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SOCIAL MEDIA AND THE RISE IN CONSUMER BARGAINING POWER

Wayne R. Barnes*

I. INTRODUCTION

When consumers enter into transactions with commercial enterprises, they almost invariably do so through the use of standard form contracts. The disparity in bargaining power between consumers and commercial enterprises is generally complete and absolute. Consumers are typically not able to negotiate the individual terms of form contracts, and so they cannot dicker with the company over onerous terms such as liability limitations, warranty exclusions, and the like. Consumers would, in most instances, not be able to understand the various legal issues at stake even if they had the bargaining power necessary to seek more favorable contractual terms at the time of contract formation. The idea that consumers can properly consent to form contracts is conceptually flawed, but has nevertheless been universally recognized and enforced by the courts absent serious defects in the bargaining process such as fraud, duress, or unconscionability. Consumers generally agree to contractual terms after having little to no say in the process, other than the simple decision of whether to purchase the goods or services from the company, and are bound by the terms dictated by the merchant.¹

Buried in form contracts, which have been consented to by masses of consumers, exist a myriad of terms that are both favorable to the companies who drafted the terms and correspondingly unfavorable to the consumers who are held to have consented to them. These terms include things like damages limitations, warranty limitations or exclusions, arbitration clauses,

* Professor, Texas Wesleyan University School of Law. I would like to thank Texas Wesleyan University School of Law for its generous research assistance provided for this Article. Thanks also to my colleagues at Texas Wesleyan for their helpful comments at a faculty colloquium in the Spring 2011 semester, and to the participants at the Sixth Annual International Contracts Conference at Stetson University School of Law in February 2011. Finally, thanks to Bonnie Bundens and Desireé Slaybaugh for their research assistance.

1. See generally discussion *infra* Part II (discussing the law generally applicable to standard form contracts and bargaining).

penalty fees, personal information disclosure, and other similar types of contractual clauses. The consumer is legally bound by the terms contained in the form contract, because, in theory, he has a duty (and is able) to read the contract, could have done so if he had desired, and ultimately indicated his assent to the form by signing, clicking, or otherwise outwardly manifesting his assent to the form contract's terms. But, again, few consumers are even cognizant of these terms, let alone capable of bargaining for more favorable treatment in these areas regardless of cognizance. The terms are "take-it-or-leave-it."²

Most of the time, nothing really comes of the unfavorable terms during the life of the consumer-merchant contractual relationship because the contingencies triggering them usually fail to occur. That is, most of the time the consumers' purchases are not faulty and do not cause injury or damage. Thus, the consumer does not need to assert any right of recourse. Sometimes, however, injuries *do* arise, and it is for just such an eventuality that the merchant has inserted the favorable clauses in the contract. At that point, the merchant may want to control the consumer's recovery of damages by limiting his available remedies, or force the consumer into accepting a less favorable dispute resolution process, such as binding arbitration rather than a jury trial before a jury of the consumer's peers. Furthermore, most of the time, in bargaining about such terms, the consumer has no more power over the merchant at this post-formation phase, during which his expectations have been disappointed, than he had at the original moment of contract formation. The consumer is at the mercy of the legally binding contract that he signed or clicked, and that the merchant is within its contractual and legal rights to enforce.

Recently, however, some consumers have used social media to assert a new kind of power over merchants. That is, these consumers have purchased goods or services by form contracts that contain unfavorable terms, and the eventualities that such terms are designed to address have in fact come to pass. When their initial efforts to protest for more favorable treatment than the contract terms technically require failed to yield any recourse to these consumers, they took their protests online into the social media—in the form of Facebook pages, Twitter posts, or YouTube videos—where their complaints are heard by hundreds, thousands, or sometimes even millions of other consumers. Faced with such online complaints which have garnered substantial attention, several merchants have relented and granted more favorable treatment than their contract terms otherwise required. This has arguably resulted in more bargaining power for these consumers making use of such social media avenues.³

2. *Id.*

3. See *infra* Part III (portraying instances where consumers have utilized social media to obtain favorable resolutions in disputes with merchants).

This Article will describe this phenomenon in its contract and bargaining contexts, and discuss the implications of social media for consumer bargaining. Part II of the Article will discuss the law generally applicable to standard form contracts and bargaining, as well as the cognitive and psychological defects that are involved in consumers' bargaining processes. Part III will discuss several instances where consumers have used social media to obtain favorable resolutions of disputes that were not otherwise required by the terms of the standard form contracts to which they originally agreed when they purchased the goods or services. Part IV will discuss some implications of these developments for consumer bargaining power and the operation of the marketplace. Part V will offer a brief conclusion.

II. STANDARD FORM CONTRACTS: LAW AND CONTEXT

A. *Governing Doctrine*

Standard form contracts are universally used by merchants contracting with consumers:

Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if [consumers] are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.⁴

Since David Slawson wrote his influential article four decades ago, the use of form contracts has only increased,⁵ especially with online contract

4. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). One of the first scholarly discussions of the use of form contracts described the phenomenon this way:

No longer do individuals bargain for this or that provision in the contract The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.

Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1264 (1993) (quoting OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 18 (1937)).

5. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (observing that "nearly all

terms—such as website terms of use and software license agreements—to which consumers assent by use of “clickwrap” or “browsewrap.”⁶ Robert Hillman and Jeffrey Rachlinski noted that “[t]he Internet is turning the process of contracting on its head.”⁷ Thus, consumers are assenting to form contracts in ever-increasing amounts, especially online, with the ease of a mouse click (or tablet screen tap).⁸

Todd Rakoff articulated seven characteristics of standard form contracts and their transactional use:

1. The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
2. The form has been drafted by, or on behalf of, one party to the transaction.
3. The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
4. The form is presented to the adhering party [i.e., the consumer] with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
5. After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
6. The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.
7. The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.⁹

commercial and consumer sales contracts are form driven”).

6. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002) (citing Robert W. Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891, 895–99 (1998)).

7. *Id.* at 429.

8. Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 229 (2007).

9. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

Businesses use form contracts for many reasons, including risk reduction, efficiency, and lowered costs.¹⁰ From the consumer's perspective, the following observations are generally true with respect to form contracts: (1) consumers do not have the bargaining power to seek more favorable terms; (2) the contingencies that the form contract terms are designed to address are unlikely to happen; (3) consumers do not shop or compare competitors' terms for anything beyond price, for the most part; and (4) consumers believe they can ignore the technical language of the contract in favor of trusting the business to treat them fairly, in spite of what the contract says.¹¹ Therefore, consumers generally do not bother reading the language in form contracts.¹²

The unilateral nature of form contracts is at odds with the paradigmatic ideal of two contracting parties with full knowledge of all terms being discussed, with vigorous bargaining and debate about the final terms in the contract.¹³ That is, "[d]eeply embedded within the law of contracts, viewed as private law, lies the image of individuals meeting in the marketplace"¹⁴ This lack of bargaining or negotiation in the standard form context is recognized in the comments to Restatement (Second) of Contracts § 211:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to

10. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943); see also Slawson, *supra* note 4, at 530–31 (explaining the predominance of standard form contracts in society).

11. Rakoff, *supra* note 9, at 1225–28.

12. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 n.338 (1960); IAN MACNEIL, *CONTRACTS* 445 (2d ed. 1978); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 13 (1981); Arthur A. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349 (1970); Karl N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 673 (1925); Rakoff, *supra* note 9, at 1179 (citing P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 731 (1979)); Arnold L. Rotkin, *Standard Forms: Legal Documents in Search of an Appropriate Body of Law*, 1977 ARIZ. ST. L.J. 599, 603 (1977); Slawson, *supra* note 4, at 531; William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 425–26 (1973).

13. Slawson, *supra* note 4, at 529 (“The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.”).

14. Rakoff, *supra* note 9, at 1216.

vary them. Customers do not in fact ordinarily understand or even read the standard terms.¹⁵

Typically, the consumer neither reads nor negotiates the vast majority of form contract terms, and commentators have struggled with the notion that consumers can *consent* to the full range of terms to a particular transaction.¹⁶ Michael Meyerson noted that “[s]tandard form contracts have been in use for over two centuries, and the question of the proper construction of these contracts has haunted contract law ever since.”¹⁷ Karl Llewellyn wrote one of the first and clearest explanations of the nature of consumer assent to form contracts:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.¹⁸

Llewellyn’s analysis astutely perceives that the consumer, expressly or implicitly, places trust in the merchant with respect to the terms that the consumer chooses not to read or understand.¹⁹ As Robert Braucher more memorably put it, during the American Law Institute’s deliberations on the Second Restatement, “We all know that if you have a page of print, whether it’s large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion’s mouth and hope it will be a friendly lion.”²⁰

Modern form contract law has evolved in a fairly direct path from Llewellyn’s original formulation. The “duty to read” rule posits that the consumer who outwardly manifests assent to a form contract, typically by signing it, is presumed to have agreed to be subject to the entirety of its

15. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

16. *See id.* § 17(1) (1981) (stating that “the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration”).

17. Meyerson, *supra* note 4, at 1263–64 (noting that the first standard form contracts were used in the late 1700s for marine insurance contracts).

18. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

19. Barnes, *supra* note 8, at 240–41 (citing Rakoff, *supra* note 9, at 1200).

20. Robert Braucher, *The American Law Institute Forty-Seventh Annual Meeting*, 47 A.L.I. PROC. 525 (1970).

terms.²¹ That is, “one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature.”²² Not only that, but as Rakoff further observed, “it is legally irrelevant whether the [consumer] actually read the contents of the document, or understood them, or subjectively assented to them.”²³

Although a consumer is generally bound by the terms of a form contract to which he assented, there are some narrow doctrinal exceptions.²⁴ Perhaps the primary safeguard exception is the doctrine of unconscionability. Unconscionability is sometimes characterized as “that which ‘affronts the sense of decency’” or that which is “outside the limits of what is reasonable or acceptable: shockingly unfair, harsh, or unjust.”²⁵ A consumer may avoid enforcement of the contract if a court determines it to be unconscionable.²⁶ Unfortunately for aggrieved consumers, however, unconscionability is not usually successful in court,²⁷ since it only avoids

21. JOSEPH PERILLO, 7 CORBIN ON CONTRACTS § 29.8, at 402 (Rev. ed. 2002).

22. *Id.* at 402–03 (quoting *Rossi v. Douglas*, 100 A.2d 3, 7 (Md. 1953)); *see also* Rakoff, *supra* note 9, at 1185 (explaining that “[t]he adherent’s signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract . . .”).

23. Rakoff, *supra* note 9, at 1185. Rakoff also stated, consistent with Llewellyn’s formulation, that “the adherent’s assent covers all the terms of the document, and not just the custom-tailored ones or the ones that have been discussed.” *Id.*

24. *See id.* (outlining the fact that “[e]xceptions to the foregoing principles are narrow. In particular, failure of the drafting party to point out or explain the form terms does not constitute an excuse. Instead, in the absence of extraordinary circumstances, the adherent can establish an excuse only by showing affirmative participation by the drafting party in causing misunderstanding . . .”).

