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Fit for Its Ordinary Purpose: Implied Warranties and Common Law Duties for Consumer Finance Contracts

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ARTICLE

FIT FOR ITS ORDINARY PURPOSE: IMPLIED WARRANTIES AND COMMON LAW DUTIES FOR CONSUMER FINANCE CONTRACTS

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ABSTRACT

The history of consumer goods and consumer credit markets presents an anomaly: market transactions for consumer goods and credit transactions evolved in tandem, from face-to-face and bespoke to standardized and widely distributed; the law governing these twin "product" markets has not. With consumer goods, the Uniform Commercial Code codifies implied warranties of merchantability and fitness for a particular purpose and the common law of tort provides strict liability for defective products. By contrast, with consumer finance contracts, borrowers enjoy scant common law protection, even though both consumer goods and consumer contracts may be dangerously defective "products."

This Article reconsiders the traditional, all-or-nothing choice between tort and contract law to govern injury from different sorts

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of consumer products. It argues for a symmetric treatment of defective consumer goods and consumer financial products, by enlisting the tort-like doctrines in the common law of contract: the doctrines of unconscionability; good faith; and warranty. The terms of an adhesive financial contract can and should be interpreted in light of an implied warranty that the contract-as-product is as described. The defense of unconscionability should be strengthened to enable enhanced scrutiny of terms that fundamentally undermine contractual products. Its procedural prong should be satisfied by the adhesive nature of the terms, without additional proof of the circumstances of a consumer's surprise about the contents of the contract. The substantive prong should be informed by implied obligations of good faith and the implication that this contract-as-product is fit for ordinary and particular purposes—that it is faithful to the underlying transaction. Attempts by lenders to disclaim implied warranties or obligations of good faith should be viewed as prima facie unconscionable.

In this way, the law governing consumer-contracts-as-products would serve the same function as the product liability and warranty laws that govern consumer-goods-as-products. Reconciliation of these laws would ensure that financial contracts are fit for their ordinary purposes as loans.

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I. INTRODUCTION

> To say that X is a member of the species Y is just to say that there is a way of looking at and talking about X which emphasizes its Y-ishness. . . . All classification decisions are, as far as the total class is concerned, choices among metaphors.
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> — Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132–33 (1970).

Product liability and warranty law evolved in the twentieth century to enable consumers to seek redress in courts when defective products caused injuries.[1] The consumer markets that prompted the development of strict liability under tort and contract law through cases like *MacPherson*,[2] *Henningsen*,[3] and *Greenman v. Yuba*[4] involved standardized goods—in these cases, automobiles and power tools. These goods were mass-produced and distributed across a long supply chain to consumers who thought they knew what they were buying but who may not have understood how the products worked or the dangers they posed.[5] In aid of consumers, common law courts overrode problematic contract and tort doctrines—most notably "*caveat emptor*," "privity," "notice," and "disclaimer."[6] Product liability and warranty law developed to hold manufacturers and distributors accountable for the defective products they manufactured, designed, and distributed.[7]

Today, consumer markets involve more than goods transactions. Goods may be coupled with intangibles, such as cellular telephone services, music streaming services, and extended warranties. Indeed, many consumer products are entirely intangible, consisting solely of services, such as internet services, intellectual property, or financial services. In these

1. *See infra* Part II.
2. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053–55 (N.Y. 1916).
3. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77–78 (N.J. 1960).
4. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963).
5. *See infra* Part II (discussing the emergence of modern product liability law after the Industrial Revolution).
6. *See generally* William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *The Assault upon the Citadel*] (discussing seller liability to ultimate consumer); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter Prosser, *The Fall of the Citadel*] (continuing his study of products liability).
7. *See infra* Part II.

transactions, consumers undertake payment obligations in return for connectivity, access to credit, deposit protection, payment options, brokerage accounts, or insurance, to give just a few examples.[8] All of these modern consumer markets are markets for "products," whether or not goods are part of the deal.[9] Where no goods are involved, the "product" is the contract. With these contracts-as-products, however, the defect often lies within the contract itself.

The evolution of consumer markets for "contractual products" has produced a troubling anomaly in the law. Tangible consumer goods—things—are governed by a common law of product liability and statutory warranty protections that evolved in the mid-twentieth century.[10] Credit contracts, software licenses, and other contractual products are governed, instead, by some combination of the common law of contract and consumer protection regulation.[11] This asymmetry is a historical accident, and we seek to remedy it—using consumer-financial-products as an example.

This Article focuses on the dangers of consumer-financial-products and critiques the unquestioned assumption that liability for defects in tangible consumer goods is conceptually distinct from the rules that govern liability for defects

8. RESTATEMENT OF CONSUMER CONTS. § 1 (AM. L. INST., Tentative Draft No. 1, 2019) (discussing scope and defining "consumer," "business," "contract," and "consumer contract").

9. We are far from the first to argue that consumer contracts, especially standardized, take-it-or-leave-it contracts of adhesion, should be compared to mass-produced consumer goods and treated as "products." Over fifty years ago, Arthur Leff argued that standardized contracts of adhesion were themselves "things," independent of the property they transferred, and that these "things" complicated and potentially undermined the principles of contract law governing these "products." *See* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 142, 144–47 (1970). Leff was neither the first nor the last scholar to question the normative implications of standardized contracting in modern consumer markets. For discussion of early standardized contracting, see Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). *See also* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 19–32 (2013) (discussing consumer consent, and the degradation of consumer legal rights and system of contract law under boilerplate); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 935–36 (2006); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 8 (2008); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) ("Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.").

10. *See infra* Part II.

11. *See infra* Part IV (examining the evolutionary failure of contract law to protect consumers following the standardization of consumer contracts).

in intangible consumer "financial products."[12] Using consumer lending as a backdrop, we propose symmetry—a single, unified theory of product liability grounded in an understanding of modern common law that embraces the blurred boundaries between contract and tort doctrines. We focus, here, on the tort-like aspects of contract law, but we are agnostic about whether redress should be found in the law of warranty or in tort, so long as the treatment is consistent.[13] The Article reaches this conclusion for three interrelated reasons:

First, consumer goods and consumer financial services are more alike than they are distinct. Both are "products" in that both are mass-produced, standardized, widely distributed, and difficult for consumers to comprehend.[14] Customized contracts-as-products are rarely available in consumer markets.[15] To the extent that consumers desire something different, they often must wait for markets to produce variation.[16]

Second, recognizing "financial products" as the twenty-first-century equivalent of mass-produced consumer goods lays bare the failure of the common law to address the problem of defective financial products and allows us to consider, by analogy, the approach of the Uniform Commercial Code to contracts of adhesion. Contractual obligation is premised on voluntary assent to a transaction (and its terms), yet duties based wholly in assent are nearly impossible to reconcile with standardized contract terms that are nonnegotiable and unread.[17] Standardization creates a tension between "assent" to the transaction and "assent" to its terms. Contract standardization saves money, to be sure; yet while consumers may be free to choose to borrow money at a

12. Although this argument might get applied to all sorts of consumer contracts and hybrid consumer "products," we concentrate on consumer *finance* contracts because the "products" are wholly contractual and caused enormous damage in the recent financial crisis, prompting a wide range of law reform and legal action. *See* Bar-Gill & Warren, *supra* note 9, at 7, 58, 94.

13. Indeed, the situation of strict liability for products in tort is itself a historical accident. *See* Edward J. Janger & Aaron D. Twerski, *Warranty, Product Liability and Transaction Structure: The Problem of Amazon*, 15 BROOK. J. CORP. FIN. & COM. L. 49, 53 (2020).

14. *See infra* Part III.

15. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1224–25 (1983) (discussing take-it-or-leave-it approach used by firms in the modern market).

16. *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 47, 50 (1993).

17. *See* Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731–32 (1931); Rakoff, *supra* note 15, at 1177 (defining "contract[s] of adhesion" with a seven-factor test).

particular rate, they may nonetheless lack meaningful choice as to, or understanding of, the ancillary terms of their agreements.[18] This lack of choice may derive from market power, the absence of substitutes, or even heuristic bias.[19] Regardless of the cause, it empowers consumer lenders to include overreaching terms that may not only harm borrowers but also society at large.[20] If assent is not the basis for enforcing particular terms, however, then what is?

In answering this question, we seek some realism about consumers. Modern judicial interpretation of tort and contract doctrines, as applied to liability for defective consumer-goods-as-products, has focused less on doctrinal distinctions and more on functional ones; less on the formalities of the transaction and more on the practicalities of its end result.[21] As applied to the market for mass-produced consumer goods, courts in the mid-twentieth century pulled away from contractual limits on liability under tort law for defective products.[22] The rule that negligent manufacturers did not enjoy strict privity of contract with end users was eventually rejected as a basis for refusing liability, for example.[23] Responsibility for injury flowed from the consumer's use of the product and the foreseeable harm caused by the product itself rather than from the formal transaction through which the consumer acquired it.[24] We think this same functional approach ought to be applied to consumer-contracts-as-products as well.

This Article reconsiders the traditional, all-or-nothing choice between either tort or contract law and looks toward the tort-like principles in contract law to flesh out the content of contracts-as-products. Modern courts have mostly looked for consumer financial protection in the contract doctrine of unconscionability to excise problematic terms in contracts of

18. *See infra* Section IV.A.1.

19. Recognition of market power and absence of substitutes can be traced at least as far back as the *Henningsen* case, see *infra* text accompanying notes 58–68. We discuss cognitive limitations and heuristic bias in consumer lending contract in depth in Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1556–57 (2006). *See generally* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 7–23 (2012).

20. *See, e.g.*, BAR-GILL, *supra* note 19, at 23–26.

21. *See infra* Part II.

22. *See infra* Part II.

23. *See infra* Part II.

24. *See infra* Part II.

adhesion.[25] While this doctrine holds promise, it needs some revamping. Courts frequently stumble on the procedural prong of the analysis. Even when they can get past process, courts facing the substantive prong of the doctrine of unconscionability find themselves in uncharted territory at odds with contract law's fixation on autonomy.[26] We recommend turning toward the tort-like boundary of contract law to flesh out the substantive component of unconscionability. Implied duties, such as good faith and implied warranties, find obligations that inhere in the bargain itself, even though standardized text might look to delete such obligations.[27] This approach to the common law should inform current efforts by the American Law Institute (ALI) to draft a Restatement of Consumer Contracts; assist state and federal legislators; and inform regulation promulgated by the Consumer Financial Protection Bureau (CFPB).[28]

Nearly fifty years ago, when Grant Gilmore, ever the realist, pronounced, "Contract is dead," he was referring to a particular—classic—vision of contract law.[29] The "classic" vision of contract law was, argued Gilmore, an invention of the nineteenth century, codified by the First Restatement of Contracts and largely abandoned by the Second Restatement.[30] Gilmore did not mean that principles of contract law had wholly disappeared with the Second Restatement; rather, he embraced the overlap between tort and contract, arguing "that 'contract' is being reabsorbed into the mainstream of 'tort.'"[31] For Gilmore, modern contract doctrines like unconscionability, promissory estoppel, implied warranty, good faith, and mistake reflected the fact that contract "law," not just contract terms, should govern the relationship between contracting parties.[32]

25. *See infra* Section IV.C.

26. *See infra* Section V.B.2.

27. *See infra* Section IV.D (discussing implied obligations).

28. The ALI is currently seeking to draft a Restatement of the Law, Consumer Contracts. *See* RESTATEMENT OF CONSUMER CONTS. (AM. L. INST., Tentative Draft No. 1, 2019), https://www.ali.org/projects/show/consumer-contracts/ [https://perma.cc/5BE6-TTEP] (last visited Aug. 23, 2021) (presenting the tentative draft and discussion draft). The CFPB's Taskforce on Federal Consumer Financial Law has issued its own report on consumer financial protection. *See generally* CONSUMER FIN. PROT. BUREAU, TASKFORCE ON FEDERAL CONSUMER FINANCIAL LAW REPORT (2021). Both efforts are controversial, to say the least.

29. GRANT GILMORE, THE DEATH OF CONTRACT 101–03 (1974).

30. *Id.* at 100–01.

31. *Id.* at 87.

32. *See id.* at 101.

These realist insights hold important implications for consumer finance contracts and other contracts-as-products. With these products, assent to the transaction should not be viewed as assent to any and every standardized term in the agreement, and in particular terms that run afoul of consumer lenders' inherent duties of good faith and fairness to their contracts with consumers. Transactional assent should, instead, give rise to certain basic warranties and responsibilities of transactional good faith and fair dealing. These obligations should be understood to inhere in reasonable broadly shared expectations of conduct that arise because of, not despite, the consumer contract. These obligations exist as contractual defaults and should withstand attempts to disclaim them through adhesive terms.

This Article proceeds in four parts. Part II combines a doctrinal review of the common law governing product liability for goods with consideration of the changing marketplace for the manufacture and sale of consumer goods. Part III compares evolution in the market for production of standardized consumer goods with evolution of the standardized contracts through which these goods were sold to consumers and their sales were financed. Complex credit cards, insurance contracts, and mortgages are widely made available to consumer markets through similar standardization in their drafting and specialization in their origination and distribution to end users.[33] Like consumer products that are goods, the distribution of consumer-contracts-as-products is similarly accomplished through long distribution chains.[34] Because of this evolution over the past hundred years, consumer contracts themselves should be characterized as "products."

Part IV contends that the standardization of consumer contracts by lenders, sellers, telecommunication providers, and others was not matched by a similar evolution in the law of contracts. It develops the idea that contract law should have shifted in recognition of this evolution in the marketplace. Indeed, in the heyday of consumer protection (in the late 1960s to early 1980s), courts seemed poised to take on this Herculean task with the then-emerging doctrine of unconscionability but squandered this opportunity for reform.[35] Courts' efforts were pushed aside by

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33. *See generally* BAR-GILL, *supra* note 19.

34. *See infra* Part III.

35. *See infra* Section IV.C (discussing the emergence and decline of unconscionability doctrine).

a flurry of federal legislation and regulation; they were further displaced by subsequent deregulation in these markets.[36]

This evolutionary failure left the common law of contract at sea when seeking to address problems raised by consumer-contracts-as-products. The law of contracts remained uncomfortable with the concept that contracting parties owe each other unstated duties that inhere in the deal.[37] Concepts like good faith and warranty can flesh out contracts of adhesion. But, like unconscionability, they are often hemmed in by boilerplate.[38] And yet, the building blocks for doctrinal development already exist in doctrines like unconscionability, which guards against overreaching, and good faith and implied warranties, which find duties that exist outside the writing but inhere in the contract itself.[39]

We conclude in Part V not just by arguing that the common law governing consumer-contracts-as-products should change but by laying out what these changes would look like. We start by arguing that adhesive consumer contracts should be presumed to be procedurally unconscionable and that an unconscionability analysis should concentrate principally on the substance of the challenged term. Second, we would flesh out the substantive prong of the doctrine of unconscionability with reference to implied terms like good faith and warranties of fitness for ordinary and particular purpose. We would further view as unconscionable attempts to disclaim those duties in boilerplate.[40] Through this analysis, we place good faith and warranty firmly within the realist concept of faithfulness to the transaction. Although we situate our solution in contract doctrine, the functional effect of our proposals is informed by the principles that motivated tort cases like *MacPherson*, *Henningsen*, and *Greenman*, and yields a similar result.

36. *See infra* Section IV.C (discussing jurisprudence from the 1980s to present).

37. *See infra* Section IV.D (discussing the influence of implied obligations on the law of contracts).

38. *See infra* Section V.E (addressing how disclaimer undermines consumer protections).

39. *See infra* Part IV.

40. We recognize that product liability law focuses on personal injury from defective goods. Implied warranties are not so narrow and cover the economic and related harms. Implied warranties could provide similar redress for defective financial products. The harms caused to borrowers, their families, and communities by predatory lending practices are every bit as harmful as personal injury. *See* Bar-Gill & Warren, *supra* note 9, at 56–69. We discuss this point further below.

Whatever one thinks about modern contract law as a whole, and regardless of doctrinal labels, this Article argues that the law governing consumer-contracts-as-products should embrace its roots in *both* contract and tort doctrine.[41] Any tension between this reabsorption and classical contract theory should be accepted as part of the move from contract law governing arms-length-negotiated-contracts to that governing consumer-contracts-as-products.

II. "PRODUCTS" IN TWENTIETH-CENTURY CONSUMER MARKETS: MASS-PRODUCED CONSUMER GOODS

We begin our discussion of the emergence of modern product liability law in the first quarter of the twentieth century with two developments: one in the law of torts and the other in the law governing the sale of goods. First, Justice Cardozo responded to the emergence of standardized consumer products with *MacPherson v. Buick Motor Co.*, which eliminated privity of contract as a limit for tort liability for negligence.[42] Second, the Uniform Sales Act, promulgated in 1906 and widely adopted over the next two decades, made inroads into the doctrine of *caveat emptor* with a conditional implied warranty of fitness.[43]

MacPherson, who had bought a Buick from Close Bros., Buick's distributor in Schenectady, was injured when thrown out of the car because the wooden spokes in the left-rear wheel broke

41. *See* Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead*, 2017 U. ILL. L. REV. 65, 67–69 (2017) (suggesting that reviving contract theory from its "post-contract-is-dead world" requires the "conceptualization of contract as the product of one of two categorically distinct" doctrines).

42. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1052–53 (N.Y. 1916). We could start the story even earlier than this by citing the English and American caselaw that borrowed the principle of *caveat emptor* to preclude contract rescission. *See, e.g.*, Chandelor v. Lopus (1603) 79 Eng. Rep. 3, 4; 1 Jac. 1 (following purchase of a so-called "bezoar-stone," the buyer sought to rescind the sale on grounds that the stone was counterfeit; however, the request was denied on grounds of *caveat emptor*—let the buyer beware—because a sale creates no implied warranties of quality); Seixas & Seixas v. Woods, 2 Cai. 48, 53–54 (N.Y. Sup. Ct. 1804) (holding that the English rule of *caveat emptor* created the proper incentive for buyers to examine goods before purchase—here, the buyer sought a refund for wood advertised and invoiced as "braziletto," which turned out to be much less expensive "peachum" wood—in so ruling, the New York Court of Appeals wrestled with competing continental rules); Laidlaw v. Organ, 15 U.S. (2 Wheat) 178, 182–83, 193, 195 (1817) (relying on the doctrine of *caveat emptor*, the Court held that the buyer's knowledge of the peace treaty and its likely effect on tobacco price was not grounds for relief because, although the contract had been negotiated in New Orleans on the morning the peace treaty resolved the War of 1812, buyers of goods hold no obligation of disclosure to sellers; thus, the Court remanded for further findings on whether there had been an "imposition").

43. *See* UNIF. SALES ACT § 15 (COMM'RS ON UNIF. STATE L. 1919).

and the wheel collapsed.[44] Although Buick did not manufacture the wheels, it conceded that it had not inspected the wheel before incorporating the wheel into the automobile "except to see that [the wheel] ran true and that it had not been marred in shipment."[45] Buick argued that it did not owe MacPherson a duty to inspect the wheels because MacPherson had purchased the automobile from its distributor, the Close Bros.[46] Without a duty of care under negligence law and any warranty from Buick to MacPherson, MacPherson bore the risk of injury from a defective wheel.[47] Because of the distribution network it had created, Buick claimed *caveat emptor*—let the buyer beware—as its defense.[48]

In a world where sellers made simple goods and sold them directly to buyers who understood their trade, the paired doctrines of *caveat emptor* and privity made perfect sense. Buyers had every incentive to verify the quality of the goods they purchased before striking the deal. Sellers were further insulated from liability in tort by the doctrine of contractual privity, which held that a manufacturer had no duty to any remote purchaser.

