the heading per the table of contents.¹⁷¹
- The numbering of the headings is incomplete.¹⁷² For example, we advise the reader not to search for section 1 in CNN's contract, because the contract simply skips the number 1 and begins at 2.
- All the paragraphs within the contract text are unnumbered.¹⁷³
- The contract's headings have a similar title to some of their subheadings.¹⁷⁴
- The heading's title is not related to the text that follows,¹⁷⁵ or the subheading titles are not explicitly associated with their corresponding heading's title.¹⁷⁶ For example, the text that follows the heading "Welcome to CNN!" states that the agreement requires arbitration to resolve disputes. Though we leave it to the company to determine how they prefer to welcome their users, mandatory arbitration clauses merit separate and adequate headings.¹⁷⁷

170. *Terms of Service*, GOOGLE, <https://policies.google.com/terms?hl=en-US#toc-intro> (Jan. 5, 2022) [<https://perma.cc/4VCL-296Q>].

171. *See, e.g., Terms*, MAILONLINE, <https://www.dailymail.co.uk/home/article-1388146/Terms.html> (last visited Jan. 16, 2024) [<https://perma.cc/724S-QR5H>] (The heading '7. Sponsored content, third party content and links available on this Site' is not identical to the table of content's relevant entry '7. Third party content and links available on this Site.').

172. *CNN Terms of Use*, CNN, <https://edition.cnn.com/2014/01/17/cnn-info/interactive-legal/index.html> (Dec. 19, 2022, 8:18 PM) [<https://perma.cc/29W5-3FHJ>].

173. *Terms of Use*, FANDOM, <https://www.fandom.com/terms-of-use> (Feb. 11, 2023) [<https://perma.cc/5WJE-E7P5>].

174. *About Us: Terms of Service*, DEVIANTART, <https://www.deviantart.com/about/policy/service/> (last visited Jan. 16, 2024) [<https://perma.cc/3RMC-YVJH>] (the heading 'Section I: General Terms' is similar to one of its subheadings, named 'General.').

175. CNN, *supra* note 172.

176. *Terms of Use, art. 10*, GOODREADS, <https://www.goodreads.com/about/terms> (Apr. 28, 2021) [<https://perma.cc/29P9-G3WP>] (the subheadings 'Assignment' and 'Disputes' are unrelated to the heading 'Disclaimers of Warranties and Limitation of Liability').

177. We appreciate that some consumer contracts include notices about the use of arbitration clauses at the outset to avoid unconscionability challenges. Whereas this practice may be an endeavor to preempt judicial

- The text of a contract paragraph combines, without any clear distinction, different topics that are not substantially related.¹⁷⁸ As one illustration, Facebook's clause 4.5.3 deals with three separate issues: (1) unenforceable terms, (2) waiver of terms, and (3) amendment of terms. A screenshot capturing this clause is below.

FIGURE 6: FACEBOOK CLAUSE 4.5.3

3. If any portion of these Terms is found to be unenforceable, the unenforceable portion will be deemed amended to the minimum extent necessary to make it enforceable, and if it can't be made enforceable, then it will be severed and the remaining portion will remain in full force and effect. If we fail to enforce any of these Terms, it will not be considered a waiver. Any amendment to or waiver of these Terms must be made in writing and signed by us.

IV. NORMATIVE DISCUSSION AND IMPLICATIONS

Given the social costs of messy contracts and their unfortunate popularity, it is necessary to consider how the law can respond to this phenomenon. This is the purpose of this Part. Section A adopts an *ex ante* perspective, offering the introduction of a new contractual duty: the duty to draft organized contracts.¹⁷⁹ Subsequently, Section B adopts an *ex post* perspective.¹⁸⁰ It surveys a suite of judicial responses to the problem of messy contracts. Finally, Section C addresses some possible critiques and skepticism towards our proposals.¹⁸¹

A. *Harnessing the Power of Prevention: Introducing a Duty to Organize Contracts*

In many walks of life, an ounce of prevention is worth a pound of cure. The case of consumer contracts is no different. To prevent messy contracts from proliferating, this Section argues that policymakers should consider imposing a contractual *organization duty* on firms. Under this proposed duty, firms that employ standard form contracts should ensure that their contracts are well-organized. Using the language of the New Jersey Supreme Court, imposing such a duty

invalidation of arbitration clauses, we remain critical of a response that employs blurry headings and suggest considering more appropriate ways to communicate important legal information to consumers.

178. FACEBOOK, *supra* note 154.

179. *See infra* Section IV.A.

180. *See infra* Section IV.B.