25. JOSEPH PERILLO, 7 CORBIN ON CONTRACTS § 29.8, at 372–73 (Rev. ed. 2002) (quoting *Gimbel Bros. v. Swift*, 62 Misc.2d 156, 307 N.Y.S.2d 952 (Civ. Ct. 1970)); *see also Unconscionability*, WEBSTER’S THIRD NEW INT’L DICTIONARY, UNABRIDGED (3d ed. 2000).

26. *See, e.g.*, UCC § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979):

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Unconscionability is usually held to comprise two elements: (1) procedural unconscionability and (2) substantive unconscionability. Arthur A. Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 116 U. PA. L. REV. 485 (1967). Procedural unconscionability deals with the contracting process—that is, the unequal bargaining power between the parties and relative inaccessibility of boilerplate language in form contracts. Substantive unconscionability deals instead with the substantive contents of the agreement. Therefore, the court may refuse to enforce such terms as “are immoral, conflict with public policy, deny a party substantially what she bargained for, or have no reasonable purpose in the trade.” Hillman & Rachlinski, *supra* note 6, at 456–57 (citing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 138 (1997)).

27. *See generally* Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of*

enforcements of contracts found to be “extraordinarily unfair.”²⁸

The result of this legal regime is that consumers are simply bound to the terms of their form contracts in the vast majority of instances. The fact that certain contingencies later occur subsequent to formation—such as the occurrence of a defect in the product—do not change this result. In fact, such an eventuality is the very reason the business placed the favorable term in the form contract in the first place. Thus, existing contract law doctrine results in consumers being bound by unfavorable terms like liability limitations and warranty exclusions, once these issues are brought to a head by the occurrence of disappointed expectations.

Short of legal recourse or the ability of the consumer to negotiate a favorable resolution with the merchant in the face of disappointed expectations, the consumer has only one significant remaining option—namely, the marketplace itself. A consumer who is disappointed by the outcome of his contract with a particular merchant may always exercise his autonomous right to refrain from further dealings with such merchant, and instead to choose to take his business elsewhere in the future.²⁹ This consumer power to vote with dollars, although not tantamount to a legal mechanism to compensate lost expectations under contract law, still gives the consumer an important ability to nevertheless vindicate his preferences and expectations for ideal business contracting behavior.³⁰ But, insofar as legalities are concerned, the consumer is bound—both at the time of formation, and subsequently after the occurrence of the eventualities that cause the consumer’s expectations to be disappointed.

B. Behavioral and Cognitive Context

In addition to the legal doctrine governing the formation of standard form contracts set forth above, scholars in other disciplines have addressed the behavioral and cognitive defects of consumers in making decisions to enter into such contracts with merchants. A discussion of these defects will

Unconscionability: An Empirical Analysis of Law in Action, 33 FLA. ST. U. L. REV. 1067 (2006) (providing empirical data on rates of success of unconscionability claims).

28. Meyerson, *supra* note 4, at 1286 (citing Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1337 (1982)); *see also* Barnes, *supra* note 8, at 248 (citing Hillman & Rachlinski, *supra* note 6, at 457) (“[S]hort of outright oppression or conscience-shocking terms, courts have been much less predictable in using unconscionability as a tool for policing terms to which consumers did not clearly assent and which are otherwise unfair or extremely unfavorable.”).

29. *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1237 (2006) (declaring that “[v]iewed now as part of a working social system, contracts are assumed to be the products of competition in the marketplace”).

30. *See generally* Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839 (2010) (discussing consumers’ ability to reflect preferences through selection of merchants with whom to bargain).

aid in the discussion of the social media phenomenon that is the primary purpose of this Article.

1. Cognitive and Psychological Problems: Bounded Rationality, Disposition, and Defective Capability

In 1995, Professor Melvin Eisenberg published *The Limits of Cognition and the Limits of Contract*, in which he articulated the “complex of social propositions [which] supports the bargain principle.”³¹ Eisenberg observed that consumers have historically been presumed to be able to assess what is valuable, and to only enter into purposefully profitable contracts that result in a net social gain.³² And, Eisenberg further observed, these presumptions were historically premised on the notion that such consumers “act with full cognition to rationally maximize [their] subjective expected utility.”³³ However, Eisenberg assembled an impressive array of evidence from other disciplines to show that consumers frequently defy this rational choice model, as a result of human “limits of cognition.”³⁴ Stated another way, consumers have limited cognitive ability to judge the risks and pitfalls associated with transacting by form contract.³⁵ Professor Eisenberg recognized three particular types of limitations that govern consumers’ transaction choices: bounded rationality, disposition, and defective capability.³⁶

Bounded rationality describes the reality that people do not have unlimited computer-like powers of analysis.³⁷ People have limited time, money, energy, and memory, and so cannot make “perfect” decisions when entering into contracts.³⁸ Since people cannot make “optimal” marketplace choices, they tend to settle for merely “satisfactory alternatives”:

An alternative is optimal if: (1) there exists a set of criteria that permits all alternatives to be compared, and (2) the alternative in question is preferred, by these criteria, to all other

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

32. *Id.* at 211–12.

33. *Id.* at 212.

34. *Id.*

35. Hillman & Rachlinski, *supra* note 6, at 450 (citing Eisenberg, *supra* note 31, at 214–16).

36. Eisenberg, *supra* note 31, at 213.

37. See Korobkin, *supra* note 5, at 1216–44 (discussing bounded rationality theory and its implications for countering the usual assumptions of consumers’ rational choices in economic theory of contracts).

38. *Id.* at 214; see also Hillman & Rachlinski, *supra* note 6, at 451 (“[P]sychologists long have believed that when making a decision, such as whether to enter into a contract, people rarely invest in a complete search for information, nor do they fully process the information they receive.”).

alternatives. An alternative is satisfactory if: (1) there exists a set of criteria that describes minimally satisfactory alternatives, and (2) the alternative in question meets or exceeds all these criteria.

Most human decisionmaking [sic], whether individual or organizational, is concerned with the discovery and selection of satisfactory alternatives; only in exceptional cases is it concerned with the discovery and selection of optimal alternatives An example is the difference between searching a haystack to find the sharpest needle in it and searching the haystack to find a needle sharp enough to sew with.³⁹

Since people cannot take every single piece of information into account in their decision-making, they tend to purposefully resolve to remain unaware of many such sources of information and conclude that is the only rational alternative since they cannot cognitively take it all into account anyway.⁴⁰ Psychologists have further observed that when consumers make such choices to be rationally ignorant, they tend to construe the contract they have entered into as comporting with their formed conclusions about the terms.⁴¹ Accordingly, bounded rationality posits that people have limited cognitive abilities to consider all relevant information in making transacting choices, and therefore will logically decide not to consider all information and potential eventualities in making their contracting choices.

39. Eisenberg, *supra* note 31, at 214 (quoting JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 140–41 (1st ed. 1958)). Eisenberg notes that Simon has proposed a decision-making model called “satisficing”—“Whereas economic man maximizes—selects the best alternative from among all those available to him, his cousin, administrative man, satisfices—looks for a course of action that is satisfactory or ‘good enough.’” *Id.* at 215 (citing HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR xxix (3d ed. 1976)); *see also* David M. Grether, Alan Schwartz & Louis L. Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 287 n.18 (1986) (defining “satisficing” as “failing to choose the best”); Hillman & Rachlinski, *supra* note 6, at 451 (noting that consumers “rely on casually acquired, partial information, sufficient to make them comfortable with their choice: a process referred to as ‘satisficing’”).

40. Eisenberg, *supra* note 31, at 215; *see also* Hillman & Rachlinski, *supra* note 6, at 452. “[P]eople tend to reduce their decisions to a small number of factors This narrow cognitive focus might be sensible Numerous studies indicate that people who rely on simplified decisionmaking [sic] models also . . . make better decisions than if they used complicated models.” *Id.* (citing Robyn M. Dawes, *The Robust Beauty of Improper Linear Models in Decision Making*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 391, 394–95 (Daniel Kahneman et al. eds., 1982)).

41. Hillman & Rachlinski, *supra* note 6, at 452–53. “[P]sychologists have demonstrated that people often engage in . . . ‘motivated reasoning,’ meaning that they make inferences consistent with what they want to believe . . . [and] interpret ambiguous evidence in ways that favor their beliefs and desires. . . . [C]onsumers usually . . . will process the terms . . . in a way that supports their desire to complete the transaction.” *Id.* (citing Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 495 (1990)).

Disposition describes the reality that people minimize the probability that negative events will occur as a result of their contracting decisions.⁴² Studies show this unbridled optimism affects expectations in many other areas as well, including driving skill, possibility of household injury, likelihood of career success, and likelihood of marital stability.⁴³ Disposition is also manifested in the fact that humans believe highly in their capability for resolving difficult problems.⁴⁴ Thus, disposition defects mean that people, including consumers, take negative risks too lightly and are too confident in their aptitude for successfully calculating the probability of the eventual occurrence of such risks.

Defective capability describes the reality that the human mind “systematically distort[s] the way an actor searches for, processes, and weighs information and scenarios.”⁴⁵ Defective capability actually describes multiple faulty decision-making processes, or heuristics.⁴⁶ One such faulty heuristic is availability.⁴⁷ The availability heuristic is that people only use information immediately available to them.⁴⁸ An example is that “the subjective probability of traffic accidents rises temporarily when one sees a car overturned by the side of the road.”⁴⁹ Another faulty

42. Eisenberg, *supra* note 31, at 216 (citing Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980)); *see also* Hillman & Rachlinski, *supra* note 6, at 453–54. “[P]eople commonly overestimate the importance of adverse risks, [and] . . . underestimate adverse risks they voluntarily undertake. . . [including] legal obligations. . . tend[ing] to believe that they can also safely discount the low-probability events covered by standard terms. . . [and] will overstate their own ability to assess . . . reputation[s].” *Id.*

43. Eisenberg, *supra* note 31, at 216–18. The empirical evidence on domestic accidents included findings that the overwhelming majority of consumers felt that their risk for injury from operation of bicycles or lawn mowers was exceedingly low, and the same was true with concerns as diverse as bleach, drain cleaner, and gas poisoning. *Id.* at 216–17 (citing W. KIP VISCUSI & WESLEY A. MAGAT, *LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION* 94–95 (1987)). With respect to life achievements, the great majority of college students surveyed felt extremely optimistic about their prospects for eventual home ownership, avoidance of alcohol problems, job satisfaction, and marital stability. *Id.* at 217 (citing Weinstein, *supra* note 42, at 809–14)).

44. *Id.* (citing Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 239 (1986)).

45. *Id.* at 218.