As the industrial revolution took hold, these doctrines shifted in function. Standardization and long supply chains eliminated face-to-face transactions between consumers and manufacturers. The doctrines of privity and *caveat emptor* insulated the manufacturers from liability to remote purchasers. These doctrines allowed them to place the risk of personal injury onto

44. MacPherson v. Buick Motor Co., 160 A.D. 55, 56 (N.Y. App. Div. 1914), *aff'd*, 111 N.E. 1050 (N.Y. 1916). At trial, Buick disputed MacPherson's claim that he had been driving slowly and on a smooth road, but the jury favored the plaintiff's version of the story. *Id.*

45. *Id.* at 56–57.

46. *See id.* at 57. In analyzing this argument, the New York Court of Appeals relied on English caselaw involving similar facts. *See MacPherson*, 111 N.E. at 1054; *id.* at 1055–56 (Bartlett, C.J., dissenting) (citing Winterbottom v. Wright (1842) 152 Eng. Rep. 402; 10 Meeson & Welsby 109, in which the court dismissed a suit brought against a maintenance company by a postal worker injured when the wheel of the coach he was driving had collapsed; the court held that the maintenance company's duty of care in tort, if any, arose out of its contract with the postal service, and did not extend to the employee). The doctrine of privity had not uniformly precluded tort recovery under New York cases decided before *MacPherson*. For cases in which courts found that inherently dangerous goods presented foreseeable risks such that manufacturers owed duties of care both to immediate buyers and those suffering injury, see Thomas v. Winchester, 6 N.Y. 397, 397, 408 (1852), mislabeled poison; Devlin v. Smith, 89 N.Y. 470, 476–77 (1882), negligently constructed scaffolding intended for workers' use and protection; and Statler v. George A. Ray Mfg. Co., 88 N.E. 1063, 1064 (N.Y. 1909), negligently manufactured coffee urn.

47. *See MacPherson*, 111 N.E. at 1051.

48. *See id.* at 1053.

consumers, who were left without recourse.[49] Because mass-produced goods were often more complex, the apellate division thought the rationale for these contractually forged shields had evaporated.[50] Buick's modern manufacturing processes made an inspection of the wheels by MacPherson impossible.[51] Justice Cardozo, writing for the New York Court of Appeals, agreed.[52] In his view, the manufacturer "was responsible for the finished product" and, thus, should have inspected the wheels it installed before allowing the automobile into the marketplace.[53] Lack of privity of contract should not preclude liability in tort for negligent manufacture of foreseeably dangerous products. In the new modern world of products, every manufacturer was a remote seller, and every consumer, a remote buyer.

The tort law of negligence was not the only area of the common law that evolved to address modern methods of manufacture. The contract law of sales also developed in reaction to automobile manufacturers drafting clauses to disclaim warranties owed to buyers and adding exculpatory clauses limiting any liability to repair or replace.[54] The Uniform Sales Act, promulgated in the very early twentieth century, added an implied warranty of fitness.[55] For a while, the law of warranty and the law of negligence developed in parallel.

But neither completely solved the problem. Until *Escola v. Coca Cola Bottling Co.*, the need to prove negligence left consumers mostly unable to plead or prove their prima facie case, and even after *Escola*, manufacturers could avoid liability by

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49. Of course, consumers could sue their immediate sellers, but in the case of standardized goods, neither sellers nor distributors would have been the negligent party.

50. MacPherson v. Buick Motor Co., 160 A.D. 55, 58 (N.Y. App. Div. 1914) ("In the old days a farmer who desired to have wheels made for an ox-cart would be apt to inspect the timber before it was painted, before the wheel was ironed and the defects covered up, in order that he might know what he was buying."), *aff'd*, 111 N.E. 1050 (N.Y. 1916); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960 33–39 (1992) (building case that contract law historically policed fairness of bargains).

51. Even where the seller manufacturer's conduct might otherwise be viewed as negligent, courts ruled that there was no duty to protect a buyer from a "patent" defect—one that could have been detected through inspection. *See MacPherson*, 160 A.D. at 58.

52. *MacPherson*, 111 N.E. at 1053.

53. *Id.* at 1055.

54. *See* Janger & Twerski, *supra* note 13, at 68–69.

55. UNIF. SALES ACT § 15 (COMM'RS ON UNIF. STATE L. 1919); *see also* N.Y. PERS. PROP. LAW § 96, *repealed by* U.C.C. § 13-102 (1964); Chysky v. Drake Bros. Co., 139 N.E. 576, 577–78 (N.Y. 1923) (discussing whether an implied warranty of fitness binds a third-party wholesaler of snake cakes).

showing they had taken "reasonable" precautions.[56] Warranty solved this problem for consumers because its liability was strict, but it had its own problems: the "four horsemen" of privity, notice, statutes of limitations, and disclaimer.[57]

The full reconciliation of the doctrines of negligence, strict liability, and warranty took many years, but its classic articulation is found in *Henningsen v. Bloomfield Motors, Inc.*[58] Claus Henningsen bought a 1955 Plymouth Plaza 6 club sedan for his wife, Helen. While driving the car ten days after the purchase, "[s]uddenly she heard a loud noise 'from the bottom, by the hood'" and "the car veered sharply to the right and crashed into a highway sign and a brick wall."[59] The crash left "the front of the car . . . so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident."[60] The Henningsens sued both on the basis of the negligent manufacture of the automobile and on the manufacturer and distributor's breach of express and implied warranties.[61] Destruction of the car complicated proof of negligence, and the trial court dismissed this count; nonetheless, the jury returned a verdict for the Henningsens on their warranty claims.[62]

On appeal, the distributor, Bloomfield Motors, and manufacturer, Chrysler Corporation, sought reversal under the warranty and limitation of liability provisions in the standardized contract that Claus had signed but, noted the court, had not read.[63] The New Jersey Supreme Court held that the Uniform Sale of Goods Act governed in this case and ordinarily imposed "strict liability" for injury, regardless of proof of the direct or indirect sellers' negligence or their knowledge of the defect.[64] But what of the disclaimers and limitation of liability in the boilerplate Claus had signed? As to these contractual provisions, the New Jersey Supreme Court held the implied warranties of fitness and

56. Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944).

57. Janger & Twerski, *supra* note 13, at 69; *see also* Prosser, *The Assault upon the Citadel*, *supra* note 6, at 1123–32; Prosser, *The Fall of the Citadel*, *supra* note 6, at 801, 829, 831.

58. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 73, 77, 84 (N.J. 1960).

59. *Id.* at 73, 75.

60. *Id.* at 75.

61. *Id.* at 73.

62. *Id.* at 73, 75.

63. *Id.* at 73–74.

64. *Id.* at 76–77.

merchantability to be nondisclaimable as applied to personal injury.[65] The court took judicial notice that "many manufacturers [had taken] steps to avoid these ever increasing warranty obligations" in their contract drafting, commenting on the pervasive and deceptive nature of these practices.[66] The court also found an express warranty that extended to Claus by taking judicial notice that "automobile manufacturers, including Chrysler Corporation, undertake large scale advertising programs over television, radio, in newspapers, magazines and all media of communication in order to persuade the public to buy their products."[67] The court did not view Helen's lack of privity of contract with Bloomfield or Chrysler, or Chrysler's boilerplate disclaimer of warranty, as dispositive.[68]

The pragmatic approach taken by the *Henningsen* court could have led product liability to be situated in a nonwaivable warranty of merchantability, but it came too late. Prosser had already identified the need for a doctrine of strict liability in tort.[69] Eventually, in *Greenman v. Yuba*, the California Supreme Court held that strict liability in tort did not depend on the presence of a contractual warranty; the tort of strict product liability then occupied the field.[70]

Product liability and warranty law, thus, emerged to meet the needs of the marketplace.[71] The common law evolved in reaction to modern methods of manufacture and distribution that standardized the means and subject of production, and that disaggregated manufacturers from retail sellers.[72] "Goods" became "products": (i) complex and yet standardized; (ii) sold over a long

65. *Id.* at 97.

66. *Id.* at 77–78 ("The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. . . . [T]he Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability.").

67. *Id.* at 84.

68. *See id.* at 83 ("The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.'" (quoting Mazetti v. Armour & Co., 75 Wash. 622 (Sup. Ct. 1913))).

69. *See* Prosser, *The Assault upon the Citadel*, *supra* note 6, at 1134.

70. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963).

71. This evolution was codified in the Uniform Sales Act, which adopted an implied warranty of fitness, UNIF. SALES ACT § 15 (COMM'RS ON UNIF. STATE L. 1919), and Article 2 of the U.C.C., which expanded this warranty with an implied warranty of merchantability, U.C.C. §§ 2-313, 2-314 (AM. L. INST. & COMM'RS ON UNIF. STATE L. 2020), and limited the enforceability of disclaimers and exculpatory clauses, especially when personal injury and wrongful death was concerned, *see id.* § 2-719.

72. *See infra* Part III.

distribution chain; (iii) to a mass market.[73] Strict product liability in tort combined aspects of tort and contract law to create a revised common law to govern product liability and warranty obligations.[74] Liability was a product of the transaction itself, not its terms, as courts recognized that meaningful bargaining is impossible with the mass-production and mass-distribution of products.[75]

III. CONSUMER FINANCE CONTRACTS AS "PRODUCTS"

Over the nineteenth and twentieth centuries, consumer contracts, like consumer goods, standardized and grew increasingly complicated. This standardization, complexity, and disaggregation similarly placed the risks of dangerous financial products on consumers. In this section, we trace the parallel economic history and focus on financial products, ranging from car loans to credit card credit agreements to residential mortgages, and the use in these contracts of standardized boilerplate.

A. From Pawns and Pledges to Modern Credit Markets

Economic historians argue that "the edifice of consumer society rests squarely upon the pillars of *three* social inventions: mass production, mass marketing, and mass finance, or consumer credit."[76] This linked history reveals that the sale of mass-produced goods and mass-produced consumer credit developed in tandem—personal loans extended by retailers to buy goods available for sale (e.g., automobiles, furniture, clothing), consumer credit offered by captive finance companies (e.g., General Motors Acceptance Corporation or General Electric Credit

73. *See infra* Section III.A.

74. *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 656–57 (4th ed. 1971).

75. *See, e.g.*, Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887, 887 (1967) (noting that problems of consumer protection from defective goods "became acute with the elongation of the process of manufacturing and distribution").

76. LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 11–12 (1999) (emphasis added) (citing and discussing DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 66 (1976)); *see* Francesco M. Nicosia & Robert N. Mayer, *Toward a Sociology of Consumption*, 3 J. CONSUMER RSCH. 65, 67–68 (1976); GEORGE RITZER, EXPRESSING AMERICA: A CRITIQUE OF THE GLOBAL CREDIT CARD SOCIETY 31–38 (1995); *see also* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 1–2 (William Chafe et al. eds., 2011) ("Personal debt assumed a new role within American capitalism once it became legal, sellable, and profitable. . . . [O]nce discovered, whether borne by profit or inscribed in law, new ways to lend spread throughout the economy.").

Company), and independent debt buyers and lenders (e.g., factors, Household Finance Co., VISA, and MasterCard).

The parallel development in markets for goods and consumer finance was not accidental. The ability of consumer credit to facilitate consumption was not lost on the manufacturers of consumer products. Sewing machines in the late nineteenth century, automobiles in the early twentieth century, and refrigerators in the mid-century were all purchased by consumers with credit.[77] Mail-order houses, department stores, distributors of automobiles, and furniture sellers all understood that American consumers were more likely to buy goods, especially expensive goods, if they could buy on credit.[78] The Spiegel and Sears Roebuck catalogues offered consumer goods to the American public on credit terms as early as the beginning of the twentieth century.[79] While early-twentieth-century cars were sold predominantly for cash, General Motors (GM) learned that it could sell the more expensive, mass-produced models by providing credit through its General Motors Acceptance Corporation (GMAC).[80]

Although retailers (car dealers, furniture stores, etc.) were loath to give up the competitive advantage that a willingness to extend installment credit provided, their specialty was retail selling, not lending. Many retailers, thus, wanted the benefits but not the obligations attendant to consumer lending.[81] With car sales on credit, automotive manufacturers developed lenders "captured" within the corporate group (e.g., GMAC).[82] But most other retailers were too small for this kind of solution to work.[83]

A practice developed, called factoring, that let these smaller retailers out of the lending business.[84] Factoring—that is, the "sale" of the receivables created when retailers sold goods on credit

77. *See* CALDER, *supra* note 76, at 101 (describing shift in Victorian thinking about debt to pay for sewing machines, mowers, and pianos); HYMAN, *supra* note 76, at 10 (quoting a banker from the 1930s who remarked on installment buying by housewives).

78. HYMAN, *supra* note 76, at 10–11 (quoting a banker from the 1930s who remarked on installment buying by housewives).

79. CALDER, *supra* note 76, at 173, 200. As early as the middle of the nineteenth century, companies like I.M. Singer & Co. and McCormick Harvesting Machine Co. developed market share precisely because they were willing to sell goods on credit. *Id.* at 157–66. For discussion of other similar market strategies, see *id.* at 166–83, which discusses, among other things, the success of mail-order house J. Spiegel & Co., whose slogan became "We Trust the People—Everywhere" by the turn of the twentieth century.

80. HYMAN, *supra* note 76, at 20–27.

81. *Id.* at 22–23.

82. *Id.* at 25.

83. *Id.* at 29.

84. *See id.*

to "factors" who specialized in collecting on this "paper"—grew out of the realization that there was big business in extending credit to facilitate small purchases, but that entities specialized in consumer lending were more likely to profit from these small loans than the retailers whose sales initiated the consumer paper.[85] By the early twentieth century, finance companies emerged to provide financial and back-office support for retailers' installment sales, especially small retailers.[86] And, with these assignments of consumer debt, there grew a distance between the consumer borrower and the entity to which the debt was owed.[87]

Creating a lengthy chain for the distribution and sale of manufactured goods was easier than creating a secondary market for consumer credit. Early, independent financing companies protected their interests by preserving the distinction between the consumer relationship (between the buyer and the seller) and the factoring relationship (commercial financing relationship between the seller and the finance company). They pragmatically guarded against potentially misaligned incentives and "tended to mask their role in credit relationships."[88] Indeed, early-twentieth-century finance companies sold this obfuscation to their retailer customers; as a part of the benefit of the service they provided, these companies explained that retailers need not lose their "identity with the customer."[89] Customers continued to pay bills at the retail outlet and, on these occasions, might buy additional merchandise; retailers acted as "the collection agent for the account," thus providing "incentives for the retailer not to lend money on accounts that were uncollectible."[90]

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85. Adam Barone, *Factor*, INVESTOPEDIA, https://www.investopedia.com/terms/f/factor.asp [https://perma.cc/DG6G-4TRP] (Nov. 14, 2020); *see* HYMAN, *supra* note 76, at 29–30 (noting that independent finance companies that originated in the automotive industry later provided retail and wholesale financing to small manufacturers and distributors as niche market); CALDER, *supra* note 76, at 191–99 (describing competition between Ford Motor Co. and General Motors on grounds of their (un)willingness to sell on credit).

86. Louis Hyman makes much of this development.

> In the 1920s, for the first time, retailers could sell their debts to another institution—the finance company—and this simple possibility inaugurated the rise of the financial infrastructure that backed the proliferation of personal debt in the twentieth century, beginning the long process of realigning our financial common sense.

HYMAN, *supra* note 76, at 11.

87. *Id.* at 29.

88. *Id.*

89. *Id.*

90. *Id.*

Early consumer credit transactions were initiated by retail sellers of goods because it was good business. Retail sellers learned that consumers bought more, and more expensive goods, when they bought on credit.[91] Initially, these transactions were structured as term loans involving equal installments made regularly over time and secured by the goods whose purchase price was financed in the transaction.[92] But retailers understood that extending credit could also enable and encourage consumers to purchase smaller value dry goods.[93] Term loans presented an unwieldy form and so revolving credit developed.[94] Although first created to evade credit controls imposed on American banks and other lenders during World War II, revolving credit quickly grew to fuel the post-War economic boom.[95] By 1955, in the United States, "nearly three-fifths of all households had a store charge account" and "[e]ighty percent of charge account customers had accounts at more than one store."[96]

Like the automotive, furniture, and catalogue retailers that preceded them, department stores and other sellers of consumer goods initially viewed revolving credit as profitable because credit customers bought more than cash customers. Some retailers began to view revolving credit as an independent profit center.[97] For example, by the mid-1960s, General Electric Credit Company (GECC) transformed from a captured installment contract finance subsidiary into an independent, revolving credit finance company, though still wholly owned within the GE conglomerate.[98]

GECC learned that a shift from installment to revolving credit terms did not decrease profitability on the sale of its consumer durables, even though revolving credit was far more complicated and expensive to keep track of because it required investment in modern computerized credit reporting, billing, and collection techniques.[99] Given excess capacity in this modern equipment, GECC extended its financing services to retailers who

91. *Id.* at 30.

92. *Id.* at 29–33.

93. *See id.* at 146.

94. *Id.* at 99; *see also* ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE 141–42 (2018) (describing the persistence of term lending in lower economic strata well into the mid-twentieth century).

95. HYMAN, *supra* note 76, at 98–99, 130.

96. *Id.* at 149–50.

97. *Id.* at 160.

98. *Id.* at 167–68.

99. *Id.*

could not afford to invest in the expensive computer equipment needed for revolving financing operations and had no relationship with GECC's own dealers.[100] GECC began to sell its expertise as a financier of consumer credit to retailers much in the same way it sold televisions and other household durables to consumers. By 1968, half of GECC's profits came from revolving credit that was not tied to the purchase of its own durables.[101] Nearly 4% of all U.S. households used this GECC credit, although many consumers were unaware of the web of financing relationships that stood behind them, their retailer, and this financing behemoth.[102]

Banks also experimented with extending short-term revolving credit to customers. In 1946, Flatbush National Bank issued a "Charg-It" plan for its depositors to use in a small suburban area.[103] However, this early "experiment" was soon cancelled as its territorial limit reduced the usefulness of the plan.[104] Regardless, the idea quickly expanded.[105] Diners Club and American Express issued charge cards for the convenience of select travelers in the late 1950s.[106] Bank of America (BoA) followed in California with its BankAmericard in 1959.[107] BoA infamously oversolicited these initial bank card holders and, as a result, suffered extensive losses—but it saw the possibilities of this source of credit.[108] By the late 1970s, the BankAmericard had been reinvented as Visa.[109] Visa and its primary competitor, MasterCard, were well on the way to creating an international network of credit card credit.[110] These cards were issued to millions of households throughout the United States and across all

100. *Id.* at 168.

101. *Id.*

102. *See id.*

103. *See, e.g.*, Sean H. Vanatta, *Charge Account Banking: A Study of Financial Innovation in the 1950s*, 19 ENTER. & SOC'Y 352, 360–61 (2018).

104. *See id.* at 361–62, 65 (reasoning that a nearly 20% default rate on early charge plans additionally contributed to their cancellation).

105. *Id.* at 362–63.

106. *See, e.g.*, MATTY SIMMONS, THE CREDIT CARD CATASTROPHE 59–66 (1995) (detailing the social history of the market for credit card credit from an insider's perspective, including the early history of Diners Club and American Express).

107. *Id.* at 116.

108. *Id.*

109. *Id.* at 123.