181. *See infra* Section IV.C.

would endeavor to ensure that “mutual assent is not achieved through ignorance.”¹⁸²

As the results of this study have elucidated, the duty to organize contracts should encompass two major requirements. First, the contract must include a complete table of contents, which organizes its topics as reflected in the contract headings. Presumably, this table of contents should be hyperlinked, so that consumers can click on a heading in the table of contents, which will take them directly to the term itself. These hyperlinks, in turn, may improve the transparency of online consumer contracts. Specifically, such hyperlinking may be particularly useful on devices such as smartphones, tablets, or TVs, which consumers use to create accounts, manage their affairs, and interact online more generally. Though these devices are not designed for reading long, complicated texts, consumers often use them to enter into form contracts.¹⁸³ Those hyperlinks will also avoid the problem of locating a heading within an excessively long contract with no page or paragraph numbers. Ideally, the table of contents would also consist of paragraph numbers, further assisting consumers in finding the headings that the table of contents details. Second, in addition to this table of contents, all the headings of the contract must be informative and accurate.

Beyond these two requirements, policymakers could also respond to the other, more anecdotal yet troubling findings of our empirical study. As noted, we found multiple deficiencies in how firms draft consumer contracts. These include, for example, headings that appeared in the table of contents but not the text itself; inaccurate and inconsistent headings; incomplete or lacking numbering; headings that do not relate to the text that follows; and clauses that combine different topics without properly distinguishing among them.¹⁸⁴

Revealingly, legislatures have already adopted an organization duty somewhat similar to the one we propose in other contexts. In several jurisdictions, court briefs often must contain a table of contents¹⁸⁵ and headings.¹⁸⁶ Likewise, in some jurisdictions, insurance policies must include a table of contents and headings.¹⁸⁷ Similarly, some mandated disclosures must include a table of

182. *Kernahan v. Home Warranty Adm’r of Fla., Inc.*, 199 A.3d 766, 785 (N.J. 2019).

183. *See generally* Jeff Sovern & Nahal Heydari, *Not-So-Smartphone Disclosures*, 76 ARK. L. REV 437 (2023) (examining whether consumers can decipher disclosures on smartphones).

184. *See supra* Section III.C.

185. FED. R. APP. P. 28 (the appellant’s brief must contain “a table of contents.”); FED. R. APP. P. 29 (“An amicus brief . . . must include . . . a table of contents.”); 210 PA. CODE § 2174 (1979) (“The briefs and the reproduced record shall each contain a full and complete table of contents.”); D.N.J. CIV. R. 7.2 (“Any brief shall include a table of contents”); Paul Yale, *A Model Form Title Opinion: Time for a Revisit?*, 1 OIL & GAS, NAT. RES. & ENERGY J. 381, 389 (2016) (“[T]ables of contents . . . are now required by most court rules for appellate briefs.”); *First Judicial Conference of the United States Court of Customs and Patent Appeals*, 65 FED. R. DECISIONS 171, 178 (1974) (“A table of contents and a table of cases is required in every appellant’s brief.”).

186. *See, e.g.*, FED. R. APP. P. 28 (the appellant’s brief must contain appropriate headings.); NEV. STATE 11 DIST. CT. R. 6.2 (same).

187. *See, e.g.*, MONT. CODE ANN. § 33-15-337 (West 2023) (“The policy must include a table of contents . . . headings . . . must be used to increase overall legibility.”).

contents.¹⁸⁸ Furthermore, some applications to federal agencies must have a table of contents.¹⁸⁹ In the same vein, reports by government departments must contain, in some cases, appropriate headings.¹⁹⁰ Finally, proposals by bidders to state agencies are sometimes required to include a table of contents.¹⁹¹

As emphasized throughout this Article, requiring firms to provide consumers with well-structured agreements may produce several benefits. First, organized contracts will likely decrease the time potential contract readers spend locating data within the contract. Since contract readers include lawyers, consumer advocates, and adjudicators, this could increase the efficient use of public and judicial resources. These structured contracts may improve contract readers' ability to remember the agreement's contents. On average, these ordered contracts are more comprehensible than messy contracts.

Given all these benefits, organized contracts may also increase the motivation of consumers to read the agreement both *ex ante* (before entering the agreement) and *ex post* (when a problem with the supplier arises). Such reading, facilitated by structured contracts, may assist consumers in making informed decisions, which consumers can hardly make under messy contracts. Employing economic terminology, messy contracts sustain information asymmetries between firms (who draft these contracts and are well-familiar with their terms) and consumers (or other readers). Organized contracts, however, can reduce information gaps and better inform readers, both *ex ante* (consumers who consider the transaction and face the contract) and *ex post* (consumers and other readers who wish to become familiar with the agreement and its risk allocation, after it was signed or otherwise accepted).

Notably, organized contracts may impact not only the demand side but also the supply side. Currently, firms employ messy contracts, which consumers are less likely to read. Since consumers do not read and notice standardized terms, such terms are mostly non-salient (i.e., unnoticed). And because consumers do

188. 17 C.F.R. § 230.481 (2023) (“Include on either the outside front, inside front, or outside back cover page of the prospectus, a reasonably detailed table of contents.”); 16 C.F.R. § 436.4 (2007) (“Include the following table of contents.”).