46. *Id.* (citing Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S251 (Supp. 1986)); *see also* Hillman & Rachlinski, *supra* note 6, at 450–51. With “limited cognitive resources with which to assess the risks associated with a contract[,] . . . [consumers] rely on mental shortcuts or rules of thumb to guide complex decisions about risks . . . lead[ing] people to worry too much about risks in some circumstances, and not enough about risks in others.” *Id.*

47. Eisenberg, *supra* note 31, at 220.

48. *Id.* at 220–22.

49. *Id.* at 221 (citing Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 40, at 1127).

heuristic is representativeness, which is that people make decisions in reliance on a non-representative sample of information that they incorrectly deem adequate.⁵⁰ Yet another flawed heuristic is faulty telescopic faculties. This comes into play when people place too much weight on immediate costs and benefits and too little weight on future costs and benefits.⁵¹ The fourth flawed heuristic in Eisenberg's article is the presence of faulty risk-estimation faculties. This is similar to the disposition limitation previously discussed, because it describes the reality that people tend to underestimate risks.⁵² Statistical evidence reveals that most people do not take such perceived low risks into account in their decision-making.⁵³

It is readily apparent that the defects in cognitive capability that Eisenberg describes have major implications for the problem of consumer form contracts.⁵⁴ Most of the eventualities addressed by boilerplate form terms are unlikely to occur in the vast majority of cases. As such, the various cognitive limitations are applicable to consumers' consideration of such contract terms, including bounded rationality (they will ignore many of the terms since they cannot fully process them or the eventualities they address); disposition and underestimation of risks (they will be unduly optimistic about anything bad happening to them in the future); and giving undue weight to present benefits and costs as opposed to those which will pertain in the future.⁵⁵ As Eisenberg articulated:

The bottom line is simple: The verbal and legal obscurity of preprinted terms renders the cost of searching out and deliberating on these terms exceptionally high. In contrast, the low probability of these nonperformance terms' coming into play heavily discounts the benefits of search and deliberation. Furthermore, the length and complexity of form contracts is often not correlated to the dollar value of the transaction. Where form contracts involve a low dollar value of performance, the cost of thorough search and deliberation on preprinted terms, let alone the cost of legal advice about the meaning and effect of the terms, will usually be prohibitive in relation to the benefits. Faced with preprinted terms whose effect the [consumer] knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth

50. *Id.* at 222.

51. *Id.* "For example, a major rationale for mandatory and voluntary but tax-favored pension programs is that most people lack the foresight to adequately save for retirement because of faulty telescopic faculties." *Id.* (citing Martin Feldstein, *The Optimal Level of Social Security Benefits*, 100 Q.J. ECON. 303, 303, 307 (1985)).

52. *Id.* at 223.

53. *Id.* (citing Howard Kunreuther & Paul Slovic, *Economics, Psychology, and Protective Behavior*, AM. ECON. REV., May 1978 (papers & proceedings), at 64, 66-67).

54. *Id.* at 240.

55. *Id.* at 240-41.

the cost of search and processing, and which probably aren't subject to revision in any event, a rational [consumer] will typically decide to remain ignorant of the preprinted terms.⁵⁶

2. Literacy Defects

Literacy is another important issue to consider in evaluating the context in which consumers agree to form contracts.⁵⁷ As set forth in the previous discussion on contract law doctrine, the legal precepts involving form contracts are primarily based on the duty to read.⁵⁸ Few consumers bother reading the form contracts they enter into, and those that try are presumed to not understand them anyway.⁵⁹ By this, commentators usually mean that consumers are laypersons and do not possess the legal training that would allow them to understand the meaning of contract language.⁶⁰ But, the problem of understanding is even more profound than that. In a recent journal piece entitled *Literacy and Contract*, Alan White and Cathy Lesser Mansfield observe that the literacy rates in the United States are rapidly decreasing, and a great many of the people that sign contracts have trouble understanding the basic English in contracts, let alone the legal terminology.⁶¹ These conclusions derive from the 1992 National Adult Literacy Survey (NALS), conducted by the U.S. Department of Education.⁶² The NALS survey ascertained adult literacy into five levels—from Level I (the lowest) to Level V (the highest).⁶³ While the NALS

56. *Id.* at 243 (citing Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990)).

57. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002) (exploring empirical data and the effects of consumer literacy with respect to contract forms).

58. John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 342 (1974).

59. Rakoff, *supra* note 9, at 1179; see also Hillman & Rachlinski, *supra* note 6, at 446. “Reading and understanding boilerplate terms is difficult and time consuming for consumers. Consumers recognize that they are unlikely to understand the lengthy and complicated legal jargon in the boilerplate.” *Id.* (citing Eisenberg, *supra* note 31, at 242).

60. Meyerson, *supra* note 4, at 1270 (citing *Commercial Union Assurance Cos. v. Gollan*, 394 A.2d 839, 841 (N.H. 1978); *Storms v. U.S. Fidelity & Guar. Co.*, 388 A.2d 578, 580 (N.H. 1978); *Unico v. Owen*, 232 A.2d 405, 410 (N.J. 1967); *DeLancey v. Insurance Co.*, 52 N.H. 581 (1873); Colin K. Kaufman, *The Resurrection of Contract*, 17 WASHBURN L. J. 38, 45 (1977)).

61. See White & Mansfield, *supra* note 57, at 234 (noting that “[n]ew research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to ‘read’ contemporary consumer contract documents are unlikely to understand them”).

62. *Id.* at 235.

63. *Id.* at 236. To explain further:

On the NALS scale, Level I for document literacy corresponds to extremely simple tasks, such as signing one's name on a social security card, or locating a

survey does not expressly concern form contracts, it does deal with a type of writing of arguably similar sophistication—namely, consumer credit disclosures.⁶⁴ These disclosures were found to require Level V literacy, which the NALS study attributed to merely three percent of adults in the United States.⁶⁵ Thus, according to the NALS study, ninety-seven percent of adults in the United States lack the capability to comprehend such content. The NALS study articulated the disheartening implication: “The degree of literacy required to comprehend the average disclosure form and key contract terms simply is not within reach of the majority of American adults.”⁶⁶ Accordingly, form contract doctrine does not comport with the ability of average adults to read and comprehend form contracts, and this further corroborates the notion that consent in this context is conceptually flawed.⁶⁷

III. SOME EXAMPLES OF SOCIAL MEDIA USAGE BY DISAFFECTED CONSUMERS

As set forth above, consumers enter into agreements with large commercial enterprises almost exclusively by way of standard form contracts. Consumers likely never read the bulk of the contracts they signed (or to which they clicked “I agree”). Had they read the contracts, they would likely have either not understood them, or would have made several cognitive errors in processing the terms and making decisions about them. And finally, even if the consumers had surmounted all of these hurdles—that is, if they had taken the time to read the contracts, understood them totally, and correctly decided that the terms were unfavorable and that they would like to change them—the consumers would almost never have been able to do so because of a complete lack of bargaining power to assert

single piece of information that is labeled explicitly on a form with no other distracting information. Level II document tasks are only slightly more complex, requiring the reader to locate information on row and column tables, and to deal with similar, distracting information. Tasks at Levels III, IV, and V require readers to use more complex tables and charts, with multiple columns and nested structures, and numerous confusingly similar pieces of information. For example, one Level IV task was based on a bus schedule that had different sections for outbound and inbound service, different rows for different times and different days of the week, and columns for various stops. From the document, readers were asked to calculate the interval between buses on a given day at a given place and time.

Id. (citing IRWIN S. KIRSCH ET AL., ADULT LITERACY IN AMERICA, A FIRST LOOK AT THE RESULTS OF THE NATIONAL ADULT LITERACY SURVEY, at 91 (1993).

64. *Id.* at 237.

65. *Id.*

66. *Id.* at 239.

67. *Id.* at 242.

against the business entity.

Legally, all of this is relatively unchanged if contingencies subsequently occur. Consider the example of a clause that limits the contractual liability of a business along with a product or service, purchased by the consumer pursuant to an unread and un-negotiated form contract, which actually causes damages for which the consumer would like to seek compensation against the business. At this stage of post-formation disappointed expectations, just as with the initial formation of the contract (i.e., signing or clicking), the consumer is generally powerless to change things. The consumer is bound and lacks bargaining power. He is likely to be directed to some low- to mid-level associate in the firm, via a 1-800 number, website, or otherwise, and told in a perfunctory manner what the binding terms are to which the consumer previously agreed. If he tries to argue that such an outcome was not known by him, or is otherwise unfair, the company is completely within its legal rights to tell the disappointed consumer: "Sorry, that is what our contract says." Anecdotal accounts of consumers gaining some degree of relief or mercy from such terms of course can and do arise, but in the main the above sets out the typical state of affairs. The consumer has no power in this scenario to persuade the business to change its mind, other than an angry slamming down of the telephone, and perhaps the threat that the consumer will tell a few friends and family not to do further business with the company. The consumer's power, reach, and ability to exert persuasive force over the company is obviously extremely limited.

But recently, several consumers have made use of social media tools in order to exert pressure on the large commercial enterprises with which they had contracted, and which had previously disappointed the consumers by standing on contract terms which were legally binding on the consumer. In most of these instances, the consumers had at first gone the traditional route of personally and directly contacting company representatives, and seeking some relief from the harsh treatment being undertaken by the company in reliance on form contract terms. When that failed, the consumers took their complaint to the social media, galvanizing large amounts of attention. In all three of the instances recounted below, consumers successfully persuaded the companies to make concessions that they had previously been unwilling to make.

A. Facebook

In February 2009, the social networking site Facebook quietly made changes to its Terms of Service to which its users were required to agree in order to continue using the site. At the beginning of that month, the Facebook Terms of Service had included a provision that read as follows:

You hereby grant Facebook an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to (a) use, copy, publish, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, translate, excerpt, adapt, create derivative works and distribute (through multiple tiers), any User Content you (i) Post on or in connection with the Facebook Service or the promotion thereof subject only to your privacy settings or (ii) enable a user to Post, including by offering a Share Link on your website and (b) to use your name, likeness and image for any purpose, including commercial or advertising, each of (a) and (b) on or in connection with the Facebook Service or the promotion thereof. *You may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.*⁶⁸

Facebook changed the above license by removing the last two italicized sentences.⁶⁹ This change had the effect of giving Facebook ownership of all images and material posted to Facebook, even after a user decided to cancel his account or remove content which had previously been posted (i.e., photos, videos, etc.).⁷⁰ Or, as one website journalist put it more colorfully: “We can do anything we want with your content. Forever.”⁷¹ Technically, Facebook’s Terms of Service provided that it would only retain the ability to use the content in accordance with the user’s most recent privacy settings, which would, for instance, prevent Facebook from having the right to use the photos or other content if the user had marked it “private.”⁷² Furthermore, Facebook founder Mark Zuckerberg assured the public that Facebook wouldn’t use anyone’s information in a way that they

68. Chris Walters, *Facebook’s New Terms of Service: “We Can Do Anything We Want With Your Content. Forever”* THE CONSUMERIST (February 15, 2009, 11:14 PM), <http://con.st/5150175> (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.*

72. Ryan Radia, *Again, Facebook sparks controversy then bows to user pressure*, THE TECHNOLOGY LIBERATION FRONT (February 18, 2009), <http://techliberation.com/2009/02/18/again-facebook-sparks-controversy-then-bows-to-user-pressure/>. As the title of the online article indicates, the February 2009 Terms of Service controversy was not the first time that Facebook had sparked an outcry from its members.