110. *Id.* at 124.

income levels by thousands of banks[111] that were mostly located in either South Dakota or Delaware to avoid usury laws.[112]

As a result of the revolving credit systems established in post-WWII consumer credit markets, bankers, "retailers[,] and consumers had arrived at a new credit system that separated debt completely from the goods borrowed for, and which made the enforcement of the debt relation itself matter more than the recovery of the goods unpaid for."[113] Because this revolving credit was generally unsecured, the system depended less on repossession or recourse and more on automated credit history and collection systems as its enforcement mechanism.[114]

Like mass-produced goods that manufacturers learned to sell through complex distribution chains, standardized lending arrangements grew increasingly disaggregated in the market for consumer finance—factors bought chattel paper from retailers; third-party lenders enabled the purchase of expensive household goods; and revolving loans and credit card credit facilitated financed purchases of smaller value goods and a wide range of services.[115] All these structures relied on good faith purchaser protections that insulated the buyers of consumer paper from defenses on the underlying sale and credit transaction.[116]

By the late 1980s, the characteristics of the relationship between consumer buyers of goods-on-credit and their retail

111. *Id.* at 121–24; *see also* HYMAN, *supra* note 76, at 240–41. Because cards bore the Visa or MasterCard logo, merchants could feel secure in recognizing and accepting the card without a need for checking into the finances of either the cardholder or card issuer. Claire Tsosie, *The History of the Credit Card*, NERDWALLET (Mar. 15, 2021), https://www.nerdwallet.com/article/credit-cards/history-credit-card [https://perma.cc/4QWV-RY4C].

112. In the late 1970s, the Supreme Court held that the law of the residence of a credit card issuer governed the terms of the credit card agreement, no matter the cardholder's residence. *See* Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 312–13 (1978). This case, and related cases expanding *Marquette* to other consumer credit markets, enabled national markets for consumer credit and, through amendments to state usury laws, initiated a "race to the bottom" for banks and other consumer lenders to locate in jurisdictions like South Dakota and Delaware. *See* Block-Lieb & Janger, *supra* note 19, at 1510–11, 1510 n.110.

113. HYMAN, *supra* note 76, at 171–72.

114. *Id.* at 167.

115. *See generally id.*

116. These protections, known as the "holder in due course" doctrine, protect a good faith purchaser for value of a negotiable instrument from claims against the instrument and most defenses on the underlying obligation. U.C.C. §§ 3-301–303, 3-305 (AM. L. INST. & COMM'RS ON UNIF. STATE L. 2020). Over time, there emerged state statutory protections and caselaw restricting the use of the holder-in-due course doctrine in consumer transactions. *Id.* § 3-302 cmt. 7. The Federal Trade Commission (FTC) eventually limited the application of the rule in many consumer credit transactions. 16 C.F.R. § 433.2.

sellers were further pulled apart at the seams.[117] The advent of national credit reporting and scoring made it possible to engage in risk-based pricing of all sorts of consumer credit—car loans, credit card credit, and even mortgage lending.[118] This, in turn, gave banks and other lenders the ability to securitize their payment streams, whether in the form of mortgages, car loans, or credit card receivables.[119] Even in the absence of securitization, debt collectors and debt buyers often enforced consumer credit, which disaggregated the consumer credit market even further and increased the likelihood that borrowers would not recognize the entity holding this debt at the time of collection.[120] The rise of national consumer credit markets, their increasing specialization, and direct access to the capital markets all fueled greater and greater consumer lending.

Like the mass-production of consumer goods, the mass-financing of consumers' consumption led to increasingly complicated consumer-finance markets that required greater standardization of increasingly complex products.[121] Moreover, as with emerging consumer markets for goods, actors in consumer credit markets reached to contract doctrine and design to shield themselves from liability through the use of boilerplate in standardized contracts of adhesion.[122] These boilerplate terms were designed to reduce cost through standardization but also shifted transactional risks.[123]

B. Designing Consumer-Contracts-as-Products

As the forms of consumer credit expanded from unsecured to secured, from term to revolving, from primary to secondary lending markets, the contractual terms to effectuate this expansion and differentiation of consumer credit grew more and more complicated.[124] This complexity required more and more

117. We have told this story elsewhere. *See* Block-Lieb & Janger, *supra* note 19, at 1509–11.

118. *Id.* at 1514–15.

119. *Id.*

120. *Id.* at 1514.

121. *See* Baird, *supra* note 9, at 940–41.

122. *Id.* at 938.

123. *See* Bar-Gill & Warren, *supra* note 9, at 77–78.

124. Complaints about the complexity of consumer finance contracts emerged from the earliest years of the twentieth century. Commentators criticized the standardized nonnegotiability of these contracts of adhesion. For invention of the term in 1919, see

words, which got positioned on the backs of documents in smaller and smaller fonts.[125]

Contractual complexity was partly the product of nonuniformity of usage. Reformers were aware of the problem of nonuniformity, but efforts to resolve this complexity were unsuccessful for many years.[126] In the early part of the twentieth century, for example, Uniform Small Loan Laws (USLL) sought to simplify the terms on which certain small cash loans were extended. These laws were more of a source of confusion than simplification, however, because the USLL covered only certain small loan lenders and not banks and other financial institutions.[127] As one commentator complained in the 1940s: "The representations with reference to charges now being made by banks, discount companies, and sales finance companies constitute a veritable babble of tongues."[128] The Russell Sage Foundation sought to resolve this problem by promoting enactment of model legislation ensuring uniformity in charges made by banks and other consumer lenders,[129] but their proposal was controversial and they soon abandoned the project.[130] This babble—often the consequence of lenders' efforts to evade usury regulations by imposing various fees and charges that arguably did not count as "interest"[131]—would persist until the late 1960s

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Patterson, *supra* note 9, at 222, stating, "Life-insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms."

125. *See* BAR-GILL, *supra* note 19, at 1; *see also infra* Section IV.C.

126. Anne Fleming, *The Long History of "Truth in Lending,"* 30 J. POL'Y HIST. 236, 239–41, 243 (2018).

127. *Id.* at 239–44 (noting that USLL applied to small cash loans (under $300) made by lenders licensed under the law, requiring those lenders to state charges as an all-inclusive rate on a declining balance, and describing the overlap of Russell Sage Foundation initiatives and push for federal Truth in Lending laws).

128. F.B. Hubachek, *The Development of Regulatory Small Loan Laws*, LAW & CONTEMP. PROBS. 108, 132 (1941).

129. For discussion of reforms proposed by the Russell Sage Foundation, see generally Arthur H. Ham, Chairman Nat'l Fed'n of Remedial Loan Ass'n, Small Loan Legislation: Progress and Improvement, Address Delivered Before the Seventh Annual Convention of the American Industrial Lenders' Association (Sept. 23, 1921), *in* DIV. OF REMEDIAL LOANS RUSSELL SAGE FOUND., at 2 (1922). *See also* Bruce G. Carruthers et al., *Bringing "Honest Capital" to Poor Borrowers: The Passage of the U.S. Uniform Small Loan Law, 1907–1930*, 42 J. INTERDISC. HIST. 393, 403 (2012) (describing the Russell Sage Foundation's focus on transparency given that "[l]enders had devised a large and complicated set of devices to conceal the total cost of loans from borrowers").

130. *See* Fleming, *supra* note 126, at 239–40, 247–48.

131. Hubachek, *supra* note 128, at 111 (criticizing USLL for not establishing standardized, all-inclusive interest rates applicable to all lenders, given efforts to evade usury laws through the multiplicity of "[d]iscounts, deductions, fees, and special charges" in loan contracts).

when the Truth in Lending Act (TILA) standardized the calculation of "finance charges" across a wide variety of consumer credit and mandated the disclosure of this standardized information.[132]

The problem of complexity was also exacerbated by the standardization of contracting about mass-produced, mass-distributed, and mass-financed consumer goods. Standardization of language is not problematic when providing a uniform explanation so long as the standardized terms are consistent with the agreed transaction. For example, not only must finance and other charges get explained but also any security interest granted by the borrower must get spelled out.[133] Uniform language could aid consumer comprehension in this context.

Where standardized terms uniformly remove consumer protection, however, uniformity may shift risk toward the buyer or borrower. For example, when retail and captured-finance companies discovered the market benefits of factoring this chattel paper, standardized clauses were inserted into contracts to assure that the assignee would find protection as a good faith purchaser so that the borrower's defenses could not be asserted in litigation to collect on the defaulted promissory note.[134]

Courts have questioned the benefits of uniformity in standardized contracting from time to time. In holding ineffective the consequential damages waiver in *Henningsen*, the court emphasized the placement of this language in fine print on the back of the contract.[135] This language had been drafted by the Automobile Manufacturers' Association, which meant that it was included in not only consumer contracts with Chrysler but also Ford and General Motors.[136] The court in *Henningsen* referred to this as a public policy problem involving "gross inequality of bargaining position."[137] Others have more recently argued that the standardization of automotive warranty terms might present anticompetitive effects.[138] Either way, the reliance on unread

132. Truth in Lending Act, 15 U.S.C. §§ 1601, 1605, 1640(a) (1968). For a history of TILA's shifts in focus, see Fleming, *supra* note 126, at 237–39. For discussion of TILA's goals, implementation, and limitations, see generally THOMAS A. DURKIN & GREGORY ELLIEHAUSEN, TRUTH IN LENDING 1–10 (2011).

133. *See* BAR-GILL, *supra* note 19, at 18–21.

134. *See* HYMAN, *supra* note 76, at 163, 165–68.

135. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 74, 95 (N.J. 1960).

136. *Id.* at 87.

137. *Id.*

138. Baird, *supra* note 9, at 941–42.

standardized terms to contractually shield manufacturers from liability for personal injury has consistently been viewed as problematic.

Where complex standardized terms shield sellers, lenders, and others from liability for economic harm, however, courts have been less likely to question the benefits of uniformity. Moreover, consumer lenders' lawyers seem to have learned from manufacturers' lawyers how to draft contracts to avoid liability. Lawyers representing associations of consumer credit lenders advised card issuers to include arbitration clauses in their credit card contracts.[139] These lawyers widely promoted to credit card issuers the cost savings and other benefits that would redound from the inclusion of arbitration and class action waivers in credit card contracts.[140] Since then, arbitration clauses have become increasingly present in banking and credit card contracts used by the largest issuers, although less likely to be found in the contracts used by smaller card issuers and especially credit unions.[141]

An informal trade association, the Arbitration Coalition, assisted by its counsel, Wilmer Cutler & Pickering LLP (now WilmerHale), drafted and promoted the arbitration and class waiver provisions in credit card contracts that would survive challenges under antitrust law.[142] Unlike the Automobile Manufacturers' Association, whose drafting was limited by

139. For a more detailed telling of this story, see Nancy A. Welsh & Stephen J. Ware, Ross et al. v. American Express et al.*: The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements*, DISP. RESOL. MAG., Fall 2014, at 18, 18–19. In *Ross*, the Second Circuit affirmed dismissal of a class action brought by credit card holders alleging that the near uniform promulgation of these clauses and their promotion by outside counsel violated the Sherman Antitrust Act. The court of appeals agreed with the lower court that, despite "conscious parallel action," there was insufficient proof of collusion for anticompetitive intent to be found. *See* Ross v. Citigroup, Inc., 630 F. App'x 79, 81–83 (2d Cir. 2015).

140. *See* Welsh & Ware, *supra* note 139, at 19.

141. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 9–10 (2015), https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/ [https://perma.cc/9ZQZ-WE73]. As a result of this report, the CFPB promulgated a regulation of class action waivers. *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040). However, the CFPB's Arbitration Rule was congressionally repealed pursuant to its authority under Subtitle E of the Contract with America Advancement Act of 1996. H.R.J. Res. 111, 115th Cong. (2017) ("Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to 'Arbitration Agreements.'"); Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 801, 110 Stat. 847, 871.

142. Ross v. Am. Express Co., 35 F. Supp. 3d 407, 415–17, 415 n.4, 456 (S.D.N.Y. 2014), *aff'd*, Ross v. Citigroup, Inc., 630 F. App'x 79 (2d Cir. 2015).

Henningsen and UCC provisions codifying *Henningsen*, the Arbitration Coalition's drafting expanded across consumer finance markets and survived efforts to contain these clauses through litigation, legislation, and regulation.[143] But if MacPherson should not be held to the doctrine of privity, and Henningsen should not be held to a boilerplate disclaimer of implied warranties, should we not also relieve consumer borrowers from similar obligations?

Revolving credit contracts, such as store cards and home equity loans, add another degree of complexity. In theory, a revolving loan needs only a credit limit and an expiration date, along with a term granting the lender unlimited discretion to demand repayment.[144] But in practice, lenders seek extensive representations and warranties and impose various express financial conditions on their borrowers.[145] Credit card contracts are even more complicated.[146]

Credit cards are also highly regulated, with lengthy disclosure mandates.[147] They also combine payment and credit attributes, both of which depend on the development of networks of merchants who stipulate further standardized terms.[148] Credit card issuers face higher risks of default than other lenders because they cannot prohibit credit card holders from obtaining new sources of consumer credit after the card has already been issued.[149] One way to address these risks is to retain maximal flexibility to modify the terms governing credit cards;[150] another is to define events of default broadly and to assert increased costs as a means of self-help—i.e., default rates of interest.[151] Additionally,

143. *Id.* at 420, 456.

144. *See* BAR-GILL, *supra* note 19, at 70–71, 86.

145. *See id.* at 70–71, 77.

146. *Study: Credit Card Agreements Unreadable to Most Americans*, CREDITCARDS (Sept. 8, 2016), https://www.creditcards.com/credit-card-news/unreadable-card-agreements-study.php [https://perma.cc/DG6N-RAUD] (finding that the average 2016 credit card contract on file with the CFPB comprised 4,900 words and required an eleventh-grade reading level).

147. *See, e.g.*, Truth in Lending Act, 12 C.F.R. §§ 1026.1–1026.2.

148. Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, AM. ECON. REV., Mar. 1991, at 50, 51, 74.

149. *See* Adam J. Levitin, *A Critique of the American Bankers Association's Study of Credit Card Regulation* 7, 20–21 (Geo. Univ. L. Ctr. Bus., Econ. & Regul. Pol'y Working Paper, Paper No. 1104327, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029191 [https://perma.cc/HQ4F-8QT4].

150. For discussion of credit card clauses allowing "modification" of credit card contracts "at any time," see Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 9 (2010).

151. For wide discussion of credit card contract provisions, see, for example, BAR-GILL, *supra* note 19, at 72–74.

the complexity of credit card contracts grew in reaction to shifts in the cost of funds in credit markets. In the early 2000s, the costs of funds fell precipitously from their historic rates.[152] To maintain market share, credit card issuers looked to raise revenue in the form of noninterest income.[153] Each source of noninterest income depends on the presence of one or more contractual provisions.[154]

Oren Bar-Gill has explored the complexity of consumer credit and the psychology behind this complex drafting.[155] So have Ronald Mann, in his book *Charging Ahead*, and Lawrence Ausubel, in economic journals.[156] Bar-Gill, Mann, Ausubel, and others, including us, have argued that the complexity of credit card agreements confuses credit card holders about the nature of their card use.[157]

To some degree, the complexity described above inheres in the nature of the product. Consumers may think they are paying when in fact they are borrowing, and at a high interest rate.[158] We and Oren Bar-Gill argue that the reasons for these mistakes are rooted in a variety of behavioral heuristics and cognitive biases.[159] Borrowers may not recognize the nature of the transaction and then both overestimate their future income and ability to pay and underestimate their cost of credit in future periods.[160]

Credit card holders' confusion is also built into the standardized terms on which credit card credit and other forms of household debt are offered to consumers. Oren Bar-Gill has

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152. *See* BAR-GILL, *supra* note 19, at 59–60; Block-Lieb & Janger, *supra* note 19, at 1505–06.

153. *See* BAR-GILL, *supra* note 19, at 94–96.

154. *See id.* at 66–69, 72–74.

155. *See generally id.*; Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008) [hereinafter Bar-Gill, *The Behavioral Economics of Consumer Contracts*]; Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33 (2006) [hereinafter Bar-Gill, *Bundling and Consumer Misperception*]; Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004) [hereinafter Bar-Gill, *Seduction by Plastic*].

156. RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 32–33 (2006); Ausubel, *supra* note 148, at 68–69, 71, 74–75.

157. Bar-Gill, *Bundling and Consumer Misperception*, *supra* note 155, at 48–49; Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 402–03 (2007); *see also* Kathleen C. Engel, *Can Consumer Law Solve the Problem of Complexity in U.S. Consumer Credit Products?*, *in* CREDIT, CONSUMERS AND THE LAW 86, 86–88 (Karen Fairweather et al. eds., 2017).

158. Ausubel, *supra* note 148, at 70–74 (promising an adverse selection theory of credit card usage, Ausubel "posit[s] a class of consumers who do not intend to borrow on their accounts, but find themselves doing so anyway").

159. BAR-GILL, *supra* note 19, at 78–83, 87–95; Block-Lieb & Janger, *supra* note 19, at 1556.

160. BAR-GILL, *supra* note 19, at 82–83, 88–89.

detailed the complex terms found in credit cards,[161] attributing these to market incentives to capitalize on consumers' cognitive biases.[162] Credit card issuers include in these contracts complex terms such as teaser rates, prepayment penalties, and so on.[163] Although these terms are written into the contract, the print is small and the danger is not obvious, even if the language is comprehensible.[164] For example, economists Xavier Gabaix and David Laibson demonstrate that competitive firms will shroud terms so that cognitively biased, myopic consumers will fail to learn to evade them; consumers who do learn to navigate these complex contracts have no incentive to "teach" the more myopic buyers because this education is likely to increase prices for both savvy and myopic consumers.[165] Gabaix and Laibson conclude that "informational shrouding flourishes even in highly competitive markets, even in markets with costless advertising, and even when the shrouding generates allocational inefficiencies."[166]

A similar increase in the complexity and lengthening of the supply chain also happened in the market for consumer mortgages.[167] Residential mortgage finance started as a boring, local product. Small, local banks invested in home mortgages issued to residents of the community where the bank or thrift was located.[168] George Bailey and the Bedford Falls of *It's a Wonderful Life* are the image evoked. This business model had its problems. Thrifts were very sensitive to local market fluctuations, and,

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161. *Id.* at 66–74.

162. For additional discussion of market incentives to craft contracts that take advantage of consumers' biases in preferences, see, for example, Stefano Della Vigna & Ulrike Malmendier, *Paying Not to Go to the Gym*, 96 AM. ECON. REV. 694, 713, 716–17 (2006); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 732–33 (1999); and Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1439–50 (1999). For general discussions of behavioral decision theory and its implications in policymaking, see generally Block-Lieb & Janger, *supra* note 19 and Sanjit Dhami et al., *Heuristics and Public Policy: Decision Making Under Bounded Rationality* 67 (Harv. John M. Olin Ctr. for L., Econ. and Bus., Discussion Paper No. 963, 2018), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Sunstein_963.pdf_[https://perma.cc/29YA-PAKZ].

163. Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 974, 1006 (2012).

164. *See* BAR-GILL, *supra* note 19, at 79–80.

165. *See, e.g.*, Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 511, 521–23, 525–26, 531 (2006).

166. *Id.* at 505.

167. For a lengthier telling of this story, see Block-Lieb & Janger, *supra* note 19, at 1509–15.

168. *Id.* at 1509–11.

because they financed long-term loans with demand deposits, they were also exposed to interest rate risk.[169] Starting after the Great Depression but gathering steam in the 1960s and 1970s with the federal encouragement of Fannie Mae and Freddie Mac, mortgages were increasingly financed through a secondary market where the mortgages were sold into asset pools, and, as with credit card debt, securities backed by mortgage debt were then sold to the capital markets.[170]

Oren Bar-Gill and others demonstrate that, like credit card issuers, mortgage lenders also packed mortgage agreements with complex terms.[171] For example, lenders might include an adjustable interest rate coupled with a prepayment penalty.[172] Disclosure mandates sought to clarify these terms for borrowers, but in some cases, the disclosures actually made matters worse.[173] Like other consumer lending transactions, residential mortgages grew more and more complex; the securitization of these residential mortgages disaggregated consumer borrowers from mortgage lenders, mortgage brokers, and mortgage services, further complicating the transaction.[174]

The complexity of residential mortgage finance befuddled more than the consumer borrowers in these standardized residential mortgage contracts. Securitization of residential mortgages grew over time until its apex in about 2007, just before historic default rates on subprime residential mortgages caused AAA-rated, asset-backed securities to default at all levels.[175] The consequence was the subprime mortgage foreclosure crisis, followed by a prime mortgage crisis, a crisis in securitization markets, and a more generalized, global liquidity crisis.[176]

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169. *Id.* at 1507, 1509–10.