189. 21 C.F.R. § 312.23 (2023) (stating that an application to the FDA by “[a] sponsor who intends to conduct a clinical investigation” shall include a “table of contents”); Workforce Investment Act, Sections 127 and 167 Migrant and Seasonal Farmworker Youth Program, 67 Fed. Reg. 1235, 1242 (Jan. 9, 2002) (requiring that grant applications to the Employment and Training Administration must include a table of contents).

190. ALASKA STAT. ANN. §§ 06.01.050, 06.26.930 (West 2023) (mandating each report by a trust company to the Alaska Department of Commerce, Community and Economic Development must exhibit in detail and under appropriate headings the resources and liabilities of the company); TEX. FIN. CODE ANN. §§ 394.202, 394.205 (West 2011) (requiring a person that acts as an intermediary between consumers and creditors and that provides a debt management service to consumers shall file reports with the Texas consumer credit commissioner which contain appropriate headings).

191. STATE OF CONN. DEP’T. PUB. HEALTH, REQUEST FOR PROPOSAL # 2019-0903 SCHOOL BASED HEALTH CENTERS 1, 8–9 (proposals to the Connecticut Department of Public Health to provide school based health center services must include a table of contents); STATE OF TENN. DEP’T. OF CHILD.’S SERV., ANNOUNCEMENT OF FUNDING (grant proposals for child abuse prevention activities that are submitted to the State of Tennessee Department of Children’s Services must include a table of contents).

not appreciate non-salient qualities and are unwilling to pay for them, a competitive market forces firms to race to the bottom and use low-quality terms. This race to the bottom enables businesses to balance the costs of competing over the salient terms, such as price. Consequently, by using messy contracts, firms undermine the potential of market forces to yield an equilibrium where firms draft high-quality contracts to compete and win over consumers.¹⁹²

Well-organized contracts, however, can counter these forces and benefit markets by incentivizing transparency and rewarding the incorporation of pro-consumer provisions. On the whole, well-organized contracts can better calibrate consumers' expectations and thus serve as an efficacious risk allocation tool—which should be a fundamental feature of contracting. Organized contracts—which are easier to read, understand, and examine—can make standardized terms more salient. This, in turn, may ignite competition over (at least some) terms. In all, organized contracts may deter sellers from incorporating one-sided terms in their contracts at the outset. Accordingly, organized contracts may support a market equilibrium in which firms have a profit incentive to behave scrupulously and offer fair and efficient consumer contracts.

B. *When Prevention Fails: Judicial Responses to Messy Contracts*

Whereas *ex ante* prevention is often superior to *ex post* cure, one may still believe that imposing a duty to organize contracts is unjustified or may not yield the expected results. Moreover, imposing a duty to organize is merely the first step, as one also ought to consider the implications of breaching the duty if it were introduced. While Section A described an *ex ante* duty imposed on firms, this Section delineates how courts may respond to messy contracts.

Courts have multiple tools in their arsenal to respond to messy contracts. Take, for instance, the duty to read contracts. According to this duty, contracting parties have an inherent duty to read the terms of their contracts before accepting them.¹⁹³ Failure to fulfill this duty does not free a party from their contractual obligations, does not constitute grounds for voiding the contract, and does not trigger a contractual mistake necessary for contract reformation.¹⁹⁴ As a classic *South Park* episode (however satirically) argues, a party who fails to read the contract can only blame themselves.¹⁹⁵

192. See discussion *supra* Subsection II.C.4.

193. See, e.g., *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1325 (D.N.M. 2012) (“[E]ach party to a contract . . . has a duty to read and familiarize herself with its contents before signing it . . .” (quoting *THI of N.M. at Hobbs Ctr., LLC v. Patton*, No. 11-537 LH/CG, 2012 WL 112216, at *22 (D.N.M. Jan. 3, 2012)); *Liggatt v. Emps. Mut. Cas. Co.*, 46 P.3d 1120, 1125 (Kan. 2002) (“A party to a contract has a duty to read the contract before signing it . . .”).

194. *Benoliel & Becher*, *supra* note 48, at 2260 (recapping these consequences while citing case law).

195. “Well, how do you know if you agree to something, if you don’t read it?” *South Park: HumancentiPad* (Comedy Central broadcast Apr. 27, 2011) (parodying iTunes terms and conditions). To be sure, there are plenty of other pop culture mockeries of consumer contracts and privacy policies. See, e.g., *Parks and Recreation: Gryzzlbox* (NBC television broadcast Jan. 27, 2015).