Back in late 2007, Facebook unveiled an advertising service called Beacon that tracked the buying habits of Facebook users for advertising purposes. Beacon allowed your friends to see your purchasing habits, sparking privacy concerns and media scrutiny. After a few weeks, Facebook gave in to pressure and began allowing users to opt-out of Beacon entirely by changing their privacy settings.

Id.

wouldn't want.⁷³

But the public relations damage had been done. The changes were immediately pointed out in an online article at The Consumerist website.⁷⁴ Large numbers of Facebook users were upset over the perceived or real threat posed by the change to Facebook's Terms of Service.⁷⁵ Several Facebook pages were immediately created for the purpose of voicing disapproval of Facebook's changes to its Terms of Service, and these pages—the equivalent of online petitions—attracted thousands of people within hours.⁷⁶ An example of one such site was a Facebook group page entitled: "FACEBOOK OWNS YOU: Protest the New Changes to the TOS!"⁷⁷ By "liking" or "joining" such pages, Facebook members essentially "signed" the online petition stating their disapproval of the changes to Facebook's Terms of Service. Ironically, the very social networking structure Facebook had created operated against them by allowing members to exponentially share their disapproval with other fellow members. The issue quickly made its way onto the blogosphere, various tech websites, and even CNN.com and the Fox News Channel.⁷⁸

In the face of mounting pressure from its own users, as well as the negative media attention, Facebook relented. Specifically, it announced that it was reverting back to the immediately previous version of its Terms of Use—that is, essentially putting back into the content license the sentences which appeared to give users the ability to terminate the license by removing the content from the Facebook site.⁷⁹ Facebook's reversion to its older Terms of Service was accompanied by a reassuring post from Facebook founder Mark Zuckerberg, conveying the message that there was never an intent to do anything unsavory or unwanted.⁸⁰ Even more, Facebook decided to pull back the curtain and created the "Facebook Bill of Rights and Responsibilities," which was designed to solicit input on what the Terms of Service should be, and what was and was not acceptable use by Facebook.⁸¹

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *FACEBOOK OWNS YOU: Protest the New Changes to the TOS!*, FACEBOOK, <http://www.facebook.com/groups/50848058709/> (last visited May 2, 2011).

78. See Radia, *supra* note 72.

79. *Id.*

80. See *Update on Terms*, FACEBOOK BLOG (February 18, 2009, 1:17 AM), <http://blog.facebook.com/blog.php?post=54746167130>.

81. *Facebook Bill of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/groups/69048030774/> (last visited May 2, 2011).

Ryan Radia wrote an article describing the controversy for The Technology Liberation Front, an online blog.⁸² He noted that “especially on the Web, companies have little choice but to listen to their users, and firms often find that they can’t get away with unsavory practices that might have flown under the radar in another era without spurring user backlash and, worse still, bad PR.”⁸³ Radia reported that, had Facebook not promptly given in to user demand, there was a looming possibility that complaints would have been filed with the Federal Trade Commission.⁸⁴ There was even a possibility that Congress would have commenced an investigation of social networking and licensing practices:

But as the user uprising and Facebook’s quick reaction illustrate, markets are perfectly capable of resolving many kinds of disputes quickly and efficiently. Regulators are the dinosaurs of the digital era. Even if the FTC had acted on EPIC’s planned complaint, any regulatory ruling probably would not have emerged until long after the fiasco had been resolved—either by Facebook relenting, or by users ditching Facebook for a competing social network.

We’ll never know what would have happened had Facebook held firm, but if history is any guide, keeping regulators at bay may well have been a wise move on Facebook’s part.⁸⁵

Thus, the consumer backlash and media attention that followed Facebook’s initial change of its Terms of Service in February 2009 caused Facebook to relent and make term changes that were perceived as more favorable to its users. This was twenty-first century online consumer pressure on a large commercial entity that, perhaps in a prior era, would not have needed to capitulate. But because of the collective persuasive power of the thousands of Facebook users who voiced their displeasure, Facebook was prevailed upon to change its terms. Facebook users scored a win and an ostensible “democratization” of the Facebook form contract Terms of Service.

B. Bank of America

In 2009, Ann Minch was one of millions of customers with Bank of America credit card accounts.⁸⁶ Although never made clear in either Ms.

82. Ryan Radia is Associate Director of the Center for Technology and Innovation at the Competitive Enterprise Institute. Radia, *supra* note 72.

83. *Id.*

84. *Id.* Radia reported that the Electronic Privacy Information Center was the organization that had been preparing a complaint to file with the FTC. *Id.*

85. *Id.*

86. Lee Ferran, *Woman Boycotts Bank of America, Wins*, ABCNEWS.COM (Sept. 28,

Minch's Internet postings or the media accounts of her dealings with Bank of America, her contract with Bank of America almost certainly contained a clause that gave wide discretion to the bank to unilaterally raise the interest rate on the card for a number of different reasons. For example, Bank of America's current credit card agreement contains the following term:

WE MAY AMEND THIS AGREEMENT

We may amend this Agreement at any time. We may amend it by adding, deleting, or changing provisions of this Agreement. We may increase or decrease any or all of your APRs, including any Promotional APRs. When we amend this Agreement we will comply with the applicable notice requirements of federal and Delaware law that are in effect at that time.

The reasons we may change the terms of this Agreement include the following: your risk profile based on your payment patterns, transaction patterns, balance patterns, and utilization levels of this and other accounts, credit bureau information including the age, history and type of other accounts, and relationships between each and all of these measures of risk. We may also change terms for reasons not related to your individual credit history, such as overall economic and market trends, product design, and business needs.⁸⁷

2009), <http://abcnews.go.com/GMA/woman-boycotts-bank-america-wins/story?id=8688175>.

87. This language was pulled from the current Visa Signature World MasterCard agreement form that Bank of America provided to the Federal Reserve Bank, with the language being current as of December 31, 2010. Bank of America Corp., *Credit Card Agreement*, FEDERALRESERVE.GOV (Dec. 30, 2010), http://www.federalreserve.gov/CreditCardAgreementsContent/creditcardagreement_3559.txt. Whether the credit card agreement terms that governed Ann Minch's account with Bank of America were substantially similar to those cited herein is not critical for purposes of the anecdotal illustration and purposes of this Article. It is worth noting, however, that in 2009 Congress passed The Credit Card Accountability Responsibility and Disclosure Act of 2009. Pub. L. No. 111-24, 123 Stat. 1734 (2009). Among other things, the Act provides that:

[R]etroactive interest rate hikes on existing balances are banned, except when:

- An introductory or 'teaser' period ends.
- The interest rate is tied to an index and is variable.
- The card user completes the terms of a workout plan for debt repayment or fails to comply with terms of a workout plan.
- The card user is more than 60 days late making a monthly payment. The card issuer must give the reason for the increase and must restore the interest rate to the previous, lower level after six months if the cardholder has made on-time payments during that six-month period.
- Military service members end active duty. Federal law caps credit card APRs for service members at 6 percent as long as they are on active

This term was almost certainly unbeknownst to Minch when she first entered into the agreement with Bank of America.

The term, and Bank of America's willingness to invoke it, became clear when the bank apparently notified Minch that it was raising her interest rate from 12.99% to 30%.⁸⁸ Minch says that when she first received the notice of the increased interest rate, she called Bank of America in order to complain, but her initial efforts were not successful in persuading the bank to change its mind.⁸⁹ In short, her bargaining power at this post-formation stage of her disappointed expectations was basically zero.

Minch decided to try another tactic, and on September 8, 2009, she posted a YouTube videotaped diatribe she entitled "DEBTORS REVOLT STARTS NOW!"⁹⁰ Stating that she could get "better rates from a loan shark" and that she was "making a stand," she recounts her unsuccessful efforts to contact Bank of America and work out her complaint privately. She then goes on to state in the video:

Well, I've thought about it, and now I have a message to Bank of America, and to all the big banks who are robbing our current middle class citizens and robbing our children and grandchildren of any hope of a middle class standard of living in their future. So here goes. You are evil, thieving bastards. You have reaped ungodly profits in your behemoth casino scams, then lost, only to turn around and usurp the wealth of this great nation by the

duty. The Federal Reserve Board added a provision that allows credit card issuers to increase interest rates on cards owned by service members to restore APRs to previous levels.

Connie Prater & Tyler Metzger, *A Guide to the Credit CARD Act of 2009*, CREDITCARDS.COM (Feb. 3, 2010), <http://www.creditcards.com/credit-card-news/credit-card-law-interactive-1282.php>.

88. Ann Minch, *DEBTORS REVOLT BEGINS NOW!*, YOUTUBE (Sept. 8, 2009), <http://www.youtube.com/watch?v=jGC1mCS4OV0>. Minch's YouTube ID is apparently "Rockerchic4God." *Id.*; see also Ferran, *supra* note 86.

89. Minch, *supra* note 88. Specifically, Minch reported:

For fourteen years, I've been a Bank of America customer. I've had two BofA credit cards, one of them paid off, another carrying a balance. I wasn't over the limit, nor behind in payments. In fact, my credit is good and even though I've been laid off I've had no trouble paying my bills. Recently, Bank of America jacked up my interest rate on the credit card to a whopping 30%. 30% APR! I could get a better rate from a loan shark. Well, I followed the advice of the finance gurus you see on TV, who say that if you call the company you can negotiate a better rate. I did call Bank of America, and they weren't willing to negotiate anything; in fact, they referred me to a credit counseling and debt consolidation service. I don't have any trouble with my budget. Basically, Bank of America's message to me was, "Tough shit."

Id. at 0:22-1:24.

90. *Id.*

outright rape and pillage of middle class Americans whose sweat and toil built it. The biggest rip-off in the history of the world is padding your bonus checks with the federal government as your co-conspirators. Every last one of you should be rotting in prison.

Well, I'm here to tell you, BofA, I officially notify you, Ken Lay,⁹¹ that I'm staging a debtor's revolt, right here, right now, and thereby refuse to pay you one more red cent on your 30% credit card account. This is called civil disobedience.