170. *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS 17–18 (2011).

171. BAR-GILL, *supra* note 19, at 117–19; *see also* Oren Bar-Gill, *The Law, Economics, and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1102–03 (2009).

172. BAR-GILL, *supra* note 19, at 135–45; ENGEL & MCCOY, *supra* note 170, at 29.

173. *See, e.g.*, ENGEL & MCCOY, *supra* note 170, at 35, 196–98; *see also* Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 772–76 (2010).

174. *See, e.g.*, ENGEL & MCCOY, *supra* note 170, at 17–19, 40–41.

175. *See, e.g.*, *id.* at 71–73; ROBERT J. SHILLER, THE SUBPRIME SOLUTION 5–6, 29 (2008); Susan Block-Lieb & Edward Janger, *Demand-Side Gatekeepers in the Market for Home Loans*, 82 TEMP. L. REV. 465, 471 (2009) [hereinafter Block-Lieb & Janger, *Demand-Side Gatekeepers*]; *see also* Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in Markets for Home Loans*, 48 FORDHAM URB. L.J. 681, 684 (2011).

176. ENGEL & MCCOY, *supra* note 170, at 72–73; SHILLER, *supra* note 175, at 49–54; Block-Lieb & Janger, *Demand-Side Gatekeepers*, *supra* note 175, at 475.

Over the nineteenth and twentieth centuries, the market for consumer credit evolved along the same lines as the market for consumer goods. Mass-market consumer contracts, especially those for consumer credit products, grew increasingly standardized and complicated, and the transactional distance between lender and borrower increased. Standardization, complexity, and disaggregation enabled externalization of the risks of defective financial products on consumers, much in the same way as these attributes of evolution in the market for consumer goods insulated manufacturers from responsibility for negligent manufacture and design. Financial contracts became financial products. Despite parallel developments in the markets for consumer goods and consumer finance, the law of consumer finance contracts did not evolve as had strict liability in tort.

IV. DOCTRINAL HALF MEASURES: CONTRACT LAW'S (NON)RESPONSE TO CONSUMER-CONTRACTS-AS-PRODUCTS

Unlike tort law, where strict product liability evolved to redress consumer injury from defective products, contract law still does little to protect consumers from consumer-contracts-as-products. Courts are not wholly unwilling to protect consumers from the worst of the contract provisions they see, but contract law with its focus on "assent"—whether actual or implied—has not been up to the task of sorting between problematic and benign provisions in contracts of adhesion.[177]

We describe courts' various efforts to identify malign contracts and provisions in this section: one effort assesses defenses to contract formation; another generally questions how terms in contracts of adhesion ought to be interpreted; a third deletes terms that are deemed unconscionable; and finally, courts may "imply" terms to flesh out a contract where the deal is not fully specified—although most implied terms can be called off by "agreement." We discuss these approaches in the sections that follow, concluding that they founder in application to contracts-as-products.

A. *Is There a Deal?*

Existing contract doctrine provides only half measures that are adaptable, but not yet adapted, to consumer lending. Existing contract doctrines enable courts to choose whether to enforce

177. Rakoff, *supra* note 15, at 1180.

adhesive contracts only if it is determined that assent to the transaction fails.[178] This might occur on two grounds: (1) when the consumer did not assent to the transaction; or (2) when substantial problems with the parties' transaction rendered the formal manifestation of assent inconsistent with the underlying deal.[179]

1. "I Agree": Assent to Contracts of Adhesion. Under U.S. contract doctrine, each party to an executed contract is assumed to have assented to the deal.[180] Formal assent to the transaction carries with it a strong presumption of assent to the terms—even though it is understood that they are rarely read—so long as the transactional nature of the agreed text is "obvious."[181]

Modern consumer contracting techniques stretch, almost beyond recognition, what behavior will bind a consumer to a transaction and the implications of that assent. Cellophane wrappers and computer interfaces exacerbate the fiction that consumers understand that they may be bound to terms they have not read because they have opened packaging or clicked on the words "I agree" or even "Register." Courts and commentators universally agree that consumer contracts are almost never read, regardless of the formatting.[182] Many courts and commentators are nonetheless willing to place the risk of nonreading and

178. *See infra* Section IV.A.1; *see also* Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1088–90 (2015).

179. *See infra* Sections IV.B–C.

180. *See, e.g.*, Dauti v. Hartford Auto Plaza, Ltd., 213 F. Supp. 2d 116, 123–24 (D. Conn. 2002); Randle v. Glendale Nissan, Inc., No. 04 C 4129, 2005 WL 281229, at *5 (N.D. Ill. Feb. 2, 2005).

181. Meyer v. Uber Tech., Inc., 868 F.3d 66, 74 (2d Cir. 2017).

182. *See e.g.*, RESTATEMENT OF CONSUMER CONTS. § 5 cmt. 1 (AM. L. INST., Tentative Draft No. 1, 2019); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 454 (2008); Ethan J. Leib & Steve Thel, Contra Proferentem *and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 789 (2015). An empirical dispute exists over whether a "critical mass" of readers is likely to impose market discipline on boilerplate terms. *Compare, e.g.*, Marotta-Wurgler, *supra*, at 475 (examining effect of competition on content of software license agreements and finding little effect), *with* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 49 (1993) (suggesting possibility of lemons equilibrium because "no seller has an incentive to offer the more favorable terms"). Even the Reporters of the draft Restatement of Consumer Contracts concede that market discipline only unevenly polices the drafting of standardized contracts. RESTATEMENT OF CONSUMER CONTS. § 5 (AM. L. INST., Tentative Draft No. 1, 2019) ("[T]erms that do not affect consumers' contracting decisions . . . [are] not subject to market discipline, and so the unconscionability doctrine is all the more necessary to police such terms.").

noncomprehension on e-consumers just as if each consumer had signed a paper contract with a ballpoint pen.[183]

Consumer contracts marketed as products create a tension long understood in contract theory but ignored in practice.[184] Contract liability is based on assent, but the justification for finding assent to any contract of adhesion is highly attenuated.[185] Consumer-contracts-as-products may be imposed through "box-top" licenses, "shrink wrap" terms, or online boxes-to-click labeled "I agree,"[186] each of which shares a key attribute: there are lengthy boilerplate provisions contained in these contracts that are rarely read and never negotiated, and everybody knows it.[187] This problem is especially acute in complex consumer financial transactions such as car loans, residential mortgages, and insurance contracts. It may also arise with seemingly small-dollar consumer finance contracts such as credit cards, rent-to-own, payday, and cell-phone contracts.[188] *Caveat debitor*—let the borrower beware.

A duty-to-read-even-though-you-are-expected-not-to-read, and could not negotiate in any event, means that assent to the transaction represented by a contract of adhesion is treated as assent to each and every term in that contract of adhesion. Yet, even where credit markets are competitive, "sellers"[189] of contractual products do not compete by advertising "better" boilerplate.[190]

The duty to read, thus, occupies the same place in the law of consumer-contracts-as-products as *caveat emptor*—the duty to

183. *See, e.g.*, *Meyer*, 86 F.3d at 75.

184. *See, e.g.*, Kessler, *supra* note 9, at 632–33; Llewellyn, *supra* note 17, at 731–32.

185. *See, e.g.*, Llewellyn, *supra* note 17, at 713; RADIN, *supra* note 9, at 19–29; *see also* Rakoff, *supra* note 15, at 1177, 1180.

186. *See, e.g.*, Knapp, *supra* note 178, at 1098.

187. *See, e.g.*, Rakoff, *supra* note 15, at 1179.

188. Block-Lieb & Janger, *supra* note 19, at 1157–58 (discussing the cognitive limitations of consumer borrowers); *see* Ray v. William G. Eurice & Bros., Inc., 93 A.2d 272, 278 (Md. 1952) (discussing a party's duty to read).

189. "Seller" is in quotation marks because contractual products may not be formally "sold" in the way the word is used in Article 2 of the UCC or in the Second and Third Restatements of Torts. However, the effect of the creation and assignment of rights in these transactions may have similar consequences. Courts are divided. For a discussion of many of these decisions, see generally Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259 (2020) and Tanya J. Monestier, *Amazon as a Seller of Marketplace Goods Under Article 2*, 107 CORNELL L. REV. (forthcoming 2022).

190. *See* Marotta-Wurgler, *supra* note 182, at 454–55. *See generally* Edward J. Janger & Susan Block-Lieb, *Consumer Credit and Competition: The Puzzle of Competitive Credit Markets*, 6 EUR. COMPETITION J. 68 (2010).

inspect—occupied in nineteenth- and early-twentieth-century cases involving consumer-goods-as-products with one large exception. Early tort doctrine surrounding this duty to inspect distinguished between patent and latent defects.[191] By and large, contract law instead views all text as patent.[192] It assumes that any "writing" can be read and understood,[193] regardless of whether the terms are negotiated face-to-face, tucked inside packaging,[194] or pop up on an iPhone screen.[195]

2. Formation Defenses: Tricks, Traps, and Threats. With consumer finance agreements, even though they are contracts of adhesion, it is hard to argue that consumer borrowers have not consented to the transaction. The house or car has been purchased, and the car loan and mortgage are signed. The same can be said about modern "fintech" transactions, at least once proceeds have been disbursed.[196]

Once a borrower is seen as assenting to the finance transaction, it is nearly impossible for them to use traditional contract defenses (such as incompetence, duress, undue influence, mistake) to challenge the lender's misconduct. Even if a consumer alleges that the contract was produced through tricks, traps, or threats, and that these circumstances ought to relieve contractual obligation, a consumer cannot simply argue that the terms of the

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191. *See* Baxter v. Ford Motor Co., 35 P.2d 1090, 1091 (Wash. 1934) ("[I]n an action for breach of warranty of nonshatterable glass in a windshield, catalogues and printed statements furnished the dealer for sales assistance are admissible against the manufacturer, although there was no privity of contract, since the falsity of the representations could not be readily detected . . . .").

192. *See* Kauders v. Uber Tech., Inc., 159 N.E.3d 1033, 1048 (Mass. 2021) ("The touchscreens of Internet contract law must reflect the touchstones of regular contract law.").

193. For an extensive discussion of this caselaw, see generally Knapp, *supra* note 178.

194. For a "shrinkwrap" case involving a corrugated cardboard box, see, for example, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)).

195. For conflicting cases premised on the duty to read hyperlinks presented in an iPhone app, compare Meyer v. Uber Tech., Inc., 868 F.3d 66, 79 (2d Cir. 2017), *vacating* Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016), with *Kauders*, 159 N.E.3d at 1054. For discussion of the Canadian and U.S. doctrine of unconscionability in this context, see Uber Tech., Inc. v. Heller, [2020] S.C.R. 16 (Can.) and *Contract Law—Unconscionability Doctrine—Supreme Court of Canada Targets Standard Form Contracts*—Uber Technologies Inc. v. Heller, 2020 SCC 16, 447 D.L.R. 4th 179 (Can.), 134 HARV. L. REV. 2598, 2600 (2021) ("[T]he majority adopted a two-part test for unconscionability that 'requires both an inequality of bargaining power and a resulting improvident bargain.'" (quoting *Heller*, 2020 SCC 16, para. 65)).

196. For discussion of one such market, see generally Pamela Foohey, *Consumers' Declining Power in the Fintech Auto Loan Market*, 15 BROOK. J. CORP. FIN. & COM. L. 5 (2020).

adhesive contract are problematic. She must challenge the transaction as a whole.[197] Arguments that she did not agree to be bound by specific provisions in the agreement are out of order.[198]

Assent-questioning defenses are, thus, of little help to consumers who concede their agreement to borrow. Where allegations relate to circumstances that the lender should have but failed to disclose, the common law defense of fraud is difficult to establish.[199] Where allegations relate to puffery, exaggeration, or statements of opinion, the buyer will likely be rebuffed by courts and told *caveat emptor*, *caveat debitor*—you should have known better than to rely on the sort of chatter common to the marketplace.[200] Finger wagging is especially likely where the consumer claims that a lender or seller deceived her by telling her what she wanted to hear, although the contract clearly states a contrary state of affairs. For example, the plaintiffs in *Dauti v. Hartford Auto Plaza, Ltd.* unsuccessfully argued that, despite their signatures on a Delivery Sheet, they did not understand the extent of their responsibilities for a car "spot delivered" to them pending financing. The court held that the buyers had a duty to read and understand the Delivery Sheet, although Polish, not English, was their first language. The language on the Delivery Sheet laid out the Dautis' obligation to pay for the cost of insurance of the car pending financing, according to the court; the writing dispelled any claim the buyers might otherwise have had for fraud or deception.[201]

All this is to say that traditional formation-focused defenses to contractual liability are unlikely to resolve any allegations of tricks, traps, and threats that may arise with consumer-contracts-as-products. The problem with standardized contracts of adhesion is not that the consumer did not intend to enter into such a contract but that the consumer did not appreciate the complexity and secondary

197. *See* Sherrodd, Inc. v. Morrison-Knudsen Co., 815 P.2d 1135, 1137 (Mont. 1991).

198. Moreover, fact-intensive allegations about transactional intent are difficult to prove. Contracts that are the product of misrepresentation may be rescinded, but the misstatement must relate to a fact on which there was reasonable reliance. Where the consumer failed to read, all agree that recission may well be impossible to establish. *See* Randle v. Glendale Nissan, Inc., No. 04 C 4129, 2005 WL 281229, at *5 (N.D. Ill. Feb. 2, 2005).

199. *Cf., e.g.*, Browder v. Hanley Dawson Cadillac Co., 379 N.E.2d 1206, 1211–12 (Ill. App. Ct. 1978) (finding a sufficient cause of action for common law fraud due to a car dealer's failure to disclose availability of cheaper credit life and disability insurance because the dealer, as insurer, held fiduciary obligations to buyers/borrowers/insured).

200. RESTATEMENT (SECOND) OF CONTS. § 168 (AM. L. INST. 1979).

201. Dauti v. Hartford Auto Plaza, Ltd., 213 F. Supp. 2d 116, 117, 124–25 (D. Conn. 2002).

consequences of some of the terms in the product they chose. Because the consumer has a duty to read even adhesive contracts, agreement to the transaction counts as agreement to the terms.

B. What's the Deal?

Where formation-based challenges fail, and the court concludes that there was a "deal," courts might address problematic terms in adhesive contracts through contract doctrine. Here, too, however, the tools are mostly not up to the task.

1. Interpretation of Express Terms: Contra Proferentem. Courts have sometimes protected consumers from standardized contracts of adhesion through interpretation—by enforcing boilerplate but interpreted with a twist. For example, courts may employ the interpretive canon of *contra proferentem* to read contracts against the drafters. Courts are especially likely to rely on this doctrine when interpreting contracts of adhesion.[202] Indeed, some courts view the canon of *contra proferentem* as a mandatory rule.[203] Other courts limit this doctrine, requiring first a finding that the contract is ambiguous—that is, reasonably capable of two distinct interpretations.[204]

Any lawyer worth his salt should be capable of drafting unambiguously overreaching language, however, thereby depriving the court of any interpretive discretion. Better drafting may also make the problem worse in another way. Aiming for perfect clarity in drafting may increase the length and complexity of the document—the enemy of consumer comprehension.[205] Finally, clarity in the drafting of adhesive consumer contracts does little to protect consumers from contract terms they have not read, could not renegotiate, and were unlikely to find alternatives to in financial markets. As a result, any protection provided by *contra*

202. For a discussion of the application of the *contra proferentem* canon of construction, see Leib & Thel, *supra* note 182, at 780–81, reviewing caselaw and jury instructions to find numerous examples of courts' reliance on *contra proferentem* not only involving the interpretation of insurance contracts but also finding that the application of the canon is complicated in practice.

203. *Id.* at 788–91 (discussing courts' rationale in imposing canon of *contra proferentem* as mandatory rule).

204. For discussion of the ambiguity justification for *contra proferentem* canon, see *id.* at 776.

205. Lauren Willis, *The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension*, RSF: RUSSELL SAGE FOUND. J. SOC. SCIS., Jan. 2017, at 74, 77–78, https://www.jstor.org/stable/pdf/10.7758/rsf.2017.3.1.04.pdf [https://perma.cc/W337-WTJS].

proferentum can be vitiated simply by writing overreaching terms clearly.

2. Reasonable Expectations. Related to *contra proferentem* is another interpretive doctrine: the doctrine of reasonable expectations as applied to consumer contracts. As many as twenty-four of the fifty states have adopted this doctrine.[206] While the reasonable expectations doctrine varies in application,[207] most jurisdictions only apply the doctrine narrowly to standardized insurance contracts and then only to those that are "take or leave it" (that is, wholly nonnegotiable) and only as to the language in these contracts that is ambiguous.[208] Commentators are mostly critical of the doctrine as a means for "regulating" even this narrowly cabined problem of contracting consumers' insurance transactions.[209] Other courts have extended the doctrine beyond insurance contracts to apply to other adhesive contracts,[210] though only a few have done this.

The Second Restatement of Contracts did not embrace the reasonable expectations doctrine. It included an extremely narrow version of the doctrine that, while not limited to insurance contracts, nonetheless requires evidence that the drafter "had reason to believe" that the other party would not have assented to

206. The reasonable expectations doctrine was first proposed by Robert Keeton. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967, 969 (1970) (arguing that courts should enforce "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts . . . even though painstaking study of the policy provisions would have negated those expectations").

207. *See, e.g.*, JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS § 11.4 (1994) (describing variation in decisions applying reasonable expectations doctrine); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1427–30 (2007) (describing "variability" in the reasonable expectations caselaw).

208. *See, e.g.*, Deni Assocs. of Florida, Inc. v. State Farm Fire & Casualty Ins. Co., 711 So. 2d 1135, 1140 (Fla. 1988) (considering applicability of doctrine of reasonable expectations to "comprehensive general liability" policies with pollution exclusion, court held that reasonable expectations doctrine (RED) only applies to policies that are ambiguous and noted that it previously had found standard pollution clauses unambiguous; to apply RED when policy was unambiguous would involve "rewrit[ing]" insurance contract).

209. Schwarcz, *supra* note 207, at 1395–1400 (critiquing reasonable expectations doctrine as means for judicial regulation of insurance policies and arguing that courts should instead police adhesive insurance policies through a product liability framework rather than the current reasonable expectations framework).

210. *E.g.*, Davis v. M.L.G. Corp., 712 P.2d 985, 989 (Colo. 1986). These cases may have been inspired by an influential law review article. *See* Keeton, *supra* note 206, at 967 (contending that "objectively reasonable expectations" of insurance beneficiaries often are honored "even though painstaking study of the policy provisions would have negated those expectations").

a term and yet included it anyway.[211] The reasonable expectations doctrine, as it currently exists, might be described as something of a loser.[212]

C. *Addressing Substance Directly? Unconscionability and Boilerplate*

Courts have occasionally addressed contractual substance by refusing to enforce boilerplate provisions on grounds of public policy.[213] For example, the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.* declined on public policy grounds to enforce a contractual limitation of liability in the boilerplate provisions contained in the contract for sale that Mr. Henningsen signed at the Bloomfield Motors dealership.[214] Decisions like *Henningsen* are few and far between,[215] making it difficult to generalize what makes boilerplate terms inconsistent with public policy.