When it comes to messy contracts, courts can exempt consumers from the duty to read such a contract. Exempting consumers from the duty to read messy contracts means consumers would not be presumed to have read their contracts. This would enable consumers to argue legitimately that they did not read their contracts and are not bound by them. At the most fundamental level, courts can adopt a presumption of no consumer assent when contracts are messy. Courts could then substitute the messy terms or agreements with punitive terms that favor consumers.¹⁹⁶ This, in turn, will incentivize firms to avoid messy contracts.¹⁹⁷

Likewise, courts could strike down messy contract terms that contradict consumers' reasonable expectations.¹⁹⁸ Along similar lines, courts could apply the test of reasonable communication, which courts developed in adjudicating forum selection clauses. In essence, the test seeks to assure that the consumer, as the consenting party, has a reasonable chance to observe a clause and absorb its effects.¹⁹⁹ Additionally, courts could rule that firms that employ messy contracts breach the general duty of good faith.²⁰⁰ Courts could further apply the doctrine of interpretation against the drafter, *contra proferentem*.²⁰¹ Courts could associate messy contracts with ambiguity, which would then be resolved against the drafter's interest.

Courts could also utilize the doctrine of unconscionability.²⁰² Messy contracts are procedurally flawed. Because courts often examine procedural and substantive unconscionability in tandem, messy contracts may ease the requirement

196. For a discussion and analysis, see Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 869 (2011) (investigating the optimal substitutes for excessive invalid contract terms); see generally Ori Katz & Eyal Zamir, *Substituting Invalid Contract Terms: Theory and Preliminary Empirical Findings*, 48 LAW & SOC. INQUIRY 780 (2023) (empirically examining various key aspects and implications of term substitution).

197. For a similar suggestion in the context of unreadable contracts, see Benoliel & Becher, *supra* note 48, at 2284–85.

198. The doctrine was originally adopted with respect to insurance contracts. According to this doctrine, “[i]n dealing with standardized [consumer] contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser’s ‘calling’, and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.” See *Gray v. Zurich Ins.*, 419 P.2d 168, 172 (Cal. 1966) (quoting Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943)) (discussing the doctrine of reasonable expectations).

199. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. L. INST. 1981) (“Where the other party has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”); RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS 22 (AM. L. INST., Tentative Draft No. 2, 2022) (“[A] standard contract terms is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving a reasonable opportunity to review the term.”).

200. See U.C.C. § 1-201(20) (AM. L. INST. & UNIF. L. COMM’N 2017) (defining “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing”).

201. See, e.g., *Damer Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 394 (Ariz. 1984) (en banc) (explaining the doctrine and its potential role in the context of consumer contracts).

202. See U.C.C. § 2-302; see also Anthony M. Balloon, Comment, *From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions*, 50 EMORY L.J. 905, 914 (2001) (discussing procedural unconscionability in the context of e-contracts).

for substantive unfairness.²⁰³ These and other judicial tools could protect consumers from messy terms and incentivize firms to avoid messy contracts.

Courts could also utilize or model existing legislation to block overly generalized headings (such as “miscellaneous”). For instance, New York’s Plain Language Act requires that consumer contracts be written clearly, coherently, and be appropriately captioned.²⁰⁴ Generalized headings may not meet the “appropriately captioned” requirement.

A major challenge in this context is that courts can only respond to cases before them. Consumers, however, are unlikely to initiate litigation to enforce their rights, especially with messy contracts the consumers struggle to comprehend. Private enforcement of consumer rights is sparse.²⁰⁵ Consumers are unaware of their rights, perceive typical harms as too small to litigate, find legal expenses prohibitive, and may fear confronting the firms or employing formal or legal means against them.²⁰⁶ Hence, a potential supplement path, discussed elsewhere, is to utilize administrative enforcement to strengthen (the likely partial) private enforcement.²⁰⁷

C. *Objections and Challenges: A Reply to Critics*

Our proposal to police and scrutinize messy contracts may be objectionable from both sides of the contract law spectrum. On the one hand, one may argue that it is unfair and unreasonable to expect consumers to cope with messy contracts. Thus, consumer protection proponents may ask why we are not suggesting more forcible means to regulate consumer contracts or improve their visual representation and design.²⁰⁸ For example, one may recommend using short summaries of terms, infographics, comics, or images to make consumer contracts more user-friendly and engaging.²⁰⁹ One may also propose more prescriptive tools—in addition to or as part of the proposed organization duty—that can

203. See generally Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (2012) (outlining the traditional “two-prong” approach to the unconscionability doctrine and discussing the “sliding scale” approach).

204. N.Y. GEN. OBL. LAW § 5-702 (Lexis Nexis 2023).

205. See, e.g., Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405, 2439–41 (2021) (surveying the common obstacles consumers face in enforcing their rights).

206. See, e.g., William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 631 (1980–1981); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 95 (1974); see also Schmitz, *supra* note 24.