Now, these are my terms. Unless you return my interest rate and monthly installment amount to what it was before the rate hike, or, you make me a too-good-to-turn-down payoff offer, you're not getting another penny out of me. Had you left well enough alone, I would have continued to make my payments in good faith. But no, you had to bend me over for no good reason other than papering over your mega screw-up. You can send all the collection agencies after me that you want. You can call me fifty times a day if you want. I don't own any real estate, I don't own any real assets, I don't even have a permanent job right now; and even if I did, you'd have to get a court order to garnish my wages. And considering how many people are defaulting on your credit card accounts right now, the civil courts are going to be backed up for years—years! You can ruin my credit, but the banks aren't loaning money anyway, so, the way I figure it, Mr. Lay,⁹² I've got nothing to lose. So stick that in your bailout pipe and smoke it.

And to my fellow citizen debtors, you must make your own personal decision about whether to join me in this debtor's revolt. You will have to search your own soul to know whether it's right for you to take a stand, and be willing to sacrifice your credit score to stop this outright financial rape. There's power in numbers, so make your own video to your creditors, write a letter, or simply tell the bill collectors who call you to "stick it."

91. Ms. Minch probably meant to refer to Ken Lewis, the CEO of Bank of America at the time. This correction is noted at timestamp 2:21–2:26. *Id.*; see also Arthur Delaney, *Debtor's Revolt: Woman Refuses to Pay Off Bank of America Credit Card*, THE HUFFINGTON POST (Jan. 19, 2010, 3:11 PM), http://www.huffingtonpost.com/2009/09/14/debtors-revolt-woman-refu_n_285394.html.

Minch was apparently confused about the fact that Ken Lay was the founder of Enron, not the CEO of Bank of America, and also further about the fact that Lay died in 2006. See, e.g., Carrie Johnson, *Enron's Lay Dies of Heart Attack*, WASH. POST, July 6, 2006, at A1.

92. Minch, *supra* note 88, at 2:21–2:26, 3:40–3:43.

But I hope you'll join me in this fight. There comes a time when we must make a stand, and my time is now."⁹³

The video quickly caught a lot of attention, especially when it was picked up by several noteworthy blogs, and eventually even some media outlets including *Good Morning America* and *Fox and Friends*.⁹⁴ Within three weeks, it had gone "viral," having been viewed over 300,000 times on YouTube.⁹⁵ As of May 2011, that number had increased to over half a million viewings.⁹⁶

Eleven days after posting her initial video on YouTube (and even fewer days after it began to attract national media attention), on September 19, 2009, Ann Minch posted a follow up video on YouTube entitled "DEBTORS UPDATE: BANK OF AMERICA RESPONDS!!!"⁹⁷ In her video, she reported that she had been contacted by a Senior Vice President at Bank of America who talked to her about her situation, and in fact, after they discussed Minch's perceptions about the abuse of the banking system, the Vice President eventually agreed to reduce Minch's interest rate back to 12.99%.⁹⁸ Although the Vice President initially proposed a new rate of 16.99%, in her second video Minch said that she refused, and that "I believe that because you guys are getting your money from the Fed at 0% interest or, at the most, 0.25, [and] that 12.99% is a more than generous profit margin for you guys."⁹⁹ For its part, in response to media inquiries,

93. *Id.* at 1:24–4:28.

94. See Delaney, *supra* note 91; *Woman Declares War on Bank and Wins!*, YOUTUBE (Sept. 28, 2009), http://www.youtube.com/watch?v=6qut8_2IEbw. Minch said in her follow-up video posted on YouTube that she had appeared live on the Fox News Channel program *Fox and Friends*, as well as conducted radio interviews with MSNBC and CBS radio. See Ann Minch, *DEBTORS UPDATE: BANK OF AMERICA RESPONDS!!!*, YOUTUBE (Sept. 19, 2009), <http://www.youtube.com/watch?v=cNHd-GBZGQo> [hereinafter Minch, *Debtors Update*].

95. See Ferran, *supra* note 86.

96. Minch, *supra* note 88.

97. See Minch, *Debtors Update*, *supra* note 94.

98. *Id.*; see also Arthur Delaney, *Debtor's Revolt: Woman Refuses to Pay Off Bank of America Credit Card*, THE HUFFINGTON POST (Sept. 14, 2009), http://www.huffingtonpost.com/2009/09/14/debtors-revolt-woman-refu_n_285394.html;

Ferran, *supra* note 86. In her second video, Minch was still waiting on written confirmation from the Vice President regarding the 12.99% interest rate when a monthly statement was received showing the rate to be 23.99%. As Minch said in her second video:

Now what's interesting is, is I just recently got an email today, online statement notification for that account; so, when I pulled it up on the screen, it's showing an APR of 23.99%, so I don't know what BofA is doing, I don't know if they know if the right hand knows what the left hand is doing. So, we'll wait to see what happens; I'll look for Mr. Crawford's correspondence in the mail that he agreed to send me.

Minch, *Debtors Update*, *supra* note 94, at 3:05–3:39.

99. *Id.* at 2:29–2:56.

Bank of America confirmed in general terms that a resolution had been reached with Minch, without giving specifics, saying only that “based on additional information we received about her situation, we reached a mutually agreeable resolution.”¹⁰⁰

It is arguable that situations like Minch’s will produce little long-term benefit to consumers on any large scale. “In a world where the Intertubes can make you someone and no one in one day’s news cycle, it’s likely Minch’s revolt will end without a bang. Banks will continue to raise rates, slash credit limits and close accounts, and people will live with it.”¹⁰¹ However, that is not necessarily the point. The point is that, in general, any consumer complaint *could* be voiced online in the social media and at any moment it *could* go viral and force the company to respond. In Arthur Delaney’s follow-up post on the story in *The Huffington Post*, he related an email he had received from Ed Mierzwinski, program director of the U.S. Public Interest Research Group:

Historically, powerful and arrogant corporations, often protected by lazy regulators, have ignored consumer complaints—now social media tools are leveling the playing field for victimized consumers The old web 1.0 mybanksucks.com sites that no one found are being replaced with realtime [sic] viral outrage that will require big business to start treating consumers more fairly or pay the price.¹⁰²

The mere possibility of it at least raises the specter of some increase in bargaining power. This “real-time viral outrage” that Bank of America experienced at the hands of Ann Minch, resulted in her achieving a much larger amount of power and bargained-for result than she surely would have received absent her use of the social media.

C. *United Airlines*

Dave Carroll is a Canadian musician who is in a band called the Sons of Maxwell. The band purchased tickets from United Airlines to fly on March 31, 2008 from Halifax to Omaha, Nebraska, with one stop to change planes in Chicago at O’Hare International Airport.¹⁰³ Carroll and his band-mates, like all passengers on United Airlines, agreed in buying their tickets to the terms contained in the United Airlines Contract of Carriage,

100. Ferran, *supra* note 86.

101. Tyler Metzger, *Ann Minch Declares Debtors’ Revolt; Not All Follow*, TAKING CHARGE (A CREDITCARDS.COM BLOG) (Sept. 30, 2009), <http://blogs.creditcards.com/2009/09/ann-minch-debtors-revolt.php>.

102. Delaney, *supra* note 98, at 2.

103. Dave Carroll, *Story*, DAVE CARROLL MUSIC, <http://www.davecarrollmusic.com/ubg/story/> (last visited May 4, 2011).

available for viewing on United's website.¹⁰⁴ Presumably unread and unbeknownst to Carroll, that form contract language, which United treated as agreed to by him, contained a provision that would come back to haunt him in his subsequent dispute with United. Specifically, "Rule 0095" in the carriage contract provides in part:

No action shall be maintained for any loss of, or damage to, or any delay in the delivery of any baggage, or on any other claim (excepting only personal injury or death), arising out of or in connection with transportation of, or failure to transport any baggage *unless the claim is reported to UA within 24 hrs.*¹⁰⁵

The Sons of Maxwell boarded the United Airlines flight in Halifax on March 31 and checked their musical instruments on the plane in the baggage department, including Carroll's 710 Taylor guitar.¹⁰⁶ When they landed in Chicago, they were waiting to get off the plane when another passenger shouted out: "My god they're throwing guitars out there."¹⁰⁷ Carroll and his bass player Mike looked outside the plane just in time to see their instruments "being heaved without regard by the United baggage handlers."¹⁰⁸

Carroll immediately tried to talk to the flight attendant inside the plane, who told him to talk to the "lead agent" outside.¹⁰⁹ The lead agent refused to talk to him.¹¹⁰ A United employee at the gate told him "that's why we make you sign the waiver" (though Carroll says he signed no waiver) and in any event to contact United personnel in Omaha once he

104. *United Airlines Contract of Carriage*, UNITED AIR LINES, INC. (Mar 9, 2011) (on file with author). The first sentence of the carriage contract states:

This contract of carriage sets forth the terms and conditions on which UA provides air transportation to passengers and their baggage on flights UA operates, whether such air transportation is purchased from UA, one of UA's agents or from another carrier. The rules contained in this contract of carriage are expressly agreed to by the passenger.

Id. at 2.

105. *Id.* at 14 (emphasis added). The twenty-four hour rule cited is stated in United Airline's carriage contract to be the rule applicable for domestic flights. The contract provides a lengthier seven-day period for notice in the event of international flights. *Id.* at 13. Apparently United always maintained that the twenty-four hour rule applied in Carroll's case, for whatever reason. The carriage contract also provides that United will not be responsible for damage to certain defined "fragile items" unless they are appropriately packaged for the flight; United further defined "fragile items" to include musical instruments and guitars particularly. *Id.* at 26-27. However, it does not appear that this provision was ever asserted by United as an additional reason to deny Carroll's claim.

106. Carroll, *supra* note 103.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

reached his final destination.¹¹¹ Carroll arrived at Omaha at 12:30 a.m. and no United employees were visibly present.¹¹² Carroll did not look at his guitar then, but instead discovered it was badly damaged the next day at a sound check for the band's first show.¹¹³ He was not able to return to Omaha for seven days until the string of concert dates was over, but when he returned to the Omaha airport he was told to make a claim for the damage at the Halifax airport, which was the point of origin.¹¹⁴ When he got back home, the Halifax airport personnel diverted him elsewhere. So began a circular customer service nightmare for Carroll that lasted several months, involving phone calls and e-mail correspondence to multiple offices of United Airlines and Air Canada in Halifax, Chicago, India, and New York. It ended with a denial of his claim (the guitar was repaired for \$1200) for several reasons, including the fact that the damage was not reported upon his arrival at the Omaha airport or within twenty-four hours thereafter, in accordance with United's terms.¹¹⁵

It occurred to Carroll that he "had been fighting a losing battle all this time and that fighting over this at all was a waste of time. The system is designed to frustrate affected customers into giving up their claims."¹¹⁶ But then he hit upon the idea to write a song about it. He told Ms. Irlweg from United that he would write not one, not two, but three songs about the whole experience with United Airlines, complete with professionally produced videos, and would put them on YouTube for free.¹¹⁷ His goal was to reach one million "hits" in a year, so that a large audience would see the way that United Airlines had treated Carroll.¹¹⁸

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The final email exchange occurred with a United employee named "Ms. Irlweg," who Carroll said gave the following reasons for the denial of his claim:

- I didn't report it to the United employees who weren't present when we landed in Omaha
- I didn't report to the Omaha airport within 24 hours while I was driving to places that weren't Omaha
- It was an Air Canada issue
- Air Canada already denied the claim (as I mentioned because Air Canada would not pay for United's damages), but I'm still unsure as to why I needed to report it in Omaha within 24 hours if it was clearly Halifax's responsibility
- Someone from United would need to see the damage to a guitar that was repaired

Id.