Terms are more likely to be excised if deemed "unconscionable," but the unconscionability doctrine also remains mired in assent. In theory, substance matters, but courts are leery of relying on substantive unconscionability lest they be deemed "emperors without clause(s)."[216] Instead, courts require some evidence of procedural defects that undercut assent, such as sharp practices or a particularly vulnerable consumer.[217] They engage in

211. RESTATEMENT (SECOND) OF CONTS. § 211 (AM. L. INST. 1979) (providing an exception to enforcement of contract as written only "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term"); *see* Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 846–47 (1990) (noting that Restatement 2d, § 211, requires proof of insurer's "reason to believe" that insured "would not have assented to a particular term" and distinguishing proposal made twenty years earlier by Keeton).

212. Schwarcz, *supra* note 207, at 1435 & n.201 (arguing that reasonable expectations doctrine has been a "failure[]" as a means for judicial regulation of insurance policies and, thus, that it should be rejected in favor of an implied warranty applicable to insurance contracts, especially of adhesion).

213. For example, although cases exist to the contrary, courts tended to uphold waiver of defense clauses in consumer credit transactions. *See, e.g.*, Ford Motor Credit Co. v. Block, 286 A.2d 228, 232–34 (D.C. 1972) (upholding wavier of defense clause as enforceable due to borrower's duty to read contract); Holt v. First Nat'l Bank of Minneapolis, 214 N.W.2d 698, 700 (Minn. 1973) (same, citing numerous cases in support). *But see, e.g.*, Rehurek v. Chrysler Credit Corp., 262 So. 2d 452, 453–54 (Fla. Dist. Ct. App. 1972).

214. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 73–74, 97 (N.J. 1960).

215. The holding of *Henningsen* has since been codified in various provisions of the UCC. *See* U.C.C. §§ 2-316, 2-719 (AM. L. INST. & UNIF. L. COMM'N 2020).

216. Arthur Leff, *Unconsionability and the Code – The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489–92 (1967).

217. *Id.* at 499.

detailed analysis of the formation of the transaction rather than presuming processual failure from the fact of adhesion.[218] This evidentiary requirement places a high burden on the consumer and limits the doctrine's protective value. The history of the doctrine both demonstrates its promise and limits, and suggests a path forward.

The modern defense of unconscionability *was* originally conceived as a tool to redress problematic terms in standardized contracts of adhesion.[219] Karl Llewellyn, the primary drafter of Article 2 of the Uniform Commercial Code, was no fan of standardization in contracting, especially in consumer contracts, and he sought to redress the problem in connection with contracts for the sale of goods. Given his scholarship before becoming reporter to the Uniform Commercial Code project, Llewellyn wanted to include in Article 2 on the Sales of Goods a draft provision to allow redress for overreaching terms in standardized contracts.[220]

Culling through early drafts of the UCC provision that would become its § 2-302, Arthur Leff concluded that the first drafts of the doctrine of unconscionability sought to police nonnegotiable "form clauses," although "bargaining of some dimension" could insulate "any contractual term" from allegations of its unconscionability.[221] As finalized, however, the doctrine of unconscionability became, on the one hand, broader in scope and, on the other hand, less effective at serving its original purpose–policing boilerplate.

The doctrine of unconscionability changed from a general statutory mechanism to combat problematic standardized fine

218. *See* Tymshare, Inc. v. Covell, 727 F.2d 1145, 1153 (D.C. Cir. 1984).

219. We use the term "modern" here to differentiate the doctrine of unconscionability found in § 2-302 of the UCC and a nearly identical provision in § 208 of the Second Restatement of Contracts from earlier language applied by courts of equity to justify a failure to grant injunctive or other equitable relief. *See generally* Note, *Section 2-302 of the Uniform Commercial Code: The Consequences of Unconscionability in Sales Contracts*, 63 YALE L.J. 560, 567 (1954). This earlier equitable doctrine of unconscionability would have been limited to contracts so problematic that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750)).

220. *See* Llewellyn, *supra* note 17, at 731 ("Standardized contracts in and of themselves partake of the general nature of machine-production. . . . [This standardization is not itself harmful.] Where skill and power enter on one side only, however, the situation changes. Law, under the drafting skill of counsel, now turns out a form of contract which resolves all questions in advance in favor of one party to the bargain.").

221. Leff, *supra* note 216, at 489–90 (form clauses), 493–94 (unconscionability).

print in adhesive sales contracts to a focus on doing equity while generally enforcing contractual boilerplate. First, the language of § 2-302 got finalized with "amorphous unintelligibility" in the UCC.[222] Second, the D.C. Court of Appeals in *Williams v. Walker-Thomas Furniture Co.*, although relying on this statutory provision by analogy,[223] shifted the statute away from a focus on boilerplate and toward the "war on poverty" brewing in the District of Columbia at that time.[224] In particular, the court's application of procedural unconscionability had the, perhaps unintended, consequence of seemingly validating boilerplate terms where there were no additional sharp practices.[225] Third, the Second Restatement of Contracts cemented this open-ended invitation to "do the right thing" as an integral provision of the doctrine of unconscionability, delinking it from the policing of standardized contracts of adhesion.[226] In combination, these factors personalized the doctrine's inquiry, shifting its focus from assent to adhesive terms, to the plaintiff's vulnerability and the defendant's sharp practices.

No case demonstrates this tension between procedure and paternalism more than *Walker-Thomas*, decided in 1965, less than two years after the March on Washington for Jobs and Freedom.[227] This case represents both a doctrinal highpoint and its undoing. The case was brought to complain about long-standing sharp practices by a retailer that sold furniture door-to-door in a deeply impoverished section of Washington, D.C.[228] High-pressured sales techniques were papered by standardized contracts.[229] The particular term at issue granted the "seller" a lease on terms akin

222. *Id.* at 488. The doctrine's roots in addressing the problems of boilerplate were not clarified by its Official Comments. Comment 1 lists numerous early product liability suits, but none of these focus on contractual language. This commentary refers to "unfair surprise" as relevant to a finding of unconscionability but doesn't limit such a finding to the existence of boilerplate. U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2020).

223. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448–49 (D.C. Cir. 1965).

224. For discussion of the relationship between the doctrine of unconscionability and the "war on poverty," see, for example, Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L. REV. 1383, 1416–18 (2014) and Norman I. Silber, *Discovering That the Poor Pay More: Race Riots, Poverty, and the Rise of Consumer Law*, 44 FORDHAM URB. L.J. 1319, 1326–27 (2017).

225. *Walker-Thomas*, 350 F.2d at 449–50.

226. *See* RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1979).

227. *See* Fleming, *supra* note 224, at 1431 & n.314; *see also* Silber, *supra* note 224, at 1325–27.

228. *See, e.g.*, Fleming, *supra* note 224, at 1392, 1395, 1408, 1409 n.153 (noting that attorney representing Williams and others was a recent law grad operating a courthouse legal assistance program).

229. *Id.* at 1395.

to a security interest, covering not just the goods bought by the purchaser in that transaction but also everything else leased by the consumer from the same store.[230] It was clear that Williams had agreed to the transaction, although she had not read and may have been prevented from reading the contractual terms on which the transaction was offered to her.[231] Indeed, even if she had, it was unlikely that she or most anybody, really, would have understood Walker-Thomas's remedies on default.

The common law of contract governed Williams's contract for the purchase of a stereo set, and at common law, the salesman's door-to-door tactics were shady but not shady enough to rise to the level of duress, undue influence, or misrepresentation.[232] Congress had not yet enacted legislation to implement the Uniform Commercial Code in the District of Columbia, so UCC § 2-302 did not govern.[233] Relying on the UCC's doctrine of unconscionability, by analogy, as the common law of D.C.,[234] Judge Wright reversed the trial court's dismissal of the complaint.[235] He emphasized the standardized form contract, the fine print, and the nearly incomprehensible legalese of the "add on" term in the boilerplate provision. He also noted the particular practices used by Walker-Thomas—its high-pressure door-to-door sales practices focused on a poor neighborhood with few retail options. Finally he pointed out Williams's poverty, lack of education, and desperate circumstances.[236] Only after clearing the procedural hurdle in this particularized way did he turn to the substantive unfairness of the transaction by questioning the commercial necessity of repossessing everything Williams had ever purchased at Walker-Thomas (which was to say, much of what she owned) to ensure repayment of the defaulted purchase price on the last item

230. *Walker-Thomas*, 350 F.2d at 447. For loyal customers, this provision gave the store considerable leverage. Williams, for example, had purchased $1,800 in furniture over the years; she owed a $164 unpaid balance on these purchases when in April 1962 she bought a stereo set for $514.95. Within months, Williams defaulted on the stereo purchase and the store sought to replevy all the items purchased since December 1957. *Id.* at 447 & n.1.

231. Fleming, *supra* note 224, at 1395.

232. *Walker-Thomas*, 350 F.2d at 448; *see* Fleming, *supra* note 224, at 1412.

233. *Walker-Thomas*, 350 F.2d at 448.

234. Purporting to rely on the common law, Judge Wright defined unconscionability as including proof of "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* at 448–49, 449 n.6. This was largely the test for unconscionability as set out in the Official Comments to the UCC. U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2020).

235. *Walker-Thomas*, 350 F.2d at 450.

236. *Id.* at 447–49.

she had purchased.[237] Even then, though, Judge Wright did not strike the payment application clause or any of the other provisions of this contract.[238] Instead, he remanded for further fact finding.[239]

Because the *Walker-Thomas* court mentioned numerous facts as potentially relevant to the lower court's post-remand trial on the issue of procedural unconscionability, the question remained: Was it enough that terms had been presented to Williams in fine print on a take-it-or-leave-it basis? If not, were both the seller's deception and the buyer's economic and social disadvantages necessary to any finding of procedural unconscionability? As a result, later courts have had to flesh out how much procedural irregularity the plaintiff must demonstrate—and often, they required a lot.

Further, Judge Wright provided little direction for defining the contours of unconscionability's substantive prong; he left for others the project of differentiating between contract terms that are "unreasonably unfavorable" and those that are merely unfavorable. But how should courts sort between enforceable and unenforceable contract terms? In his decision, Judge Wright also provided no guidance to future courts on substance.

The late 1960s and the 1970s were a relative high point for unconscionability decisions. But, even then, courts required detailed showings of both procedural irregularity and substantive unfairness. They emphasized particularly vulnerable buyers caught by demonstrably sharp selling practices but also required proof of substantive unconscionability.[240] Some of these cases involved price gouging.[241] But not all of them. The problem of how to identify substantively unconscionable clauses was sometimes

237. *Id.* at 449.

238. *See id.* at 450.

239. *Id.*

240. For examples of such cases, see Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 264–67 (Sup. Ct. 1969); Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 758–59 (Dist. Ct. 1966), *rev'd on other grounds*, 281 N.Y.S.2d. 964 (App. Term 1967); State *ex rel.* Lefkowitz v. ITM, Inc., 275 N.Y.S.2d 303, 310, 312–16, 320–22 (Sup. Ct. 1967); Am. Home Improvement, Inc. v. MacIver, 201 A.2d 886, 887–89 (N.H. 1964); Jefferson Credit Corp. v. Marcano, 302 N.Y.S.2d 390, 392–95 (Civ. Ct. 1969); Kugler v. Romain, 279 A.2d 640, 643–44, 652 (N.J. 1971).

241. *Jones*, 298 N.Y.S.2d at 266–67; *Frostifresh*, 247 N.Y.S.2d at 758–59; *Kugler*, 279 A.2d at 643–44.

solved by reference to state or federal regulation.[242] Other cases questioned the commercial reasonableness of clauses commonly found in consumer finance contracts: several involved car repossessions;[243] some questioned whether waiver of defense clauses ought to be enforced against consumers, on which courts were roughly divided.[244]

Despite this initial flurry of judicial activity after *Walker-Thomas*, litigation surrounding the doctrine subsequently quieted. Between roughly the late 1970s and 2000, unconscionability was rarely relied upon by courts to upset bargained-for financial transactions by consumers.[245] The prevalent conclusion was that the defense of unconscionability had, like the reasonable expectations doctrine, become something of "a loser."[246] Suits premised on violations of consumer protection regulation or legislation were easier to prove.[247]

It was not until the recent mortgage foreclosure and subsequent financial crisis in the United States that unconscionability regained its vitality. Through the 1990s, there existed only a handful of cases applying the doctrine to consumer finance contracts.[248] One possible explanation is that the Office of

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242. *Am. Home Improvement*, 201 A.2d at 886–89 (holding that contracting company failed to inform borrower of interest and other charges related to home improvement contract and that contract was unconscionable and violative of state licensing law); *Lefkowitz*, 275 N.Y.S.2d at 310, 313, 315, 321–22 (finding unconscionable pyramid-style installment contract extending credit at rates subject to reduction for each additional customer brought to lender by borrower).

243. *E.g.*, *Jefferson Credit Corp.*, 302 N.Y.S.2d at 392.

244. *See id.* at 393–95; *Kugler*, 279 A.2d at 644, 654; *Lefkowitz*, 275 N.Y.S.2d at 323; Block v. Ford Motor Credit Co., 286 A.2d 228, 231, 233 (D.C. 1972).

245. And not for lack of trying. *See, e.g.*, Greene v. Citizens & S. Bank of Cobb Cnty., 213 S.E.2d 175, 177–78 (Ga. Ct. App. 1975) (concluding that clause in bank deposit agreement permitting bank to set off car loan in event of default was not unconscionable); Lake v. Equitable Sav. & Loan Ass'n, 674 P.2d 419, 420, 422–23 (Idaho 1983) (holding that due-on-sale clause in mortgage was neither unconscionable, violative of public policy, nor unreasonably restrictive on alienation).

246. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1442 (2008) (citing 7 JOSE M. PERILLO, CORBIN ON CONTRACTS § 29.4 (rev. ed. 2002) ("Most claims of unconscionability fail.")). *But see* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 965, 978 (2019) (contradicting conventional wisdom and arguing "the doctrine is quietly flourishing, and courts regularly use it to strike down substantive terms," including interest rates, in consumer finance contracts).

247. *See, e.g.*, Preston v. First Bank of Marietta, 473 N.E.2d 1210, 1215, 1216 (Ohio Ct. App. 1983).

248. For examples of outliers, see Discover Bank v. Owens, 822 N.E. 2d 869, 871–74 (Ohio Mun. Ct. 2004), involving overlimit fees and accumulated monthly fees for product called "CreditSafe Plus," the court found the contract unconscionable because the card

the Comptroller of the Currency (OCC) promulgated a regulation broadly preempting application of state law to consumer finance transactions involving bank lenders.[249] Thereafter, state courts became reluctant to rely on the doctrine of unconscionability as a tool of consumer financial protection.[250] Another, perhaps even more powerful, explanation is that, by the 1990s, many credit card agreements and other consumer finance contracts contained arbitration agreements, which would have precluded litigants from bringing any action before a court of law.[251]

After around 2000, there was an uptick in cases finding the terms of consumer loans to be unconscionable, however.[252] Some of

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holder, a Social Security Disability recipient, was eligible to collect on credit insurance only if hospitalized; and *Preston*, 473 N.E.2d at 1214–15, striking down as unconscionable and lacking consideration early-form variable rate mortgage; while not holding that variable rate mortgages were per se unconscionable, the court did conclude that interest rate charges must be sufficiently defined so that "parties can readily ascertain the extent of their obligation at any given time."

249. For this OCC preemption regulation, see 12 C.F.R. § 7.4000(a)(1)–(3). For a discussion of the OCC's initial preemption regulation, see, for example, Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 274–75 (2004).

250. *See, e.g.*, Montgomery v. Bank of Am. Corp., 515 F. Supp. 2d 1106, 1109–10, 1113–14 (C.D. Cal. 2007) (applying state law). Enforcement of the plain language of the OCC preemption regulation would have precluded such actions, despite concerns that the OCC had exceeded its authority to promulgate as broad a regulation as it did. *See* Wilmarth, *supra* note 249, at 237. The Supreme Court later struck down the OCC regulation in Cuomo v. Clearing House Ass'n, 557 U.S. 519, 521, 523, 529 (2009), but the Court's five-four decision was not a foregone conclusion and, in any event, litigation over the power of the OCC took years.

251. *See* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 607–08 & n.22, 612–17, 619–20 & n.35 (2020) (finding "a decline in the number of cases adjudicated by state courts relative to federal courts," and a parallel rise in class actions migrating to federal courts).

252. We are not alone in this observation. *See, e.g.*, Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 621–22 (2009) [hereinafter Knapp, *Blowing the Whistle*] (analyzing reported unconscionability cases between 1990 and 2008 and finding a "tenfold" increase during this period). *See generally* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001) (referring to arbitration in consumer contexts as "mandatory" due to their nonnegotiability in standardized contracts); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002) [hereinafter Knapp, *Taking Contracts Private*] (reviewing federal courts' decisions on enforceability of arbitration clauses as creating a "'modern' contract law"); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186, 194 (2004) ("[J]udges currently find arbitration agreements unconscionable at twice the rate of nonarbitration agreements.").

these cases focused on predatory subprime mortgages,[253] while another set zeroed in on the arbitration clauses themselves.[254]

The majority of these "new" cases involved findings that an arbitration clause should not be enforced on grounds of unconscionability.[255] Some also focused on class action waivers as being particularly problematic.[256] Not all courts agreed, of course: California courts led the charge in holding that arbitration clauses in all sorts of contracts of adhesion were unenforceable due to the unconscionable circumstances surrounding the parties' agreement to the clause,[257] but New York, Illinois, and other courts held to the contrary.[258] Eventually, the Supreme Court of the United States substantially limited California's jurisprudence with its decision in *AT&T Mobility v. Concepcion*.[259]

253. *See, e.g.*, Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 659 (W.Va. 2012).

254. *See, e.g.*, Acorn v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1167–70, 1174 (N.D. Cal. 2002).

255. Knapp, *Taking Contracts Private*, *supra* note 252, at 790 & n.95.

256. *See, e.g.*, Cohen v. DIRECTV, Inc., 48 Cal. Rptr. 3d 813, 822–23 (Ct. App. 2006). The Supreme Court sees the issue of class arbitration in the opposite light, however. In its most recent arbitration decision, *Lamps Plus, Inc. v. Varela*, the Court had this to say about class arbitration: "Class arbitration . . . 'sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'" Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

257. Knapp, *Blowing the Whistle*, *supra* note 252, at 623–24.

258. *See, e.g.*, Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 227 (2d Cir. 2001) (holding that broad arbitration clauses should always be enforced even if court views grounds for arbitration frivolous); Andermann v. Sprint Spectrum L.P., 785 F.3d 1157, 1158, 1160 (7th Cir. 2015) (enforcing arbitration clause against consumers although found in contract of adhesion); Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 47 N.E.3d 463, 467, 473 (N.Y. 2016) (holding that "courts must 'rigorously enforce' arbitration agreements according to their terms" and that McCarran-Ferguson Act did not preempt enforcement of such a clause) (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013)); Borowiec v. Gateway 2000, Inc., 808 N.E.2d 957, 970, 971 (Ill. 2004) (enforcing arbitration clauses and holding that Magnuson-Moss Act did not preempt Federal Arbitration Act). *But see* Smith v. Nobiletti Builders, Inc., 110 N.Y.S.3d 747, 750–51 (App. Div. 2019) (holding that arbitration clause was unenforceable and that the FAA did not govern enforceability of this clause because the transaction did not implicate interstate commerce).