207. Adar & Becher, *supra* note 205, at 2443–48 (discussing the promise of administrative enforcement).

208. Cf. *Contract Design Pattern Library*, WORLDCC FOUND., <https://contract-design.worldcc.com/> (last visited Jan. 16, 2024) [<https://perma.cc/A7M8-TH4T>] (suggesting various patterns and examples to improve contract design).

209. See, e.g., sources cited *supra* note 59; see also Shmuel I. Becher, Yuval Feldman & Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans*, in THE CAMBRIDGE HANDBOOK OF MARKETING AND THE LAW (Jacob Gersen & Joel Steckel eds., 2023) (suggesting the use of videos and infographics to increase consumer engagement and the understanding of high-risk financial transactions).

reduce the messiness of consumer contracts. These may include cross-functional teams (where skilled communicators work alongside lawyers), draft audits for communication effectiveness, or more consumer engagement and focus in the drafting and redrafting processes.

Even more generally, one may also suggest opting for content regulation. Indeed, specific laws regulating unfair consumer contracts are the prevailing norms in many other jurisdictions, including the European Union,²¹⁰ the United Kingdom,²¹¹ Australia,²¹² New Zealand,²¹³ and Israel.²¹⁴ According to this line of reasoning, messy contracts provide yet another justification for contract regulation that moves beyond our recommendations.

To be sure, organized contracts are only one aspect of the complicated challenge of consumer contracts, and one needs to consider additional means to address this challenge holistically. To be clear, we support exploring additional and presumably more all-encompassing regulatory tools. Nonetheless, we opted for realistic proposals that (1) respond directly to our empirical findings, and (2) may hopefully appease even relatively conservative lawmakers who seek moderate interventions. Thus, our suggestions do not negate content regulation that tackles unfairness or other regulatory means to improve the visual presentation of consumer contracts. We do opine, however, that even fair and balanced contracts that are presented in engaging ways would greatly benefit from being organized.

Whereas consumer protection proponents may seek stronger regulatory measures, others may suggest relying on market forces to discipline sellers. Do messy contracts justify limiting the parties' freedom of contract? Is it clear that messy contracts create a market failure that regulatory intervention can cure? Do the benefits of regulating and tackling messy contracts outweigh the regulatory and enforcement costs? Can new technologies make messy contracts obsolete by providing consumers with easy and accessible contractual information, regardless of the text's messiness?²¹⁵

Although the discussion above emphasizes the benefits of organized contracts, we acknowledge the costs and risks of imposing a duty to organize contracts. Obliging firms to include a table of contents and informative headings interferes with the parties' freedom to design their contracts. This intervention may entail some costs.

210. See Council Directive on Unfair Terms in Consumer Contracts 93/13/EEC, 1993 O.J. (L 95) 29 (EU) (protecting consumers against unfair standard contract terms imposed by traders).

211. See The Consumer Rights Act 2015, 2015 c. 15 (UK) (specifically addressing unfair terms in contracts between traders and consumers, stating that unfair terms in consumer contract are "not binding on the consumer;" *id.* s62(1)).

212. See Competition and Consumer Act 2010 (Cth) sch 2 ch 2 pt 2-3 ss 23-38 (Austl.) (exclusively regulating unfair contract terms, unfair terms of consumer contracts, and small business contracts).

213. See Fair Trading Act 1986, ss 26A-26E, 46H-46M (N.Z.) (specifically regulating "unfair contract terms" in consumer standard form contracts).

214. See Standard Contracts Law, 5743-1982 (Isr.) (particularly regulating "unduly disadvantageous" terms in standard form contracts between suppliers and customers).

215. Cf. Arbel & Becher, *supra* note 131 (demonstrating the power of AI language processing models to assist consumers in reading, understanding, personalizing, and benchmarking consumer contracts).

Still, we submit that this relatively mild intervention is proportionate, balanced, and legitimate. First, the contracting parties remain free to decide on the contract content. The proposed intervention only relates to organizational features, not the contractual substance. Second, the costs are likely to be quite minimal. Adding a table of contents that follows the contract's terms and ensuring proper headings should not be overly burdensome. Once firms include these organizational signals, they can repeatedly use the contract and refine the signals only upon contract amendments. Third, as online contracts multiply, bloat and become longer and longer with time, the need for organizational signals that will assist readers becomes stronger.²¹⁶

Furthermore, we submit that enforcement costs are also likely to be moderate. Lack of a table of contents or vague and general headings are normally easy to identify and monitor. At the same time, consumers suffer from imperfect information and a lack of bargaining power. Consumers are, hence, less likely to grasp contractual issues and insist on their rights.²¹⁷ Given the unwarranted effects of messy contracts, ensuring that firms properly organize consumer contracts is a small price to pay for a more just and efficient contractual environment.