116. *Id.*

117. *Id.*

118. *Id.*

And so Carroll wrote the song “United Breaks Guitars,” and uploaded a professional video of the song to YouTube on July 6, 2009.¹¹⁹ The song is quite catchy, very light-hearted, and clever. The lyrics to the song colorfully describe the episode and Carroll’s sentiment:

I flew United Airlines on my way to Nebraska
The plane departed, Halifax, connecting in Chicago’s “O’Hare.”
While on the ground, a passenger said from the seat behind me,
“My God, they’re throwing guitars out there”
The band and I exchanged a look, best described as terror
At the action on the tarmac, and knowing whose projectiles these
would be
So before I left Chicago, I alerted three employees
Who showed complete indifference towards me

Chorus

United . . . (United . . .)
You broke my Taylor Guitar
United . . . (United . . .)
Some big help you are
You broke it, you should fix it
You’re liable, just admit it
I should’ve flown with someone else
Or gone by car
‘Cause United breaks guitars.

When we landed in Nebraska, I confirmed what I’d suspected
My Taylor’d been the victim of a vicious act of malice at O’Hare
So began a year-long saga, of “Pass the buck,” “Don’t ask me,”
and “I’m sorry, sir, your claim can go nowhere.”
So to all the airlines people, from New York to New Delhi
Including kind Ms. Irlweg, who says the final word from them is
“no.”
I heard all your excuses,

119. Dave Carroll, *United Breaks Guitars*, YOUTUBE (July 6, 2009), <http://www.youtube.com/watch?v=5YGc4zOqozo>.

And I've chased your wild geese
 And this attitude of yours, I say, must go

(Repeat chorus)

Well, I won't say that I'll never fly with you again,
 'Cause, maybe, to save the world, I probably would,
 But that won't likely happen,
 And if it did, I wouldn't bring my luggage
 'Cause you'd just go and break it,
 Into a thousand pieces,
 Just like you broke my heart
 When United breaks guitars.

(Repeat chorus)¹²⁰

The song quickly found an audience, and went viral. The video generated nearly four million hits in the first ten days.¹²¹ Within four months it had generated over 5.8 million hits.¹²² As of May 2011, the number of hits was over 10.3 million.¹²³ Carroll's story attracted the attention of the national and international print and television media.¹²⁴ It

120. *Id.*; Sons of Maxwell, *United Breaks Guitars Lyrics*, LYRICSMODE, http://www.lyricsmode.com/lyrics/s/sons_of_maxwell/united_breaks_guitars.html (last visited May 4, 2011). Carroll eventually released two more songs to complete his promised "United" trilogy. See Dave Carroll, *United Breaks Guitars Song 2*, YOUTUBE (Aug. 17, 2009), <http://www.youtube.com/user/sonsofmaxwell#p/u/1/h-UoERHaSQg>; Dave Carroll, *United Breaks Guitars Song 3: 'United We Stand' on the Right Side of Right*, YOUTUBE (Mar. 1, 2010), <http://www.youtube.com/user/sonsofmaxwell#p/u/0/P45E0uGVyeg>. As of May 4, 2011, Song 2 had generated over 1.2 million hits and Song 3 had generated over 350,000 hits.

121. Eddie Wrenn, *The Sweet Music of Revenge: Singer Pens YouTube Hit After United Airlines Breaks His Guitar . . . And Shares Plunge 10%*, DAILY MAIL (July 24, 2009, 8:12 AM), <http://www.dailymail.co.uk/news/worldnews/article-1201671/Singer-Dave-Carroll-pens-YouTube-hit-United-Airlines-breaks-guitar--shares-plunge-10.html>.

122. Christine Negroni, *With Video, a Traveler Fights Back*, NEW YORK TIMES, Oct. 29, 2009, at B1.

123. *United Breaks Guitars*, *supra* note 119.

124. See, e.g., CBS News Online, *Singer's Sweet Revenge*, YOUTUBE (July 10, 2009), <http://www.youtube.com/watch?v=V0ophSWaRSQ>; gerrior99, *United Breaks Guitars - CNN Situation Room - Wolf Blitzer*, YOUTUBE (July 9, 2009), <http://www.youtube.com/watch?v=-QDkR-Z-69Y>; Ryan McCarthy, *'United Breaks Guitars' Singer Gets Cash Offer from Airline*, HUFFINGTON POST (August 8, 2009), http://www.huffingtonpost.com/2009/07/08/united-breaks-guitars-pas_n_228062.html;

was even speculated to have been the cause of a 10% decline in the value of United Airlines stock—an amount worth \$180 million—which occurred in the days following the posting of Carroll’s video.¹²⁵

In the face of the negative publicity, United Airlines contacted Carroll in order to resolve the matter.¹²⁶ Specifically, they offered to pay him the money for his repair costs and to give him vouchers for future flights on United Airlines.¹²⁷ Interestingly, Carroll declined the offer and requested that United donate the amount to charity instead (although, of course, it should be noted that all of the publicity from the video and the incident almost certainly helped Carroll’s album sales).¹²⁸ A United spokesperson acknowledged the powerful effect of Carroll’s usage of social media in this instance, stating that “[w]e understand the power of social media and the implications it has on our reputation, and realize it has a role in our communicating to our guests and the public at large.”¹²⁹ In fact, United Airlines appears to have acknowledged the poor customer service on its part with respect to Carroll’s claim, and has even stated that it plans to incorporate the video into its employees’ customer service training in the future.¹³⁰

IV. SOME IMPLICATIONS OF CONSUMERS’ USE OF SOCIAL MEDIA FOR FORM CONTRACT RELIEF

In prior eras the Facebook accountholders, as well as people like Ann Minch and Dave Carroll, would not have been nearly as likely to have obtained the results they did by utilizing social media to voice their complaints. These consumers had signed or otherwise agreed to the form contracts accompanying the services they received. Before the advent of

Negrone, *supra* note 122; Christopher Reynolds, *Smashed Guitar, YouTube Song—United is Listening Now*, LOS ANGELES TIMES (July 7, 2009), <http://articles.latimes.com/2009/jul/07/travel/la-tr-smash-guitar-united-07072009>; Wrenn, *supra* note 121; The Economist, *Did Dave Carroll Lose United Airlines \$180m?*, GULLIVER BUSINESS TRAVEL (July 24, 2009, 10:32 AM), <http://www.economist.com/node/20024421>.

125. See Wrenn, *supra* note 121 (“The company has lost 10[%] of their share value—a massive \$180 million—after being blamed for damaging a musician’s guitar.”). *But see* The Economist, *supra* note 124 (sarcastically stating “[t]hat’s right folks. United’s share-price plunge is all attributable to Dave Carroll”).

126. See Brandon Walker, *Dave Carroll Wins War with United Airlines: Company Says it Will Compensate Musician for Breaking Guitar*, THE DAILY PRESS (Mar. 27, 2010), available at www.thedailypress.ca/ArticleDisplay.aspx?e=1647542.

127. Wrenn, *supra* note 121.

128. *Id.*

129. *United Airlines’ Higgins: guitar blunder ‘made terrific fodder for a video*, ELLIOTT.ORG (Aug. 14, 2009), <http://www.elliott.org/first-person/united-airlines-higgins-guitar-blunder-made-terrific-fodder-for-a-video/>.

130. Wrenn, *supra* note 121.

social media, Ms. Minch would perhaps have called Bank of America's 1-800 number to complain about the mailed notice of a raised interest rate, but would have relied solely on the hope that she caught a bank employee on a good day so that she could be the random recipient of a concession—there would be no power she could assert in such discussions, but rather she would be completely at the mercy of whether the bank, acting through its representatives, would choose to extend leniency not required by its form contract. The same would have been true for Mr. Carroll. In eras past, United's decision to deny his claim for failure to timely notify and document it would be unassailable, and Carroll would have no power to wield against United, in order to get it to relent in the enforcement of its claims policies. All of these consumers assented to form contracts, which allowed the companies to act in the manner they initially did. Absent the consumers' use of social media, it appears that those initial decisions would have remained final.

However, the Facebook protesters of February 2009, Ann Minch, and Dave Carroll were all able to obtain post-formation concessions from their behemoth corporate contracting partners. They exerted bargaining pressure against the companies by using social media technology that scarcely existed until a few years ago. The potential implications are interesting, insofar as they could herald at least some correction to the vastly uneven playing field that currently exists between consumers and their corporate contracting partners, a correction that would be a welcome development. For although Henry Maine famously observed in the nineteenth century that "the movement of progressive societies has hitherto been a movement from status to contract,"¹³¹ in the early twentieth century it was feared that the rise of standard form contracts and unequal bargaining power would gradually operate to return us to a state of affairs which is more "status"-based than based on principles of freedom of contract:

Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals. This spectacle is all the more fascinating since not more than a hundred years ago contract ideology had been successfully used to break down the last vestiges of a patriarchal and benevolent feudal order in the field of master and servant. Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture.¹³²

131. HENRY J.S. MAINE, *ANCIENT LAW* 96 (Gaunt 1999) (1861).

132. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of*

As observed in Part II of this Article, these fears have largely come to pass, given the now ubiquitous nature and use of form contracts in consumer transactions. Therefore, any incremental recapture of bargaining power for the use of individual consumers would surely serve to create better agreements, better products and services, and a better marketplace.

In this section, the Article will make two primary observations about the positive effect of the consumers' usages of social media described in Part III. First, the level of cognitive dealings between the consumer and the merchant are superior when the dealings occur at the point of post-formation disappointed expectations, as opposed to the level of cognitive dealings that occur at the formation stage of the contractual relationship. Second, the bargaining power exerted by consumers at the post-formation disappointed expectations stage is much higher than it is at the formation stage, or even at the traditional post-formation disappointed expectations stage, when there is effective use of social media which attracts a great deal of attention. This results in more cost-effective contractual remedies or concessions for the consumer than expensive and inefficient litigation against the merchants with whom they contract.