259. *AT&T Mobility*, 563 U.S. at 346, 348, 351–52. In *AT&T Mobility*, the Supreme Court held that the FAA preempted state courts' rulings that waivers of class arbitration were per se unconscionable. *Id.* at 340, 352; *see* Noble v. Samsung Elecs. Am., Inc., 682 F. App'x 113, 114, 118 (3d Cir. 2017) (concluding that arbitration agreement on the ninety-seventh page of a 143-page warranty manual did not bind purchaser of electronics as a contract). The Supreme Court's decision in *AT&T Mobility* was followed by *Am. Express Co.*, 570 U.S. at 236, 238 & n.5, holding that evidence of excessive cost of arbitration and the risk of blocking litigation of certain sorts of claims does not preclude enforceability of arbitration clause under the Federal Arbitration Act, and *Lamps Plus*, 139 S. Ct. at 1415, 1419, rejecting existence of "necessary 'contractual basis' for compelling class-wide arbitration" based on provision ambiguous as to whether class arbitration is permitted

But *AT&T Mobility* did not *completely* cut off litigation claiming the unconscionability and unenforceability of arbitration clauses, given the narrow holding in the majority and even narrower concurrence. Read together, the several opinions in *AT&T Mobility* preempt state courts' reliance on the doctrine of unconscionability to strike "class arbitration" clauses across the board; they do not preempt other uses by state courts of the doctrine of unconscionability or, indeed, other contract law bases for concluding that the arbitration agreement is not a binding consequence of contractual boilerplate.[260] As a result, *AT&T Mobility* left untouched lower courts' findings of procedural unconscionability based solely on the adhesive consumer contracting and, thus, with reference to neither the demographics of the purchasers or borrowers nor to the particular sales or loan practices.[261]

State and lower federal courts' willingness to take up claims of unconscionability also increased in the wake of the mortgage foreclosure crisis, which had been caused at least in part by a failure of consumer financial protection regulation.[262] Often this caselaw involved unconscionable terms in subprime residential

(quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)). Of course, the issues raised by *AT&T Mobility* and related Supreme Court jurisprudence are statutory, not constitutional. Congress could enact legislation limiting the preemptive reach of the FAA, at least in consumer contracts or more specifically in consumer finance transactions. It came close to doing this when, in the Dodd-Frank Act, it vested the then-newly created CFPB with jurisdiction to study and possibly regulate arbitration clauses in this context. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1028(a)–(b), 124 Stat. 1376, 2003–04 (2010) (codified at 12 U.S.C. § 5518). The CFPB issued a report under this statutory grant and promulgated a regulation purporting to restrict some class action waiver provisions, CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015); Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017), but in the early months of the Trump Administration, Congress exercised its authority under the Congressional Review Act to vote to reverse this regulation, which thus never entered into effect, H.R.J. Res. 111, 115th Cong. (2017).

260. *AT&T Mobility*, 563 U.S at 340–41, 343, 348, 352 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."); *id.* at 353, 355, 357 (Thomas, J., concurring).

261. For caselaw decided after *AT&T Mobility*, see, for example, Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 188 (Cal. 2013), concluding that after *AT&T Mobility*, "state courts may continue to enforce unconscionability rules that do not 'interfere[ ] with fundamental attributes of arbitration'" (alteration in original) (quoting *AT&T Mobility*, 563 U.S. at 344). *See generally* Richard Frankel, Concepcion *and Mis-*Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 233–35 (2014); Knapp, *Taking Contracts Private*, *supra* note 252, at 776 & n.59.

262. *See* sources cited *supra* note 175.

mortgages[263] or foreclosures overturned due to unconscionable practices.[264] In some instances, unrelated to foreclosure litigation, courts also found terms in subprime fringe lending arrangements, such as payday loans and signature loans, to be unconscionable.[265] Here, courts' focus on substance remains, but these courts also pay close attention to the procedural facts pertaining to borrower vulnerability and aggressive lending practices.[266]

This is not to say that courts have returned unconscionability jurisprudence to the halcyon days of the 1960s and 1970s. Unconscionability remains a defense that rarely succeeds, and, except in the arbitration context, courts continue to require a showing of particularized procedural irregularity. For every judicial decision concluding that aspects of some financial product should be struck down as unconscionable, there are more than a handful of rulings reaching a contrary result. The defense of unconscionability may no longer be a straight-out "loser," as commentators pronounced fifteen years ago, but it is still something of a Hail Mary pass.[267]

Nonetheless, unconscionability has an important role to play in any common law of consumer financial protection. The seeds of doctrinal reform can be found in the cases since 2000. First, the procedural prong could be satisfied by adhesiveness alone; second, and as a result, courts would need to flesh out more clearly the principles underlying the substantive prong. We suggest that this second task might be accomplished with reference to existing concepts of implied obligations in contract.

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263. *See, e.g.*, McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 282–86 (4th Cir. 2016); Lona v. Citibank, N.A., 134 Cal. Rptr. 3d 622, 639–40 (Ct. App. 2011).

264. *See, e.g.*, Gulfco of La., Inc. v. Brantley, 430 S.W.3d 7, 9, 14 (Ark. 2013) (finding that mortgagors exhibited "an intolerable pattern of reprehensible and unconscionable conduct"). Courts have long scrutinized foreclosure procedures under equitable standards, including that of the doctrine of unconscionability. *See* Robert Kratovil, *Unconscionability—Real Property Lawyers Confront a New Problem*, 21 J. MARSHALL L. REV. 1, 10 & n.54 (1987). For empirical study of mortgage foreclosure practices, see generally Brian Feinstein, *Judging Judicial Foreclosure*, 15 J. EMPIRICAL STUD. 406 (2018).

265. *See, e.g.*, State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 663, 665, 667, 676 (N.M. 2014) (finding certain signature loan provisions to be unconscionable as marketed to less educated and less financially sophisticated individuals by obscuring from them details of such high-cost loans).

266. *See, e.g.*, *id.* at 665–69.

267. *See generally* Bruhl, *supra* note 246.

D. *Implied Terms and the Overlap of Contract and Tort*

In addition to policing formation, interpreting terms, and deleting the unconscionable, the law of contract also fills in gaps. Courts may add to the contract by relying on default rules or other implied terms. By implication, certain duties are assumed to be part of the deal, even where the parties are silent. Examples include an implied obligation to use best efforts[268] or provide reasonable notice of termination.[269] Both the UCC and Second Restatement of Contracts imply an obligation to enforce and perform all contracts in "good faith."[270] In this regard, the law of contract behaves much like the law of torts. These obligations are imposed, not because they have been explicitly agreed to, but because they are implicit in the contractual relationship that was created. They are a necessary part of "the deal."

Of these "implied" obligations, the doctrine of good faith is perhaps that most likely to be relied on when interpreting and enforcing adhesive consumer contracts, particularly those that grant broad discretion.[271] Courts may rely on the doctrine to question performance or enforcement that undermines the overarching purpose of the contract[272] and are most likely to rely on the doctrine to police discretion exercised under an open-ended term.[273] But there are other theories as well.[274]

The UCC's implied warranties of fitness for ordinary[275] and particular purposes[276] provide additional sources of protection to

268. *See* U.C.C. § 2-306(2) (AM. L. INST. & UNIF. L. COMM'N 2020). *See generally* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

269. U.C.C. § 2-309(3) (AM. L. INST. & UNIF. L. COMM'N 2020).

270. *Id.* § 1-302(b); RESTATEMENT (SECOND) CONTS. § 205 (AM L. INST. 1979).

271. *See, e.g.*, James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1692, 1703 (2017) (arguing that doctrine of good faith has played a "paramount role[] in limiting the ability of businesses to impose unfair contract terms on consumers").

272. *See, e.g.*, Sons of Thunder, Inc. v. Borden, Inc., 690 A.2d 575, 585–87 (N.J. 1997).

273. *See, e.g.*, Seidenberg v. Summit Bank, 791 A.2d 1068, 1078 (N.J. Super. Ct. App. Div. 2002).

274. *Cf.* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960) (declining to enforce both disclaimer of implied warranty in that case and exclusion of all obligations except those specifically assumed by the express warranty because such language would "signify a studied effort to frustrate that protection" otherwise granted by legislature).

275. *See* U.C.C. § 2-314(1), (2)(c) (AM. L. INST. & UNIF. L. COMM'N 2020) (implying that all goods sold by merchants are "fit for the ordinary purposes").

276. *Id.* § 2-315 (implying in certain sale of goods a warranty that the goods will be fit for the *specific* purpose made known to the seller of such goods).

consumers of goods. However, Article 2 of the UCC does not apply to lending agreements or other nongoods contracts.[277]

Thus, the law of contracts does not address the question of whether consumer-*contracts*-as-products must be fit for their ordinary and particular purposes. Courts have sometimes relied on the UCC by analogy and, in this way, have expanded the reach of the implied warranty provisions, just as the UCC's implied warranty provisions were influenced by earlier common law doctrines of tort and warranty.[278] The UCC implied warranty provisions have, in turn, influenced the development of later common law doctrines, such as the implied warranty of habitability (in residential leases)[279] and an implied housing merchant warranty (in residential construction).[280] Although courts' creation of common law warranties has been limited so far, the widespread emergence of contracts-as-products and the practices detailed above warrant the analogous extension of implied warranties to financial products.[281]

E. Faithfulness to the Transaction

Notwithstanding their shortcomings, there is a common thread that runs through each of the half measures described above. That concept is faithfulness to the underlying transaction. Unconscionability and reasonable expectations excise terms inconsistent with the agreed transaction. *Contra proferentem* charges the drafter of the contract with an expectation of faithful drafting given presumptions of a commitment to the transaction. The doctrine of implied terms grabs the same thread and pulls it from the other side by enabling courts to flesh out duties inherent in committing to the deal.

277. Article 2 of the UCC applies only to transactions in goods. *Id.* § 2-102.

278. *See, e.g.*, *Henningsen*, 161 A.2d 69 at 77.

279. *See, e.g.*, Fairchild v. Park, 109 Cal. Rptr. 2d 442, 445–46 (Ct. App. 2001); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077–80 (D.C. Cir. 1970); Lemle v. Breeden, 462 P.2d 470, 472–74 (Haw. 1969); Pines v. Perssion, 111 N.W.2d 409, 412–13 (Wis. 1961). For discussion of some of these decisions, see Audrey Goldstein Fleissig, Note, *Unconscionability: A New Helping Hand to Residential Tenants*, 1979 WASH. U. L.Q. 993, 994 & n.12, 995, 1004 n.51 (1979).

280. *See, e.g.*, Caceci v. Di Canio Constr. Corp., 526 N.E.2d 266, 267–70 (N.Y. 1988) (recognizing "Housing Merchant" warranty to be implied in every contract for sale of newly constructed home and rejecting application of rule of *caveat emptor* in such context).

281. For the argument that a similar implied warranty ought to police insurance contracts of adhesion, at least as relates to those involving consumers, see Schwarcz, *supra* note 207, at 1395–96, 1402.

V. CONTORT: TOWARD SUBSTANTIVE UNCONSCIONABILITY, GOOD FAITH, AND IMPLIED WARRANTIES IN CONSUMER LENDING

Nonnegotiable consumer-contracts-as-products are not the bargained-for agreements assumed by classical contract theory. Consumers almost always assent to transactions without examining the terms, particularly if those terms are buried in shrink-wrap, browse-wrap, or "terms of service."[282] Although it may be rational for consumers to agree to "purchase" financial products without reading the terms, and it may be appropriate for the law to treat these "purchases" as "contracts," enforcement of the unread, nonnegotiable terms in the contract associated with that transaction should not be presumed to maximize social welfare. Nor should assent to any particular term be presumed.

The question then is not whether some of the terms of these nonnegotiable consumer contracts ought to be excluded, but whether and why they should bind at all. We need to ask: What is the normative basis for enforcing any of the nondickered terms? And when is it appropriate to read assent to a transaction as implying consent to a term in the writing governing that transaction? That a term appears in boilerplate tells us what the *drafter* wants the terms of the deal to include. The presence of adhesive and unread language in a consumer contract tells us nothing about the *consumer's* intent, other than to assent to the transaction and to those boilerplate terms necessary to the implementation of the transaction. The sections below offer a way to distinguish between the adhesive terms the drafter wants and those that should be enforced against consumer borrowers.

A. *Some Realism About Contracts of Adhesion*

Llewellyn, as a scholar, was troubled by the lack of meaningful assent to boilerplate in contracts of adhesion, even where it was clear that the parties had agreed to transact. This scholarly concern was reflected in the early drafts of the UCC's doctrine of unconscionability. But, as discussed above, the focus changed in the final draft of § 2-302 and its early caselaw.

282. *See* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1139, 1155–56 (2019). For economic arguments that enforcement of unread contracts should not be viewed as problematic, see, for example, Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 12–13 (2009) and Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 587 (2014).

As reporter for Article 2, Llewellyn did not get everything he wanted in the doctrine of unconscionability. He did manage, in other provisions of the UCC, to operationalize a realist's approach to the question of what terms govern, including for adhesive contracts.[283] These term rules are found in sections of Article 2 other than its doctrine of unconscionability, but the through-line connecting these provisions is faithfulness to the transaction. Referred to in UCC § 2-208 as "practical construction," this approach contextualizes express terms where possible as consistent with course of performance, course of dealing, and usage of trade.[284] This approach permits reference to evidence of party and commercial behavior to flesh out the terms of the deal.[285] Even where no such evidence exists, all goods contracts are further subject to implied duties of good faith, implied warranties that the transaction is as described, and other gap fillers.[286]

The UCC's process of contextual interpretation and implication stood (and stands) in tension with the common law's focus on the "written" terms contained in a contract and the "duty to read" this writing. The UCC moved contract law toward a recognition that the "deal"—the transaction assented to—included obligations arising outside the writing.[287] In this regard, Llewellyn the reporter and the realist rendered the law of contracts more tort-like.

Grant Gilmore, a fellow realist and participant in the UCC project, celebrated this merger of contract and tort doctrines in his book, *The Death of Contract*. His focus there was on the common law of contract, so he omitted the UCC from this story.[288] Gilmore emphasized how the doctrine of promissory estoppel and its expansion in the Second Restatement blurred the line between

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283. *See, e.g.*, U.C.C. §§ 1-201(b)(3), 1-303, 1-304 (AM. L. INST. & UNIF. L. COMM'N 2020) (defining "agreement"; defining "course of dealing," "course of performance," and "usage of trade"; and describing the obligation of good faith).

284. U.C.C. § 2-208 (AM. L. INST. & UNIF. L. COMM'N 2001) ("course of performance or practical construction").

285. U.C.C. §§ 1-201(b)(3), 1-303 (AM. L. INST. & UNIF. L. COMM'N 2020); U.C.C. § 2-208 (AM. L. INST. & UNIF. L. COMM'N 2001).

286. *See, e.g.*, U.C.C. §§ 1-201(b)(3), 1-303, 1-304, 2-313–16 (AM. L. INST. & UNIF. L. COMM'N 2020) (defining "agreement"; defining "course of dealing", "course of performance," and "usage of trade"; describing the obligation of good faith; and listing express and implied warranties).

287. *See, e.g.*, Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 634 (1975); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 340–41 (1995).

288. Gilmore, *supra* note 29, at 87, 90.

promissory obligation and a tort of negligent promising.[289] He embraced this assimilation of contract into the mainstream of tort. As Gilmore put it, contract became contort.[290] Although he neither examined the problem of consumer contracts of adhesion nor its overlap with regard to implied terms—other than attributing to Justice Cardozo a willingness to fill in gaps as needed to save a contract—Gilmore's insights suggest how and why the tort-like doctrines of contract law should address the terms of nonnegotiated contracts.[291]

In the sections that follow, we explore how context and implication can inform and supplement the interpretation and enforcement of consumer contracts-as-products. The insight is a simple one. Once parties have a deal, they owe each other a duty to fulfill the agreed transaction.[292] Obligations inherent to the underlying relationship may go beyond the written terms.[293] This reframing invites reconsideration of classical contract doctrine as set out below. We revisit the "half measures" described above, reexamining them through the lens of faithfulness to the transaction.

B. *Unconscionability, Adhesion, and Assent: Reclaiming Llewellyn*

In this section, we examine some courts' application of the doctrine of unconscionability to protect borrowers from certain consumer-contracts-as-products, especially financial products. Llewelyn initially envisioned the doctrine of unconscionability as constraining adhesive contracts that "cross the line,"[294] but when does the substance of boilerplate "cross the line"? Throughout the process of drafting the language that would become § 2-302, the UCC drafters struggled to distinguish between "good" boilerplate and boilerplate that a court "may refuse to enforce."[295] Recent

289. *Id.* at 87–88.
290. *Id.* at 87.
291. *Id.* at 77, 87.
292. *See e.g.*, U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N 2020).
293. *See e.g.*, U.C.C. §§ 1-201(b)(3), 1-303, 1-304 (AM. L. INST. & UNIF. L. COMM'N 2020) (defining "agreement"; defining "course of dealing," "course of performance," and "usage of trade"; and describing the obligation of good faith).
294. Llewellyn, *supra* note 17, at 731–32, 734–35.
295. Leff, *supra* note 216, at 489–501, 509–16 (describing drafting history of UCC § 2-302).

cases demonstrate that courts continue to struggle with this distinction.[296]

The court in *Walker-Thomas* focused on particularized findings of sharp practices and limited consumer capacity. We would return the doctrine of unconscionability to Llewellyn's initial vision.[297] We would deem the procedural prong of the unconscionability doctrine satisfied as to all contracts of adhesion. Adhesive terms should be treated as procedurally unconscionable without particularized proof pertaining to the plaintiff's vulnerability or the defendant's ill motives.

As reframed, unconscionability would still police the substance of terms of contracts of adhesion that were not the subject of "particularized bargaining."[298] Trying to fix the bargaining process for contracts that are, by their very nature, standardized and nonnegotiable is a fool's errand. Bold print and multiple checkboxes do nothing to give the consumer borrower a "meaningful choice." This does not mean that boilerplate should never be enforced. It does, however, mean that the focus would be on substance rather than procedure. The question that must be asked is whether the term is consistent with the "deal."

As reframed, substantive unconscionability fits within the framework of "practical construction" as set out in Article 2.[299] Viewed through the lens of course of performance, course of dealing, usage of trade, good faith, and implied warranty as contemplated by both the UCC and the Second Restatement, unconscionability would focus on boilerplate terms that are not faithful to the underlying transaction.[300] Unconscionability should operate as the negative counterpart to good faith and warranty. Implication incorporates (or uncovers) duties inherent in the deal. Unconscionability should be understood to allow courts to red-pencil terms that break faith with the agreed transaction. As such, we propose stepping out from the shadow of *Walker-Thomas* and taking more seriously the substantive implications of the doctrine of unconscionability.

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296. *See infra* Part V.

297. *See supra* text accompanying note 294.

298. *See* Leff, *supra* note 216, at 489 (describing first public version of UCC § 2-302, circa 1941, as providing "that if a contract or portion thereof were in fact the subject of some (not quite specified) level of particularized bargaining, it would be safe from judicial rewriting" under this provision).

299. U.C.C. § 2-208 (AM. L. INST. & UNIF. L. COMM'N 2001).

300. RESTATEMENT (SECOND) OF CONTS. (AM. L. INST. 1979), §§ 220–223; U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 2020).