Although organized contracts cannot and will not guarantee that consumers start reading all form contracts they presumably agree to, such contracts still carry considerable value. As the preceding analysis clarifies, organized contracts have a few notable advantages in the context of the 'no-reading' problem. First, they may encourage at least some consumers to read some of their contracts. In other words, it may well be that one of the reasons that consumers generally do not read form contracts is the costs associated with reading such (messy) texts. Reducing reading costs by making such contracts more user-friendly may, in turn, prompt more consumers to read them. In this context, the proposal to improve organizational signals—such as the inclusion of a table of contents and informative headings—should be considered in conjunction with other relevant suggestions, like shortening contracts and simplifying them.

Second, some consumers read (at least parts of) their form contracts, especially when faced with a problem, grievance, or dispute.²¹⁸ In all, organized contracts will make it easier for consumers to read, understand, and remember the context of their agreements. Given the challenge of consumer access to justice,

216. See, e.g., Hoffman, *supra* note 2, at 18 (discussing the spread of online contracts); Samples et al., *supra* note 14, at 8 (discussing the growing length of popular online contracts).

217. See source cited at *supra* note 206.

218. See, e.g., Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. TECH. L. REV. 303, 315 (2008) ("Most of the reasons for the lack of effective reading and comprehension of 'non-salient' terms ex ante do not apply to the ex post context."); Becher & Unger-Aviram, *supra* note 79, at 214–15 (noting that many more consumers indicated "they would read the contract ex post (rather than ex ante)"); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 6 (2017) (finding that tenants are likely to be deterred by the terms of their lease agreements once a dispute arises even if those terms are unenforceable).

it is imperative to make it easier for consumers to access and read their contracts ex post and not only ex ante.

Third, as noted throughout this Article, organized contracts can serve stakeholders beyond consumers. Organized contracts can also assist, for instance, intermediaries, consumer organizations, watchdogs, adjudicators, regulators, and the media. There is no legitimate reason to ignore the benefits that organized contracts confer on third parties, which perform important social functions.

Fourth, organized contracts may instill a greater sense of transparency and surveillance. Regardless of the actual impact on consumer readiness to read form contracts, the mere need to offer organized, easy-to-read-and-navigate contracts may impact firms as contract drafts. At the end of the day, the duty to organize contracts may thus incentivize firms to be more prudent and balanced when drafting form contracts, resulting in overall better contracts.

Fifth, from a normative perspective, consumers should have the right to read organized contracts, whether or not they regularly utilize this right. Consumer consent, once again, should not be based on confusion and ignorance. Coupled with other measures to enhance user-centric form contracts, organized contracts will provide consumers with a better opportunity to read, understand, and meaningfully consent to them.

V. CONCLUSION

Law review articles have a clear structure, organizing the text into Parts, Sections, and Subsections. These articles also often contain a hierarchical table of contents.²¹⁹ Authors carefully consider the article's headings and sub-headings featured in the table of contents.²²⁰ All this organizational attention ensures that readers can more easily comprehend the key arguments, quickly distinguish among the different parts of the manuscript, and painlessly navigate the manuscript.²²¹

Authors of law review (and other) articles have a strong incentive to draft well-structured papers. The market for law review articles is competitive.²²²

219. Authors often create these table of contents to assist both readers and themselves in reflecting on the article's argument, structure, consistency, possible gaps, and unnecessary repetitions. *See, e.g.*, EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* 99 (2016).

220. For instance, a typical advice would be "to choose headings that refer to your specific argument . . . rather than generic ones . . ." *Id.* at 98.

221. For example, Volokh suggests that "[r]eaders find subsection headings helpful . . . subsection headings can bring the reader back on track . . . Subsection breaks also provide extra white space on the page, which seems to make text more appealing to many readers." *Id.*

222. *See, e.g.*, Orin S. Kerr, *Maybe the Status Quo Isn't So Bad? Thoughts on Two Proposals about Law Review Reform from the AALS*, VOLOKH CONSPIRACY (Dec. 18, 2019, 6:07 AM), <https://reason.com/volokh/2019/12/18/maybe-the-status-quo-isnt-so-bad-thoughts-on-two-proposals-about-law-review-reform-from-the-aals/> [<https://perma.cc/P5BJ-755W>] ("From the journal side, we have hundreds of journals competing for the best articles they can get from thousands of submissions on every legal topic under the sun. And from the author side, we have thousands of authors competing for the best placement they can from hundreds of journals."); *cf.*

Authors who write messy articles may find it challenging to get their articles accepted.²²³ Slightly restated, proper organization and clear writing increase the prospects that law reviews will accept a paper for publication. Moreover, messy articles are also less likely to be read and understood. In other words, organized and clear articles are likely to enjoy higher readership, potentially contributing to readers' engagement and the paper's overall impact.²²⁴