A. *Improved Cognitive Dealing*

As discussed in Part II, the law of form contracts is governed by the duty to read—that is, consumers are bound by the terms of the contract they sign whether they actually read them or not.¹³³ In fact, consumers basically do not bother to read the bulk of the language in form contracts.¹³⁴ This has been a source of great consternation to contract law academics, because it conflicts with the ideal notion of two contracting parties who have full cognizance of the range of all contractual terms being discussed in the negotiation.¹³⁵ To illustrate this point at the formation stage with the anecdotes discussed in Part III, Ann Minch probably did not read the fine print in her Bank of America credit card contract that allowed the bank to raise her interest rate to thirty percent at the time she initially entered into the agreement.¹³⁶ So, she likely never even thought about that issue and whether the eventuality of Bank of America raising her interest rate in the future might ever arise, in agreeing to be bound by the contract. The same

Contract, 43 COLUM. L. REV. 629, 640–41 (1943) (citation omitted); see also Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917).

133. Rakoff, *supra* note 9, at 1185 (noting that “it is legally irrelevant whether the [consumer] actually read the contents of the document, or understood them, or subjectively assented to them”).

134. *Id.* at 1179.

135. *Id.* at 1216 (stating that “[d]eeply embedded within the law of contracts, viewed as private law, lies the image of individuals meeting in the marketplace . . .”).

136. See *supra* notes 86–87 and accompanying text.

is almost also assuredly true with respect to Dave Carroll and his ticket agreement with United Airlines.¹³⁷ He surely never read—and thus did not think about at the time he purchased his airline ticket—the provisions that limited his ability to make a claim against United in the event of any damages to his luggage and musical instruments.

However, this lack of subjective awareness was certainly no longer true once the consumers were faced with the disappointed expectations that came to pass under the performance of their contracts. In the case of Ms. Minch, once the letter from Bank of America arrived proposing to increase her rate to 30%, this was no longer an unknown eventuality. It was staring her in the face and was at the forefront of her mind.¹³⁸ And the same was true once Dave Carroll realized his guitar was damaged, and that United Airlines was asserting that it would not pay, based on the inadequacy and un-timeliness of his claim under the terms of United's carriage contract.¹³⁹ At this point, the contract clauses, which at the time of formation were buried in the fine print and not even in the consumers' conscious mind, became issues of which they were now acutely aware. It is said that nothing concentrates the mind so wonderfully as the hangman's noose,¹⁴⁰ and this principle also has some import within this context of unfavorable contract terms being asserted against a consumer who was theretofore subjectively unaware of their presence. Once the knowledge of the term—the power to raise interest rates or deny baggage claims—is at the forefront, then and only then is the consumer dealing with the merchant on that point with the factual knowledge and realization which comports with the paradigmatic ideal of dickering parties in the marketplace, hashing out all of the terms of the deal.¹⁴¹ The parties at this point are dealing with true, subjective realization of what is at stake, and thus the cognition is far superior to that which occurs at the formation stage when the consumer does not read and thus is not aware of the term which will eventually be enforced by the merchant.

To go even further, there are far superior cognitive dealings at the post-formation disappointed expectations phase, even in the relatively rare situations where a consumer *has* read the particular boilerplate term at the time of formation. Recall from Part II.B of this Article that consumers

137. See *supra* notes 103–05 and accompanying text.

138. See *supra* notes 88–89 and accompanying text.

139. See *supra* notes 107–15 and accompanying text.

140. Steven J. Dwyer, Leonard J. Feldman & Robert G. Nylander, *Effective Oral Argument: Six Pitches, Five Do's, and Five Don'ts from One Judge and Two Lawyers*, 33 SEATTLE U. L. REV. 347, 353 (2010). “[W]hen a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully . . .” *Id.* (quoting James Boswell, *The Life of Samuel Johnson, LL.D.*, in GREAT BOOKS OF THE WESTERN WORLD 351 (Robert Maynard Hutchins ed., 1952) (1791))

141. Rakoff, *supra* note 9, at 1216.

have significant cognitive and psychological defects in making decisions. The limitations of bounded rationality, disposition, defective capability, and illiteracy may come into play when the consumer initially agrees to a form contract.¹⁴² Ann Minch couldn't really have understood, at the time she initially entered into the Bank of America credit card agreement, all of the various boilerplate terms that were in it, including the myriad of scenarios that would contractually authorize the bank to raise her interest rate to thirty percent in the future. Thus, it made sense for her to just focus on the "main points" like her credit limit and her initial interest rate.¹⁴³ The same would be true of Dave Carroll, who did not dig up United Airline's contract of carriage and peruse it before making a ticket purchase decision. Instead, he just focused on ticket price and perhaps time schedules. Further, even if Minch and Carroll had focused specifically on the interest rate raise and limited baggage claims terms, respectively, they likely would have greatly discounted the possibility that it would affect them. This is first because of disposition. They would be unduly optimistic about their future affairs, and thus Minch would assume that *her* rate would never be raised, and Carroll would assume that *his* guitar or luggage would never get damaged (or United would not deny *his* claim if he ever made one).¹⁴⁴ Second, this would be because of defective capability. The possibility of such occurrences are greatly discounted simply because it involves future events, as opposed to immediate issues like credit limit, initial interest rate, ticket price, and schedule.¹⁴⁵

But, none of these cognitive defects are relevant once the post-formation disappointed stage of the dealings occurs. Once Minch received the letter from Bank of America raising her interest rate to 30%, issues of bounded rationality, disposition, and defective capability were rendered moot.¹⁴⁶ At that point, she was no longer rationally ignorant of the bank's ability to raise her interest rate, because the bank was presently raising it. Similarly, Bank of America's letter also mooted Minch's unrealistic optimism and failure to focus on future eventualities. At that point, the time for forecast was over and the reality of the bank's present enforcement of the form contract term was upon her. The hangman's noose was around Minch's neck, and at that she point she engaged the reality of the contract term directly. The same was true once Carroll realized United Airlines had not only damaged his guitar, but also was going to invoke a boilerplate term to deny him compensation.¹⁴⁷ At these points, Minch and Carroll

142. See *supra* notes 37–56 and accompanying text.

143. See *supra* note 40 and accompanying text.

144. See Eisenberg, *supra* note 31, at 216–18.

145. *Id.* at 218–22.

146. See *supra* notes 88–89 and accompanying text.

147. See *supra* notes 107–15 and accompanying text.

realized and were fully cognizant of the existence and reality of the form contract terms and were finally prepared to deal with their contracting merchants with those terms fully in mind. The ideal of bargaining parties possessing the best information possible was finally at hand. Thus, the negotiations that thereafter occurred were cognitively superior and arguably produced a more just and fair result compared to a buried boilerplate term of which the consumer was completely unaware at the time of initial contract formation. Accordingly, the problem of faulty assent when consumers do not initially read or properly engage form contract terms may be solved by these post-formation dealings once the disappointed expectations manifest themselves fully and are presented for resolution by the parties. The achievement of this result in these occurrences has been greatly aided by the utilization of social media.

B. Increased Bargaining Power and Lower Remedy Costs

In the previous section, it was established that consumers have better information and a more realistic appraisal of the stakes at issue once the contingency occurs that brings the boilerplate term to the forefront to be grappled with.¹⁴⁸ In this section, I will briefly demonstrate and reiterate that, once this greater awareness is present in the consumer's mind, use of the social media can greatly increase the consumer's bargaining power in negotiating a resolution of the issue affected by the previously unread boilerplate term. It scarcely needs to be said that the use of social media is an exploding phenomenon. The number of hours that the average individual spends on various social media platforms is increasing exponentially.¹⁴⁹ Sites like Facebook, Twitter, LinkedIn, and YouTube are all continuing to grow increasingly popular.¹⁵⁰ Businesses are more and more cognizant of the need to increase their online presence on social media sites in order to maximize their business opportunities.¹⁵¹

148. See *supra* notes 133–47 and accompanying text.

149. See, e.g., Steve King, *Time Spent on Social Networking Sites Exploding*, SMALL BUSINESS LABS (Jan. 25, 2010, 1:00 AM), <http://www.smallbizlabs.com/2010/01/time-spent-on-social-networking-sites-exploding.html> (noting that between 2007 and 2009, the time Internet users spent on social networking sites increased by eighty-two percent yearly).

150. *Id.*; see also Adam Ostrow, *You Tube is the Top Social Media Innovation of the Decade*, MASHABLE (Dec. 22, 2009), <http://mashable.com/2009/12/22/youtube-2010/> (

How does something 'go viral'? In the case of YouTube, an enormous part of it is the ability to embed clips anywhere, from blogs, to social networking profiles, to the front page of popular websites. YouTube pioneered this concept, and today, it's a driving force behind the collective 1 billion minutes we spend *each day* watching YouTube clips

) (emphasis in original).

151. See *Social Media Exploding Globally, Opening New Opportunities for Businesses*,

Part III of this Article addresses three anecdotal instances where social media was used to increase consumers' bargaining power. When companies change their website Terms of Service for the purposes of contractually governing consumers' access to their sites (i.e., "browsewrap"), such actions are typically adhesive in nature, insofar as the persons accessing the site have no real bargaining power, but must rather "take the terms or leave them" (to the extent they are even aware of them). Emails to the webmaster listed on the site, or the other contact information, protesting or attempting to dicker some particular term in the terms, would be met with about as much willingness as that of the Sears salesperson when I try to negotiate the terms of the credit agreement when buying a refrigerator on credit. But, it is easy for companies to ignore or rebuff single individual consumers on a one-on-one basis. It was harder for Facebook to ignore the protests of thousands of Facebook users, when members made plain their extreme discontent by joining the various protest sites.¹⁵² In the face of such organized pressure, Facebook relented and changed its terms back to the more consumer-friendly preceding version, and it is unlikely they would have done so if only a few isolated email complaints had been made.¹⁵³

The stories of Ann Minch and Dave Carroll also provide anecdotal evidence of the increased bargaining power afforded by consumers' use of social media. In Minch's case, she initially tried the traditional route of simply calling Bank of America on the phone and talking to a customer service representative.¹⁵⁴ She was unsuccessful, as she had little-to-no leverage, and as she was an individual of modest means with a fairly small credit card balance, whereas Bank of America was a large, well-capitalized corporation.¹⁵⁵ But, after she posted her video protest "Debtor's Revolt" on YouTube (which then, of course, was passed around the Internet via blogs, Facebook, and the like) and ultimately received hundreds of thousands of hits, Bank of America contacted her to make a favorable settlement.¹⁵⁶ With her phone call, Minch had no bargaining power and therefore obtained no renegotiation of her interest rate; with her YouTube video disseminated via social media, Bank of America came back to the table and dealt with her as a more troublesome adversary. The inescapable conclusion is that Minch's use of social media made the difference.

TECH JOURNAL SOUTH (Jan. 17, 2011), <http://www.techjournalssouth.com/2011/01/social-media-exploding-globally-opening-new-opportunities-for-businesses/> (explaining the impact of "real-time" social networks on business development and consumer behavior).