1. Procedurally Unconscionable Boilerplate. Procedural unconscionability reflects "an absence of meaningful choice on the part of one of the parties,"[301] sometimes referred to as "focusing on 'oppression' or 'surprise' due to unequal bargaining power."[302] Most courts emphasize procedural factors beyond that the contract was offered in a take-it-or-leave-it standardized form.[303] For example, Williams bought her stereo and other furniture by signing a one-page form contract in *Williams v. Walker-Thomas Furniture Co.*[304] More than noting that this form contract had been neither negotiated nor drafted by Williams, the *Walker-Thomas* court also emphasized Williams's background and family situation, the format of the contract she signed, and the circumstances under which she signed it.[305] Information about Williams's socioeconomic status and educational background relate more to that version of procedural unconscionability resulting from "oppression" than simply from "unfair surprise." A few courts *have* held that a contract of adhesion is procedurally unconscionable as a matter of law,[306] however, recognizing that the adhesive nature of the contract alone is sufficient to establish the procedural prong of this defense.[307]

Although a growing number of cases allow litigation to proceed against payday lenders and lenders offering similar "signature loans" on the grounds of the exorbitant interest rates charged on these loans and other aspects of these transactions, these courts still jump through the procedural hoop, requiring procedural irregularities and sharp practices before finding

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301. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). Leff puts courts' reluctance this way: "The presentation of an adhesion contract to a person is not, like the presentation of pistol to his head, sufficient, if proven, to prevent the enforcement of the contract no matter how 'fair' its terms." Leff, *supra* note 216, at 508.

302. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (quoting A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121 (Ct. App. 1983)).

303. *See, e.g.*, Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1076 (2006).

304. *Walker-Thomas*, 350 F.2d at 447–48.

305. *See supra* notes 227–38 and accompanying text.

306. *See, e.g.*, Graham v. Scissor-Tail, Inc., 623 P.2d 165, 173 (Cal. 1981) (after concluding that contract of adhesion was consistent with party's "reasonable expectations," court assessed whether arbitration clause was oppressive or unconscionable). *But see, e.g.*, Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 337, 342–43 (Ky. Ct. App. 2001) (declining to find arbitration clause in mobile home financing agreement substantively unconscionable).

307. *Walker-Thomas*, 350 F.2d at 449–50.

unconscionability.[308] Although the provisions at issue in these cases differ importantly, their analysis closely resembles that followed in *Williams v. Walker-Thomas*. In *State ex rel. King v. B & B Investment Group*, for example, the New Mexico Supreme Court focused on borrowers' "lack of financial sophistication" and the lenders' "exploitation of borrowers' disadvantages," noting evidence that unbanked and underbanked New Mexican borrowers are dramatically less educated and significantly more impoverished than the general population, and that these borrowers "exhibit certain cognitive biases that lead them to make decisions that are contrary to their interests."[309]

A similar set of cases involve claims that various subprime mortgage terms—such as high loan discount "points" payable at the initiation of a loan, high annual percentage rates payable throughout the loan, prepayment penalties, and balloon payment obligations not triggered until the end of the loan term—were unconscionable. One such case is *Quicken Loans, Inc. v. Brown*.[310] There, the West Virginia Supreme Court easily found sufficient proof of procedural unconscionability.[311] We learn that Brown "was a single mother to three children who earned $14.36 an hour and who had a well-documented poor credit history. She was not a sophisticated borrower."[312] The court also held that Quicken exploited this lack of sophistication:

> Quicken's own records describe her as "timid," "fragile" and needing to be handled with "kid gloves." When Plaintiff declined the original $112,000 loan because the payments were too high, Quicken continued to pursue her. It tried to contact her numerous times especially after Mr. Guida's appraisal came in at almost four times the actual fair market value of the property.[313]

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308. *See, e.g.*, De la Torre v. CashCall, Inc., 422 P.3d 1004, 1008, 1014, 1021–22 (Cal. 2018) (on certification from Ninth Circuit, California Supreme Court concluded that payday loans of less than $2,500 with interest in excess of 90% could be viewed as unconscionable under California state law); State *ex rel.* King v. B & B Inv. Grp., 329 P.3d 658, 663, 670–71 (N.M. 2014) (finding that high cost "signature loans" of $50–$300 carrying APRs ranging from 1,147%–1,500% were both procedurally and substantively unconscionable); Drogorub v. Payday Loan Store of WI, Inc., No. 2012AP151, 2012 WL 6571696, at *5 (Wis. Ct. App. Dec. 18, 2012) (agreeing with lower court that "while a 294% interest rate is not per se unconscionable, it is unconscionable under the facts of this case"); James v. Nat'l Fin., LLC, 132 A.3d 799, 816–17, 826–37 (Del. Ch. 2016) (similar).

309. *King*, 329 P.3d at 665–68.

310. Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 650–51 (W. Va. 2012).

311. *Id.* at 659 ("This is not a close case.").

312. *Id.*

313. *Id.*

Based on these facts, the court found not only that Quicken's practices were procedurally unconscionable but also that they were fraudulent.[314]

Some courts have been willing to turn away from the close factual inquiry into process and capacity that *Walker-Thomas* appears to see as necessary. These cases turn less on evidence of "oppression" than on proof of "unfair surprise." Surprise, of course, recognizes (indeed rests on the assumption) that boilerplate may never have been read. For example, *Perdue v. Crocker National Bank* questioned the high fees charged to bank depositors for processing checks written in excess of funds in the account.[315] There, the California Supreme Court declined to dismiss a class action complaining that such fees were not just high but unconscionably high.[316] After concluding that the "signature card" that Crocker required all depositors to sign was a "contract of adhesion" authorizing the imposition of NSF fees on returned checks in any amount set by Crocker,[317] the court held that Perdue's allegations that the terms were unconscionable were sufficient to survive a motion to dismiss.[318] In assessing Perdue's claim, the court did not focus on the plaintiff's lack of sophistication. Instead, it noted that proof of procedural unconscionability "may turn on," any one of, "the absence of meaningful choice, the lack of sophistication of the buyer and the presence of deceptive practices by the seller."[319] The court did not specify whether it was relying on Perdue's "absence of meaningful choice," (which is to say, the fact that depositors were unable to negotiate the terms set out in the signature card), the bank's "deceptive practices" (that is, the fine print in which this term was

314. *Id.* at 656, 659. Some of Quicken's fraud occurred when Brown took out the mortgage. Other aspects of its fraud occurred later, when Brown unsuccessfully sought to refinance the loan after a surgery caused her to miss work and mortgage payments. *Id.* at 651, 655.

315. Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 514 (Cal. 1985).

316. *Id. But see* Best v. U.S. Nat'l Bank of Or., 739 P.2d 554, 555–56 (Or. 1987) (concluding that similar language in bank deposit agreement was not unconscionable).

317. *Perdue*, 702 P.2d at 510–11 (holding "as a matter of law that the card is a contract authorizing the bank to impose such charges, subject to the bank's duty of good faith and fair dealing in setting or varying such charges," and authorizing plaintiffs to amend complaint to add allegation pertaining to Crocker's bad faith in setting such fees).

318. *Id.* at 508, 514. The California Supreme Court also held in *Perdue* that the National Bank Act (NBA) did not preempt these common law claims. *Id.* at 517, 525. In *Best*, the Oregon Supreme Court similarly concluded that a depositor's claims that overcharge fees had been set by a national bank in "bad faith" were not preempted by the NBA. *Best*, 739 P.2d at 563.

319. *Perdue*, 702 P.2d at 513 (citations omitted).

buried in a card ostensibly limited to obtaining a sample signature to protect depositors against fraudulent withdrawals), or both. Importantly, we never hear how "sophisticated" Perdue was, nor whether as a class all depositors should be viewed as similarly unsophisticated.

We think the *Perdue* court got this right. Consumer capacity is not, and should not be, the principal factor in finding an absence of choice. A showing that a particular consumer had limited capacity or circumstances should not be the exclusive hallmark of procedural unconscionability. For contracts of adhesion, it should be sufficient to establish procedural unconscionability through a showing that a reasonable person was not expected to read the relevant terms or, if read, could not have negotiated or found distinct terms in the market.

Although courts rarely consider a lender's market power as an indicator of the unfairness of the surprise in these cases, the extent to which the borrowers or depositors might have avoided the unfavorable terms by shopping more carefully for different ones is implicit in the concept of adhesion and should be central to the concept of procedural unconscionability.[320] Market power was central to the New Jersey Supreme Court's decision in *Henningsen*.[321] The court in *Perdue* comes close, but only indirectly. While the court does not discuss whether Perdue might have avoided the high overcharge fees by depositing his money in some other bank, we are certain that it would have been difficult to "shop" around in search of lower fees associated with a default-like event.

This reframing of the procedural prong of unconscionability holds important implications for the possibility of class action litigation involving claims of unconscionable adhesive terms. The *Walker-Thomas* framing of the procedural prong as requiring particularized proof was the death knell of class actions under the theory of unconscionability. *Perdue* alters this calculus. There, a requirement that each member of the class demonstrate the extent of their financial sophistication would have destroyed class certification. By allowing the adhesive nature of the deposit agreement to demonstrate "lack of meaningful choice," the court finessed this point. If the adhesive nature of the term is sufficient, then substance can be examined for the class as a whole.

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320. *Cf.* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960).
321. *Id.*

2. Substance. With consumer contracts of adhesion, boilerplate alone should be sufficient to establish procedural unconscionability. The focus should, instead, be on the substance of the resulting terms and not on the facts of the particular transaction, or the character or context of the consumer bound to the nonnegotiated, unread terms.

Thus far, caselaw has insufficiently considered what makes boilerplate substantively unconscionable. Courts have glided over substance in this context out of fear that close analysis would draw them out of principles of contract and into policy analysis.[322] But the substantive prong of unconscionability has just as robust a root in contract doctrine as does the procedural prong. We think the drafters of adhesive contracts should bear responsibilities to the transactions they construct and the consumers they transact with. These responsibilities would arise out of the fact of contracting as much as the terms set out in that contract. In exploring the content of these responsibilities, we focus on the tort-like doctrines within contract law that impose duties even when agreements are silent.

No case brings this point home more clearly than *Henningsen*. Generally thought of as a product liability case, on closer reading the rationale in *Henningsen* sounds at least as much in warranty, disclaimer, and public policy. There, the court held that disclaimer and limitation language on the back of that contract should not get enforced on grounds that the clause at issue involved a "studied effort to frustrate" the protections otherwise offered through an express warranty of quality.[323] This rationale not only influenced the doctrine of unconscionability and inspired statutory limitations on disclaimers and other exculpatory provisions but it also inspired courts' interpretation of the doctrines of good faith and reasonable expectations.[324]

In recent cases where claims of unconscionability were successfully lodged against bank overdrafts, subprime mortgages,

322. *See, e.g.*, Div. of Triple T Serv., Inc. v. Mobil Oil Corp., 304 N.Y.S.2d 191, 201–02, 204 (Sup. Ct. 1969) (apparent inequity of contract insufficient without procedural unconscionability), *aff'd*, 311 N.Y.S.2d 961 (App. Div. 1970) (mem.).

323. Because *Henningsen* was decided before the UCC got enacted in New Jersey, the Supreme Court relied on the classical common law defense of public policy. *Henningsen*, 161 A.2d at 95–97. But subsequent New Jersey decisions have relied on *Henningsen* as a proto-doctrine-of-good-faith case. *See, e.g.*, Gladden v. Cadillac Motor Car Div., Gen. Motors Corp., 416 A.2d 394, 402 (N.J. 1980).

324. *See, e.g.*, Sons of Thunder, Inc. v. Borden, Inc., 690 A.2d 575, 587 (N.J. 1967) (describing doctrine of good faith as premised on mandate that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (quoting Palisades Props., Inc. v. Brunetti, 207 A.2d 522, 531 (N.J. 1965))).

and payday and signature loans, courts considered the price to be exorbitantly high and so substantively unconscionable. In *Perdue*, the court remanded for consideration of the question of whether Crocker's $6 fee per overcharge was excessive given proof that the administration costs associated with each event totaled only $0.30.[325] The substantive unconscionability of the payday and signature loans in these cases also was decided on the basis of price. In *King*, the court found the signature loans in that case to be substantively unconscionable given effective interest rates that ranged between 1,147.14% and 1,500%, even though there was no relevant legislation setting a prohibited rate of usury for the state.[326] In *Brown*, the court also emphasized the high interest rates, points, and other fees imposed by the subprime mortgage there.[327]

Although courts historically have found price terms unconscionable,[328] the notion that courts should be involved in policing prices through the doctrine of unconscionability has always been controversial.[329] The grounds on which courts decide that a price term is unconscionable—either comparing the price charged to the plaintiff to the price charged to others or to the extraordinary profits that the seller would earn if complained-of pricing was permitted—sound more in policy than the principles underlying common law of contract.

Moreover, courts' almost-exclusive focus on process and price suggests nonprice terms should not be viewed as substantively unconscionable. But a stronger, more nuanced basis for unconscionability can be found in the concept of "faithfulness to the transaction," discussed above. This faithfulness is a cognate of,

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325. Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 513, 525 (Cal. 1985) (describing "2,000 percent profit").

326. State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 670–71, 675 (N.M. 2014). The court in *King* also mentioned the "late fees" in these cases, which equaled 5% of the outstanding loan. *Id.* at 671. Other payday and signature loan cases were decided on the same basis, although the effective interest rates differed in each case. *See* Daye v. Cmty. Fin. Loan Serv. Ctrs., LLC, 280 F. Supp. 3d 122, 1256–58 (D.N.M. 2017).

327. Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 647, 654–55 (W. Va. 2012).

328. *See, e.g.*, Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), *rev'd on other grounds*, 281 N.Y.S.2d 964 (App. Term 1967).

329. *See, e.g.*, Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor*,*'* 102 GEO. L.J. 1383, 1429–30 (2014) (reviewing unconscionability cases and noting that "few consumers prevailed in challenging contracts based on price"); *see also* Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1691–98 (2006) (reviewing caselaw and noting court's wariness to police pricing through doctrine of unconscionability); Ramsi Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 CARDOZO L. REV. 1741, 1767–68 (2018) (reviewing courts' application of doctrine of unconscionability to price gouging).

and can be derived from, the other extratextual doctrines of contract law—good faith and implied warranty. If courts were to extend their analysis of the substantive unconscionability of a consumer finance contract of adhesion, they may find various nonprice terms—such as those governing acceleration, prepayment, and privacy— to undermine the value of the contract to the consumer borrower. We reconsider those doctrines below to circle back to how they should inform substantive unconscionability.

C. Good Faith in Consumer-Contracts-as-Products

The implied obligation of good faith derives from a baseline responsibility not to undermine the central goals of the contract. Where nonprice terms are involved, the harm of substantively unconscionable terms often lies in contractual discretion granted to the seller or lender.[330] These terms should be governed by an unstated-because-generally-obvious pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[331] Caselaw applying the doctrine of good faith often expressly refers to the importance of interpreting contracts of adhesion consistent with the nondrafting party's "reasonable expectations."[332] There is broad agreement among courts that contracts should be interpreted with an eye on the parties' "reasonable expectations" of contractual language, and that a party's performance inconsistent with these reasonable expectations should be viewed as "bad faith" performance.[333] Before dismissing this rhetoric as judicial activism gone haywire, it is worth noting that the decision that first used this language

330. Div. of Triple T Serv., Inc. v. Mobil Oil Corp., 304 N.Y.S.2d 191, 202 (Sup. Ct. 1969), *aff'd*, 311 N.Y.S.2d 961 (App. Div. 1970) (mem.).

331. Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933); *see also* Wilgus v. Salt Pond Inv. Co., 498 A.2d 151, 159 (Del. Ch. 1985) (concluding that good faith performance should not "prevent[] the other party to the contract from receiving the fruits of the contract"); Fortune v. Nat'l Cash Reg. Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (holding that employer breached covenant of good faith in at-will employment contract by discharging salesman to avoid paying large commission).

332. *See, e.g.*, Tymshare, Inc. v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1984); Best v. U.S. Nat'l Bank of Or., 739 P.2d 554, 558 (Or. 1987) (noting that Oregon caselaw "has sought through the good faith doctrine to effectuate the reasonable contractual expectations of the parties").

333. *See, e.g.*, *Tymshare*, 727 F.2d at 1153 ("[T]he object of our inquiry is whether it was reasonably understood by the parties to this contract that there were at least certain purposes for which the expressly conferred power to adjust quotas could not be employed.").

was written by then-Judge Scalia when he was on the D.C. Court of Appeals.[334]

Courts often state that the doctrine of "good faith" should be understood to obligate parties to perform contracts in "a reasonable way,"[335] although this language should not be understood to obligate parties to be reasonable in all their interactions with each other and may only get used when courts look to pour content into an otherwise vague or open-ended term in the contract.[336] Along the same lines, the UCC now defines the term "good faith" as both "honesty in fact" *and* "the observance of reasonable commercial standards of fair dealing,"[337] a standard applicable to all sorts of contracts, not just merchants' conduct as to their contracts for the sale of goods, and to the contract as a whole, not just to open-ended standards.[338]

Some modern courts go further and imply or impose minimal obligations on contracting parties as a way of "saving" a contract.[339] The judicial practice of implying obligations, such as those responsibilities situated under the umbrella of a doctrine of good faith, sits uneasily in classical contract doctrine, because implied obligations exist, by definition, between the lines rather than in the text of a contract.

There exist only a few cases directly applying the doctrine of good faith to consumer contracts of adhesion, whether financial or

334. *Id.* at 1147.

335. USX Corp. v. Prime Leasing Inc., 988 F.2d 433, 438 (3d Cir. 1993) (concluding that duty of good faith implies a "duty to bring about a condition or to exercise discretion in a reasonable way") (quoting HOWARD O. HUNTER, MODERN LAW OF CONTRACTS ¶ 5.03 (1986)); *see also* Lazar v. Hertz Corp., 191 Cal. Rptr. 849, 853–54, 857 (Ct. App. 1983) (construing car rental agreement permitting rental company to unilaterally determine price of gas to fill tanks in returned rental cars, court assessed allegation that Hertz fixed unreasonably high prices, in breach of its duty of good faith and fair dealing and held that "[t]he essence of the good faith covenant is objectively reasonable conduct. Under California law, an open term in a contract must be filled in by the party having discretion within the standard of good faith and fair dealing.").

336. *See, e.g.*, Walker v. Keith, 382 S.W.2d 198, 199–200, 202 (Ky. 1964).

337. U.C.C. § 1-201(b)(20) (AM. L. INST. & UNIF. L. COMM'N 2020).

338. The UCC has not always defined the phrase "good faith" in this way; indeed, recent revisions to Article 1 expanding on the doctrine have generated some controversy and even nostalgia for the "good ole days" when only merchants of goods, and not lenders or other sorts of contracting parties, were explicitly held to an obligation to act consistent with "reasonable commercial standards of fair dealing." For discussion of these contrasting definitions, see Margaret L. Moses, *The New Definition of Good Faith in Revised Article 1*, UNIF. COM. CODE L.J., Summer 2002, at 47, 47–48, 50, 56–57.

339. *E.g.*, K.M.C. Co. v. Irving Tr. Co., 757 F.2d 752, 759 (6th Cir. 1985) (finding an implied duty of good faith limits lender's right to immediate termination of a credit facility).

otherwise.[340] In these cases, while the courts do not emphasize it, good faith and substantive unconscionability are joined at the hip. Perhaps the most important of these is, again, *Perdue v. Crocker National Bank*, the case involving the $6 draft overcharge fees that we discussed above.[341] Perdue claimed that these fees were unconscionable, but also that Crocker's establishing of these fees at high rates amounted to bad faith implementation of the open-ended permission to set fees that had been contained in the signature card presented when the account was first opened.[342] Nor is *Perdue* alone in reaching this result. In *Best v. United States National Bank of Oregon*, the Oregon Supreme Court reached the same conclusion.[343] In both these cases, the price term is found unconscionable on the grounds that it is too high, but it should also have been viewed as unconscionable because it frustrated the purpose of the contract—grounds for finding it was not in good faith.[344] The depositors in *Perdue* looked to safeguard their money in a checking account at Crocker National Bank, but the high fees there put Perdue even further in the red.[345]

Similarly, in deciding that payday and signature loans, subprime mortgages, and bank overdraft services were unconscionably priced, courts could have found that they amounted to a "studied effort to frustrate" the consumers' purposes in contracting.[346] The borrowers in *King* and *De la Torre* sought small-dollar loans to help them make ends meet, but after repeatedly rolling over these supposed two-week term loans, the

340. *See, e.g.*, Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291–92 (N.Y. 1995) (finding that high school student agreed to ETS standardized form agreement by registering for and taking SAT, "which expressly permit[ted] cancellation of a test score so long as ETS found 'reason to question' its validity after offering the test-taker the five specified options. Nothing in the contract compelled ETS to prove that the test-taker cheated. . . . The contract, however, did require that ETS consider any relevant material . . . supplied to the Board of Review."); *Lazar*, 191 Cal. Rptr. at 857 (construing open-ended term permitting car rental company to charge for gasoline on return of car as requiring company to perform in "good faith" and thus to charge "reasonable" price); *see also* Nehf, *supra* note 271, at 1704, 1707–08.

341. Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 508 (Cal. 1985).

342. *Id.* at 510–12.

343. *See* Best v. U.S. Nat'l Bank of Or., 739 P.2d 554, 557 (Or. 1987) (concluding that doctrine of good faith "limited the Bank's apparently unlimited authority to set NSF fees, and the depositors can recover for the breach of this obligation just as they could for the breach of any other contractual obligation").

344. *Perdue*, 702 P.2d at 510, 513 (holding that bank's discretionary power to set or vary fees on overdrawn checks was subject to obligation to perform this standardized agreement in good faith, which entitled court to look outside contract's explicit text to ascertain reasonableness of bank's conduct).

345. *See id.* at 507–08.

346. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960).

triple- or quadruple-digit interest charges quickly aggregated to exceed the original principal that had been borrowed.[347] Similarly, the borrower in *Brown* looked to refinance her mortgage and lower her monthly payments, but the interest charges and preclosing points ensured that the costs of this new mortgage would be exorbitantly high.[348] Indeed, the facts in *Brown* established that the borrower tried to back out of the closing because the payments were unaffordable over the long term, but the sales agent's pitch to her over the telephone promised Brown that she would be able to refinance after making just a few payments at the contract rate.[349] In all of these cases, the high fees and charges constituted studied efforts to frustrate borrowers' purposes in entering into these financial products. In other words, instead of focusing on price in applying the substantive prong of unconscionability, these courts could and should have focused their substantive inquiry on concepts of consumer expectations and lender good faith.

D. A Proposal for Implied Warranties in Consumer Lending

The discussion, so far, explains how revised understandings of the connections between the doctrine of unconscionability and good faith would assist in "evolving" the law of contracts as applied to financial-contracts-as-products. However, the evolution is only partial. The final and most direct step is through warranty (though it must be freed of disclaimer).

Both unconscionability and good faith are high hills for the injured consumer borrower to climb. Both offer fact-specific inquiries but put the burden on the plaintiff and require costly, individualized litigation, of little use to consumers enmeshed in small transactions.[350] This is roughly where the law of product liability stood after *MacPherson* but before *Henningsen* and § 402(a) of the Second Restatement of Torts.[351] The implied warranty of merchantability in Article 2 of the UCC assures purchasers that goods are as described and "merchantable."[352] A similar warranty should apply to contractual products as well. In contracts-as-products, the contract is the product, but much of the

347. State *ex rel.* King v. B & B Inv. Grp., 329 P.3d 658, 663 (N.M. 2014); De la Torre v. CashCall, Inc., 422 P.3d 1004, 1008 (Cal. 2018).

348. Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 647, 650–51 (W. Va. 2012).

349. *Id.* at 649.

350. For discussion of these standards and the caselaw interpretation of them, see *supra* Part IV.

351. Our timeline is, of course, hypothetical.

352. *See* U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 2020).

text is like the inner workings of a car. The consumer is not and cannot be expected to read, comprehend, and reopen negotiations on them. The onus is on the manufacturer to build a car that works; similarly, the onus should be on the drafter of adhesive contracts to write an internally consistent and comprehensible agreement.

In his article *Contract as Thing*, Arthur Leff focused on the importance of warranty analysis to understanding consumer contracts of adhesion.[353] He merely pointed in the direction of warranty law because he viewed breach of warranty claims brought on the basis of thingy contracts of adhesion as suffering from the same line-drawing problems inhering in the doctrine of unconscionability.[354] We disagree. Analogies to the UCC warranties of merchantability and fitness for particular purpose have been used by common law courts to extend implied warranties to residential leases and new construction.[355] Similarly, these warranties should both inform and complement the doctrines of unconscionability and good faith in connection with consumer finance products. Warranty concepts would assist in defining the tort-like duties owed by the purveyors of consumer financial products to their customers. Further, courts (or legislatures or regulators) should extend implied warranties to ensure that consumer-contracts-as-products are fit for their ordinary and particular purposes.

For example, in the unconscionability cases referred to above, the courts could have found that the fees, interest charges, and discount points charged in payday and signature loans, subprime mortgages, and bank overdraft services rendered the financial products extended in those cases unfit for their "ordinary purposes." The high overdraft fees in *Perdue* pushed the depositors into the red, although their checking account looked to safeguard their deposits.[356] The 1,000% effective APR applicable to the small-dollar, short-term loans in *King* and *De la Torre* also pushed the borrowers in these cases over the edge.[357] Similarly, the high-interest charges and preclosing points contained in the residential mortgage in *Brown* increased the cost of that mortgage

353. Leff, *supra* note 9, at 148–49, 151.

354. *Id.* at 155.

355. *See supra* notes 278–82 and accompanying text.

356. *See* Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 507–08 (Cal. 1985).

357. For discussion of *King*, *De la Torre*, and similar cases, see *supra* notes 308–09 and accompanying text.

so substantially that the borrower risked losing the modest home initially purchased with her by-then deceased mother although her original purpose in inquiring about a loan was to preserve that home.[358] Indeed, the facts in *Brown* suggest a breach of the implied warranty of particular purpose: there, the borrower repeatedly declined the offer of refinancing on the grounds that the payments were unaffordable, only to be reassured that she could later refinance on better terms.[359]

Leff was right to raise concerns about whether the law of warranty could, on its own, protect consumers from overreaching terms set out in adhesive consumer-contracts-as-products. Identifying the *ordinary* purposes of a consumer-contract-as-product is, admittedly, difficult and will differ from product to product. We do not look in this Article to detail all such provisions or circumstances. Unlike courts that point simply to exorbitantly high prices charged for especially fringe financial products, we think more can be said about nonprice terms and how they should be viewed as unfit for ordinary purposes and about contract design.

In general, the ordinary purpose of a loan is repayment, on time and in full. And yet there are loan agreements that contain "unsuitable" contract terms that render some financial products unfit for this ordinary purpose.[360] For example, some financial products are structured to profit predominantly from payments owed only after default.[361] It is simplistic to describe all finance transactions that "blow up" and end in default as unfit for their ordinary purposes. Nonetheless, we would recommend holding up for special scrutiny contract terms that undermine the repayment of financial products because an alternative set of terms, applicable only if the borrower defaults, are triggered.[362] Mann's sweatbox model for financial products would get scrutinized under such a standard.[363]

358. Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 647, 650–51 (W. Va. 2012).

359. *Id.*

360. *See, e.g.*, Jonathan Macey et al., *Helping Law Catch Up to Markets: Applying Broker-Dealer Law to Subprime Mortgages*, 34 J. CORP. L. 789, 814 (2009).

361. For discussion of this market strategy, see, for example, Mann, *supra* note 152, at 384.

362. *Id.* at 387.

363. *Id.* at 391. For even broader expansion of the doctrine of unconscionability, see Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752–54 (1982).

Analyzing some default-triggered terms as unfit for ordinary purposes would find common law support. Courts of equity have historically scrutinized contractual agreements imposing harsh consequences in the event of default on the grounds that "equity abhors a forfeiture."[364] And courts frequently invalidate terms that "clog" a debtor's "equity of redemption."[365] Even at law, courts scrutinize liquidated damage clauses viewed as imposing a penalty.[366] They invalidate provisions where a substantial loss of equity would impose liability far outweighing the economic losses suffered by the nonbreaching lender.[367] All this caselaw might also get reexamined through the lens of an ordinary-purpose implied warranty.

Certain financial products may not be fit for their *particular* purpose either. For example, lenders may design a loan so that it appears to be a short-term loan with a one-time fee, when it is really expected that it will be repaid over far longer periods than "advertised" and at substantially higher costs.[368] These sorts of transactions may breach an implied warranty of fitness for *particular* purposes. For example, lenders may advertise payday loans as due when the borrower's next paycheck is received, knowing that borrowers are likely to refinance or "roll-over" these loans over several months before paying the outstanding principal and accrued interest.[369] Similarly, homeowners seeking relief from

364. *See, e.g.*, Naftalin v. John Wood Co., 116 N.W.2d 91, 100 (Minn. 1962) ("[It is a] . . . well-recognized principle that forfeitures are not favored either in law or equity."). For debate on whether equitable doctrines premised on ex post determinations should continue to be recognized by modern courts, compare Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323, 1367–70 (2020), suggesting that "the personal sovereignty explanation of American contract law justifies the rejection of the ex post doctrines as legal error," with Kenneth Ayotte et al., *A Safety Valve Model of Equity as Anti-Opportunism* 26 (Nw. L. & Econ. Rsch. Paper, Paper No. 13-15, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245098 [https://perma.cc/LY9U-AQAA], arguing that ex post intervention may be "the most cost-effective device to deal with opportunism."

365. *See, e.g.*, Bruce Wyman, *The Clog on the Equity of Redemption*, 21 HARV. L. REV. 459, 464 (1908).

366. *See e.g.*, Truck Rent-A-Ctr. v. Puritan Farms 2nd, Inc., 361 N.E.2d 1015, 1018 (N.Y. 1977).

367. *Id.* (striking liquidated damages conspicuously "disproportionate to the probable loss[es]").

368. For discussion of the complex policy issues surrounding payday and signature lending, see *supra* note 308 and accompanying text.

369. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, CFPB OFF. OF RSCH., RESEARCH BRIEF NO. 2021-1, CONSUMER USE OF PAY-DAY, AUTO TITLE AND PAWN LOANS: INSIGHTS FROM THE MAKING ENDS MEET SURVEY 10 (2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-payday-auto_title-pawn_loans_research-brief_2021-05.pdf [https://perma.cc/A3B5-DBR2].

unaffordable residential mortgages may be encouraged to enter into a refinanced mortgage with smaller initial monthly payments but payable over a longer term and coupled with adjustable interest rates (option ARMs) certain to push rates up in the near term.[370] This may be especially problematic, like in *Brown*, when a refi like this includes some penalty for prepayment, or if mortgage brokers or loan officers are coached to urge borrowers not to worry because the mortgage can get refinanced down the road, although the terms of the mortgage conflict with these sorts of oral assurances.[371]

Extending implied warranties in this way is not a foolproof solution to the problems that consumers face in financial markets. For one thing, on its face, Article 2 of the UCC does not govern consumer finance contracts.[372] Still, as noted above, warranties of fitness, whether for ordinary or particular purposes, have been implied in other contexts besides contracts for the sale of goods. Courts have extended these principles of Article 2 by analogy to residential leases,[373] the construction of residential real property,[374] and even as far as contracts of insurance.[375] We think an extension of these implied warranties to protect consumer borrowers from oppressive terms in financial products fits squarely within existing caselaw.

There is also the issue of damages: torts theories of product liability preclude recovery for economic loss untethered from some other personal injury; the implied warranty we have in mind necessarily would be asked to redress pure economic loss. One important benefit of reference to warranty law is that recovery under this theory would not be subject to the economic loss rule.[376] Under Article 2, warranty damages include any loss of value—

370. *See, e.g.*, Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1263 (2002).

371. *Id.*

372. U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM'N 2020).

373. *See supra* note 279 and accompanying text.

374. *See supra* note 280 and accompanying text.

375. *See generally* Schwarcz, *supra* note 207, at 1394, 1403, 1457–58.

376. Courts have long limited tort-centered product liability recovery where the injury produces solely economic loss. *See, e.g.*, People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 109 (N.J. 1985); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1100 (N.Y. 2001). The current Restatement of Torts similarly recognizes substantial limitations on when economic losses ought to be recoverable. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 (AM. L. INST. 1997).

including purely economic value—plus consequential loss due to injury to person or property.[377]

E. Unconscionability and Disclaimer: Squaring the Circle

So far, the analysis in Part V has made three key points: (i) where boilerplate is involved, the procedural prong of unconscionability should be satisfied if a reasonable person would not, in the context of the transaction, be expected to read, understand, and have a meaningful opportunity to act upon the relevant boilerplate; (ii) where a financial product is procedurally unconscionable by virtue of its nonnegotiable terms of adhesion, proof of substantive unconscionability would take on greater importance than under current law, and this gap should be informed by implied obligations of good faith and implied warranties of fitness for their ordinary and particular purposes; and (iii) more than simply inform development of what constitutes substantive unconscionability, consumer finance contracts-as-products should be protected by a strong implied obligation to enforce and perform these contracts in good faith and consistent with the ordinary and particular purposes of the transaction. There remains a crucial problem, both with regard to good faith and warranty: that of disclaimers. Here is where we square the circle.

If Article 2 implied warranties were extended by analogy to protect consumers from financial-contracts-as-products, it might seem logical to extend the UCC provisions permitting disclaimer of these warranties, as well. But this impulse should be guarded against. Permitting disclaimer will undermine the protections of an implied warranty in every standardized consumer finance contract. Conspicuousness is not a solution where the problem is that consumers do not read and cannot negotiate their adhesive contracts. We return again to *Henningsen*, where the court overrode an adhesive disclaimer buried within eight-and-a-half inches of fine print, two-thirds of the way down the page, on the reverse side of the document.[378] Our invocation of Llewellyn's original conception of unconscionability would extend the holding in *Henningsen* as follows: (i) if the relevant term is contained in

377. U.C.C. § 2-714 (AM. L. INST. & UNIF. L. COMM'N 2020) (stating that damages for breach of warranty include loss in value associated with nonconformity); *id.* § 2-715 ("Consequential damages resulting from the seller's breach include . . . *any* loss [and] . . . injury to person or property proximately resulting from any breach of warranty." (emphasis added)).

378. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 74 (N.J. 1960).

boilerplate that a reasonable person would not be expected to read, the procedural prong of unconscionability is satisfied; and (ii) if nonprice terms would otherwise be viewed as substantively unconscionable, an adhesive waiver of implied warranties or normal good faith duties also should be invalidated as prima facie unconscionable.[379]

Consumer-contracts-as-products create duties that arise as a result of their standardization, complexity, and disaggregated distribution. If contract law alone were the basis for implied duties of good faith and implied warranties of fitness, then the producers of standardized financial contracts of adhesion would limit the duties that emerge from them simply by ensuring that consumers more fully comprehend the details of the deal—by making the adhesive terms of some disclaimer salient, to use the language that some commentators and some law reformers have adopted in support of the draft Restatement of Consumer Contracts.[380] But an implied warranty that a financial product ought to be fit for its ordinary and particular purposes should not depend on the salience of unread text and should not be subject to waiver. It should be insufficient to ensure that notice is given through the use of clarifying standardized terms or practices. Warranties implied as relates to consumer-contracts-as-products arise, not solely out of the expectations of the contracting parties, but out of expectations that exist more broadly in society. These duties should be understood, thus, as emerging more on the tort side of contort than the contract.

Modern contract law, as Grant Gilmore noted, has to some extent been "reabsorbed into the mainstream of 'tort.'"[381] But not fully enough. The tort-like doctrines of promissory estoppel started contracts scholars down this road but still do not fully redress the problems of boilerplate and defective consumer contracts. The doctrines of unconscionability, good faith, and warranty should be understood in light of the adhesive terms in boilerplate contracts.

379. The approach we follow here is similar in structure to the approach followed for personal injury damages in U.C.C. § 2-719(3) (AM. L. INST. & UNIF. L. COMM'N 2020). There, disclaimer of liability for personal injury is treated as "prima facie unconscionable." *Id.* That the harms caused to consumers by unsuitable financial products are not "personal injuries" as understood in the context of transactions for consumer goods should not undermine the parallel. Financial-contracts-as-products can cause grave harms that endanger the wellbeing and livelihood of consumers and their families, as evidenced by the fallout from the subprime lending crisis.

380. For such an approach, see RESTATEMENT OF CONSUMER CONTS., § 5 reporter's notes on procedural unconscionability (AM. L. INST., Tentative Draft No. 1, 2019).

381. GILMORE, *supra* note 29, at 87.

To argue that some or even most of these standardized provisions offer network efficiencies and economies of scale is to excuse and indeed ignore the incentives created by this one-sided set of protections for externalizing the risks of default on consumer borrowers through market power.[382]

VI. CONCLUSION

Our consumer economy depends, and has depended for some time, on individuals procuring goods for personal and household purposes through standardized market transactions. Today nearly all consumer goods are manufactured for sale through complex manufacturing and distribution arrangements, which separate buyer from seller. Consumer goods are viewed as "products" in the modern parlance, not simply because they are produced by manufacturers, but more precisely because: (i) their manufacture is standardized; (ii) their readiness for market transactions is characterized by long, complex distribution chains; and (iii) the goods themselves are often fairly complex, with the complexity confounding easy inspection of the goods by consumers before purchase.

So, too, with consumer finance transactions. These contracts are not "produced" by a manufacturer in the same tangible sense that consumer goods are; nonetheless, credit cards, insurance contracts, and mortgages are "financial products"—widely made available to consumer markets through standardized drafting and standardization in their origination and distribution to end-users. Like consumer-goods-as-products, the distribution of consumer-contracts-as-products is often accomplished through chains of retail entities. Storefront entities on Main Street are just as likely to "sell" cell phones and related telecommunications contracts or fringe (e.g., payday loans) or conventional (e.g., personal loans or car loans) financial services as they are to offer washing machines and sneakers for purchase by consumers. Distribution might also occur through disposition of the loan or other receivable to secondary markets, such as those involved in the securitization of residential mortgages, car loans, and credit card receivables. Like modern consumer goods, these modern consumer-contracts-as-products are often highly complex, defying easy comprehension by consumers.

382. *See* Eigen & Leib, *supra* note 41, at 89–90.

Just as standardization in the manufacturing and distribution of consumer goods has reduced costs, so has standardization in consumer contracting. But the reduction of costs to the market may have been accomplished, in part, by shifting risk to individual buyers and borrowers by capitalizing on their lack of understanding. Complexity can also enable manufacturers and loan originators to externalize costs.

To accomplish the task of policing contract boilerplate, we propose turning to tort-like doctrines in the common law of contract. Written terms should be interpreted in light of an implied warranty that the contract-as-product is as described. The defense of unconscionability should be strengthened to enable enhanced scrutiny of boilerplate terms that obscure or undermine the content and nature of the contract-as-product. Its procedural prong should be satisfied by the adhesive nature of the terms, without additional proof of the circumstances of a consumer's surprise about the contents of the contract. The substantive prong should be informed by implied obligations of good faith and the implication that this contract-as-product is fit for ordinary and particular purposes. Any attempt by lenders to disclaim obligations of good faith, or to disclaim a warranty of fitness for ordinary purpose, should be viewed as *prima facie* unconscionable. These principles can be derived from existing common law but might also be codified through legislation or regulation.

In this way, the law governing consumer-*contracts*-as-products would serve the same function as the product liability and warranty law that governs consumer-*goods*-as-products. And this law would ensure that financial contracts are fit for their ordinary purposes as loans.