Likewise, a competitive business environment should theoretically lead firms to draft clear consumer contracts. After all, a contract reflects a mutual agreement that presumably advances the utility of all contracting parties, who are presumed to read, understand, and agree to their contract terms.²²⁵ Firms that draft non-user-friendly, messy contracts make it harder for consumers to realize their rights and obligations. Other things being equal, one would expect that firms that employ messy contracts would lose consumers to competitors that offer well-organized contracts.²²⁶ Our empirical findings, however, suggest that this is not the case.²²⁷

Giant global businesses, such as Google, Facebook, Instagram, TikTok, eBay, and Amazon, have changed the business-to-consumer contractual landscape. Whereas traditional standard form contracts typically involved national suppliers and local consumers, current standard form contracts are often formed between mega-global suppliers and many (often billions) of worldwide diffused consumers. This, coupled with firms' ability and profit incentive to manipulate the online contracting environment to their advantage, systematically exposes

Timothy T. Lau, *A Law and Economics Critique of the Law Review System*, 55 DUQ. L. REV. 369, 369 (2017) (noting that "journals have no availability to accept all articles of equal quality").

223. Jan Feld, Corinna Lines & Libby Rosset, *Writing Matters*, 217 J. OF ECON. BEHAV. & ORG. 378, 378 (2024) (finding that even for a discipline that relies on quantified analysis such as economics, "writing matters . . . economists judge edited versions (of economic papers) as higher quality; they are more likely to accept edited versions for a conference; and they believe that edited versions have a better chance of being accepted at a good journal").

224. While we use articles to illustrate our point, much of our analysis pertains to other types of texts that can benefit from table of contents and headings. More generally, these tools can benefit many texts that are (1) lengthy, (2) contain various parts that may not equally interest readers, or (3) where different readers may have different interests (or shift their interest throughout with time).

225. See, e.g., *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1325 (D.N.M. 2012) ("Each party to a contract . . . has a duty to read and familiarize herself with its contents before signing it" (quoting *THI of N.M. at Hobbs Ctr., LLC v. Patton*, No. 11-537 LH/CG, 2012 WL 112216, at *22 (D.N.M. Jan. 3, 2012)); *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 965 (N.D. Cal. 2010) ("Plaintiff has a duty to read the terms of a contract before signing."); *Anderson v. Equitable Life Assurance Soc'y*, 248 F. Supp. 2d 584, 590-91 (S.D. Miss. 2003) ("Mississippi law creates a duty on contracting parties to read their contracts, and imputes the knowledge of that contract to the parties.").

226. Cf. George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1307-08 (1981) (explaining that under conditions of perfect competition firm would design products' attributes to maximize consumers' welfare); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1392 (1983) (arguing that a competitive equilibrium would force firms to compete over goods and contract terms and offer them to consumers "at the lowest possible cost").

227. See *supra* Section III.C.

masses of consumers worldwide to undesirable, non-transparent contractual practices.²²⁸

TL;DR is internet slang, abbreviating “too long, didn’t read.”²²⁹ The literature systematically explores the problem of lengthy and complex consumer contracts, observing that routine business-to-consumer transactional legal documents “are the epitome of TL;DR.”²³⁰ Thus far, however, the literature has neglected to consider the problem of contractual messiness. Our findings suggest that messy contracts constitute a disturbing phenomenon. In fact, it justifies introducing another abbreviation to internet slang: TM;DR (too messy, didn’t read).

Particularly, this Article suggests that powerful firms often draft messy online contracts with no consistent organizational signals. This reality, in turn, increases the difficulty for consumers and other contract readers to understand it when needed. It also reduces the ability of competitive forces and reputational constraints to yield a fair and efficient business-to-consumer market equilibrium. Whereas contract drafters may have lawyers and judges in mind, it is time to ensure these contracts also—perhaps primarily—serve the fundamental needs of those who presumably agree to and are bound by them: consumers.

Whereas our study focused on two key organizational signals in 100 popular online contracts, future studies could expand this analysis and examine additional contracts²³¹ and other organizational signals and indicators.²³² Future scholarship could also provide a more granular analysis, categorizing contracts into different degrees and types of messiness. Further investigation may also study the possible difficulties in determining how best to word contract headings,

228. See generally Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C.L. REV. 55 (2023) (surveying empirical studies that document how firms employ non-transparent contractual arrangement at the expense of consumers).

229. This slang made its way to some of the most acceptable dictionaries and platforms. These include, for example, Wikipedia, Oxford Dictionaries Online, and Merriam-Webster. See *TL;DR*, WIKIPEDIA, <https://en.wikipedia.org/wiki/TL;DR> (last visited Jan. 16, 2024) [<https://perma.cc/D985-XM3W>]; *TL;DR*, OXFORD DICTIONARIES ONLINE, <https://www.oxfordlearnersdictionaries.com/definition/english/tl-dr> (last visited Jan. 16, 2024) [<https://perma.cc/A8HJ-PAMA>]; *TL;DR*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/TL%3BDR> (last visited Jan. 16, 2024) [<https://perma.cc/32DG-GA97>].