152. See *supra* notes 68–85 and accompanying text.

153. See *supra* notes 79–81 and accompanying text.

154. See Minch, *supra* note 88. In fact, Minch characterized the Bank's response as "[t]ough shit." *Id.*

155. *Id.*

156. See *supra* notes 90–100 and accompanying text.

The same is true of Dave Carroll and his episode with United Airlines. When his guitar was broken and he eventually contacted United in order to claim compensation, he was rebuffed.¹⁵⁷ However, after his splendid song and video, “United Breaks Guitars,” was posted to YouTube (and to date has received over ten million hits), United Airlines came back to the table and was ready to deal.¹⁵⁸ Initially, he was a single consumer bound by an onerous form contract term, and his efforts to reach a compromise were futile. After his effective use of social media to draw attention to his plight, United saw Carroll as someone with whom it would behoove them to deal more meaningfully, and he wielded greater bargaining power. It is difficult to come to any conclusion other than that Carroll was able to increase his bargaining power as a consumer, and this gave him much greater power than he had to negotiate at the time of initial contract formation (when he first bought the tickets) and even at his first attempt at post-formation modification of the deal (when he first tried to make his claim for compensation). Again, his use of social media changed the result dramatically.

If consumers successfully use social media to increase their bargaining power, then they may obtain concessions or remedies which are superior to what they would achieve through traditional means of redress like litigation. As a mere private party attempting to redress legal wrongs against the merchant directly, consumers like Minch and Carroll would be in a distinctly untenable position. Because of the prohibitive cost of litigation, consumers in Minch’s and Carroll’s position are unlikely to be able to mount any type of serious legal challenge or opposition to their wealthier merchant contracting partners.¹⁵⁹ However, Minch and Carroll made their own relatively inexpensive videos and put them on the web themselves, foregoing any attorneys’ fees or litigation costs. They utilized a low-cost social media option, which wielded a much larger result with little comparable cost.

Thus, companies are increasingly recognizing the power that consumers have at their disposal with social media. These are no longer isolated incidents. “Social media is very effective in shrinking the world . . . It has gone a long way to level the playing field to make the individual

157. See *supra* notes 114–15 and accompanying text.

158. See *supra* notes 116–30 and accompanying text.

159. *Recent Development: Arbitration*, 13 J. CONSUMER & COM. L. 35, 36 (2009) (“Litigation being prohibitively expensive, consumers seeking minimal damages are unlikely to pursue justice against a merchant if they must bear the burden of litigation alone.”) (discussing *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1096 (9th Cir. 2009)); see also Henry Barkhausen, Comment, *Regulating in the Shadow of the U.C.C.: How Courts Should Interpret State Consumer Protection Laws*, 119 YALE L.J. 1329, 1338 (2010) (“As the costs of litigation rise, it becomes more expensive for consumers to hire counsel to defend themselves against claims by their creditors.”).

consumer's voice on par with the powerful public relations resources available to large corporations."¹⁶⁰ As a result, savvy companies are beginning to monitor the social media sites, scanning for complaints about their companies, products, or services, and acting promptly to resolve any issues.¹⁶¹ "We're in a world where one person, by their actions, can make a company look bad, and it can get echoed and amplified over and over again. . . . *The power has shifted, [so] that big companies now have to be worried about one individual with a microphone called a blog.*"¹⁶² As one business consultant advises companies on her blog:

We are in an era of the powerful consumer. Consumers are taking matters into their own hands, taking a vengeance against companies for being unresponsive. These powerful consumers refuse to be ignored and in the process they are attracting enormous media attention, influencing consumer buying decisions, and causing significant market damage to companies.

You need to be right there when and where consumers vent their problems online so you can respond in an immediate and personal way.¹⁶³

Web 2.0 has arrived. Social media has given some power back to consumers that had been lost as a result of the gradual widening of the disparity between merchants and consumers in the age of industrialization and the proliferation of standard form contracts.

V. CONCLUSION

Standard form contracts are here to stay. They are efficient, and merchants will not sell products or services unless they are able to

160. Karen L. Stevenson, *Social Media Spurring Consumer Protection Litigation?*, ABA LITIGATION NEWS (Aug. 11, 2010), http://apps.americanbar.org/litigation/litigationnews/top_stories/081110-social-media-consumer-protection.html (quoting Lynn Lincoln Sarko, who was counsel for plaintiffs in a litigation with Procter & Gamble).

161. See Carolyn Y. Johnson, *As blogs expand the reach of a single voice, firms monitor the Internet looking for the dissatisfied*, BOSTON GLOBE (Jul. 7, 2008), at 6 (including an account of a Comcast cable customer sending a Twitter post about a problem with his reception, and receiving a prompt reply and fix of the issue from a Comcast representative via Twitter).

162. *Id.* (emphasis added) (quoting Josh Bernoff, an analyst at Forrester Research); see also Jon Yates, *Using Twitter, Facebook to Submit Consumer Complaints*, CHI. TRIB. PROB. SOLVER (Apr. 23, 2010, 12:35 PM), <http://newsblogs.chicagotribune.com/the-problem-solver/2010/04/social-media-as-a-consumer-complaint-avenue.html> (describing similar incidents involving T-Mobile, Southwest, AT&T, and Best Buy).

163. Myra Golden, *Does Your Company Monitor Twitter, Facebook and Blogs for Customer Complaints? If Not, Why Not?*, MYRA GOLDEN MEDIA BLOG (Feb. 3, 2010), <http://myragolden.wordpress.com/2010/02/03/does-your-company-monitor-twitter-facebook-and-blogs-for-customer-complaints-if-not-why-not/>.

contractually inoculate themselves against certain types of risks by the inclusion of protective boilerplate (e.g., warranty limitations and exclusions, liability limitations, arbitration clauses, choice of law, etc.). Consumers realize that the contract terms, like most other aspects of a deal, are adhesive in nature—“take-it-or-leave-it.” They don’t have any bargaining power in the formation of the contract.¹⁶⁴ And, even if they did, consumers suffer from multiple cognitive and decision-making defects that would nonetheless preclude their ability to read, comprehend, and negotiate different terms.¹⁶⁵ All in all, consumers have very little bargaining power when they initially decide to transact with a merchant by buying its goods or services.

Traditionally, consumers have had no greater power once the merchant’s goods or services create some measure of disappointment for them. If the product breaks, or the services are faulty or unsatisfactory in some manner (e.g., the bank raised Minch’s interest rate, the airline damaged Carroll’s guitar and refused to pay), the consumer is contractually bound by the limiting terms in the boilerplate under the duty to read rule of contract law. Merchants are entitled to enforce the terms and refuse any relief to the consumer, at least in the absence of unconscionability, fraud, or some similar impediment to enforcement, which is rare. And, even if there were some basis for the consumer to argue for relief, the high costs of legal representation and litigation present an often-insurmountable obstacle to seeking such remedies. Instead, consumers are traditionally likely to simply call a 1-800 number or seek personal attention from one of the merchant’s employees. However, because of the unequal power between the parties, the merchant’s frequent decisions to refuse any such relief has no immediate consequences, other than loss of the consumer’s repeat business and the limited effects of traditional word-of-mouth discussion of the consumer’s experiences. Simply put, the ironclad nature of the merchant’s protective form contract language, coupled with the enormous bargaining power advantage, results in the merchant being able to effectively deny any relief to the consumer in the face of his disappointed expectations.¹⁶⁶

However, in the world of social media, the landscape is changing. Ann Minch and Dave Carroll were consumers who once agreed to acquire services from merchants by way of form contracts with one-sided provisions that protected their respective merchants. They likely never read the onerous terms, nor could they have likely negotiated more favorable ones even if they had read them. However, when faced with disappointed expectations, Minch and Carroll (not to mention the

164. See *supra* Part II.A.

165. See *supra* Part II.B.

166. See *supra* Part III.

thousands of Facebook account holders who petitioned against Facebook's change of service terms in February 2009) took their complaints to the social media. After their complaints went "viral," their merchants were compelled to approach them and offer concessions which they had been previously unwilling to offer. As a result, these consumers were able to obtain relief and a remedy against perceived unjust merchant behavior.¹⁶⁷

In addition to reporting on this phenomenon, this Article simply makes two observations about these anecdotes which are positive from a consumer contracting perspective. First, at the point of dealing with the disappointed expectations, the merchant and consumer are dealing on a much more level playing field information-wise, because the contingency which is the basis of the new dealings between the parties is now a concrete, real event which has in fact occurred, rather than a vague, inchoate possibility of some negative event which conceivably might occur at some point in the distant future. In short, the parties are not dealing in unknown hypotheticals anymore—the thing has happened (e.g., the goods have broken down, or the service has been unsatisfactory), and so both parties know the score. They are not dealing in informational asymmetries that greatly favor the merchant.¹⁶⁸ Second, and the more obvious point, the consumer is able to wield potentially much more power over the merchant by his or her use of a social media tool to voice his contractual disappointment. If the video, blog entry, tweet, or Facebook post goes "viral," it will rapidly generate exponentially more attention than the consumer's traditional efforts to contact the merchant directly. This can result in enormous pressure on the merchant to rectify the wrong in the court of public opinion. Furthermore, the consumer has achieved this result without necessarily paying any attorneys' fees, litigation costs, or encountering other traditional barriers to achieving a satisfactory remedy against undesirable merchant behavior.¹⁶⁹

The result is greater empowerment to consumers, or at least the specter of it, in the world of social media and Web 2.0. The world is truly growing ever smaller through the use of social media. Consumer empowerment is, of course, just one potential result of this enormously significant truth. Its influence is also playing out in other aspects of our society, from matters of entertainment to much more significant matters of political unrest and even revolution.¹⁷⁰ But its development in the area of

167. *Id.*

168. *See supra* Part IV.A.

169. *See supra* Part IV.B.

170. *See, e.g.,* Indira A.R. Lakshmanan, *Clinton Defends Facebook, Twitter Amid Egypt Protests*, BLOOMBERG BUS. WK. (Jan. 27, 2011), <http://www.newsmax.com/SciTech/clinton-facebook-twitter-egypt/2011/01/27/id/384064> (examining the use of social networking to organize protests as part of the 2011 Egyptian revolution).

consumer contract remedies is a welcomed one. Justice Louis Brandeis famously said, “Sunlight is the best disinfectant.”¹⁷¹ Less famously, but right before that sentence, Brandeis said: “Publicity is justly commended as a remedy for social and industrial diseases.”¹⁷² With the advent of the Internet and social media, consumers have the ability to remedy the “disease” of grossly disproportionate bargaining power between behemoth corporate merchants and individual consumers who buy their goods and services. Never before has there been greater ability for consumers to generate publicity, and thus “sunlight,” on poor treatment of them by merchants. The result is potentially greater power for consumers, and this is for the good.

171. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1914).

172. *Id.*