230. See Samples et al., *supra* note 14, at 2; see also Cristiano Lima & Aaron Schaffer, *No One Reads the Terms of Service. Lawmakers Want to Fix That with A New ‘TLDR’ Bill*, WASH. POST (Jan. 13, 2022), <https://www.washingtonpost.com/politics/2022/01/13/no-one-reads-terms-service-lawmakers-want-fix-that-with-new-tldr-bill/> [<https://perma.cc/44B8-AXU6>].

231. Increasing the sample size would entail including websites of smaller size and popularity, which may yet be important. Because these websites are subject to even less scrutiny and attention than larger and more popular websites, we hypothesize that their messiness would be even more prominent. Such findings would align with other empirical results, which found associations between low popularity and increased lack of transparency. See, e.g., Benoliel & Becher, *supra* note 48, at 2281–82 (suggesting that websites with fewer page views are likely to have poorer readability scores); Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GA. L. REV. 657, 685 (2021) (finding that “less popular sites tend to have less transparent modification mechanisms”).

232. For example, additional or alternative messy indicators may include whether contract clauses are not logically ordered, or when there are multiple contract clauses that address one specific issue (with or without contradiction). Other aspects of well-organized contract drafting may include, for example, graphic elements, proper definitions, introductory paragraphs, and coherence, which are all beyond the scope of this Article.

which can vary depending on contractual settings and the contract's target audience (considering literacy and education, for example).

In the meantime, our findings provide a compelling indication that messy contracts result from unequal bargaining power between firms and consumers. The empirical findings also clearly show that billions of consumers are subject to messy contracts, and that market forces have not remedied the problem. If the additional drafting costs are negligible (and can be passed onto consumers) as this Article suggests, one may legitimately wonder whether businesses maintain messy contracts to facilitate and aggravate information imbalances.

Ultimately, messy contracts undermine consumers' ability to exercise freedom, autonomy, and choice. Messy contracts hamper consumers' ability to advance their utility via open market transactions. The fact that the most popular and powerful firms allow themselves to employ disorganized and untidy contracts to interact with billions of customers indicates that something is rotten in the state of consumer contracts.²³³

However unfortunate, this reality is not inevitable. Policymakers could require firms to draft well-structured and organized mass standard form agreements. At the same time, courts can view messy contracts with suspicion and use judicial tools to assist consumers and encourage better contract drafting. We hope this Article provides the necessary conceptual and empirical framework to explore and advance a less messy contracting reality.

233. With apologies to WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 4, l. 100.

APPENDIX A: SAMPLE WEBSITES (ALPHABETICALLY LISTED)

1. alamy.com	35. goodreads.com	69. sciencedirect.com
2. alibaba.com	36. google.com	70. sears.com
3. aliexpress.com	37. homedepot.com	71. shutterstock.com
4. amazon.com	38. houzz.com	72. simplyhired.com
5. bbc.com	39. imdb.com	73. soundcloud.com
6. bestbuy.com	40. indeed.com	74. spotify.com
7. bloomberg.com	41. insider.com	75. springer.com
8. britannica.com	42. instagram.com	76. stackexchange.com
9. businessinsider.com	43. jstor.org	77. target.com
10. buzzfeed.com	44. latimes.com	78. thefreedictionary.com
11. buzzfile.com	45. linkedin.com	79. theguardian.com
12. cambridge.org	46. manta.com	80. tiktok.com
13. cbsnews.com	47. medium.com	81. trip.com
14. chamberofcommerce.com	48. merriam-webster.com	82. tripadvisor.com
15. cnbc.com	49. microsoft.com	83. tumblr.com
16. cnn.com	50. moovitapp.com	84. twitter.com
17. costco.com	51. nextdoor.com	85. usnews.com
18. dailymail.co.uk	52. npr.org	86. walmart.com
19. dailymotion.com	53. nypost.com	87. washingtonpost.com
20. deviantart.com	54. nytimes.com	88. wayfair.com
21. dreamstime.com	55. patch.com	89. waze.com
22. ebay.com	56. pinterest.com	90. webmd.com

23. etsy.com	57. popsugar.com	91. weebly.com
24. expedia.com	58. poshmark.com	92. wikihow.com
25. facebook.com	59. prnewswire.com	93. wordpress.com
26. fandom.com	60. quizlet.com	94. yahoo.com
27. flickr.com	61. quora.com	95. yellowpages.com
28. forbes.com	62. realtor.com	96. yelp.com
29. foursquare.com	63. redbubble.com	97. youtube.com
30. gamespot.com	64. reddit.com	98. zillow.com
31. genius.com	65. redfin.com	99. ziprecruiter.com
32. github.com	66. researchgate.net	100. zoominfo.com
33. glassdoor.com	67. reuters.com	
34. goodhousekeeping.com	68. salary.com	

