PIZZA-BOX CONTRACTS: TRUE TALES OF CONSUMER CONTRACTING CULTURE

*Amy J. Schmitz**

"The computer industry and other courts have adopted the term 'pizza box' to describe the package in which the document containing the terms and conditions of the agreement is shipped. As a matter of law in the State of New York, such a container is not a 'pizza box.' No self-respecting New York pizza would be caught soggy in such a box. The container may pass as a 'pizza box' in those parts of the world that think food from Domino's, Little Caesar's, Pizza Hut, and Papa John's is pizza. In this Court's opinion such a classification cannot be recognized east of the Hudson River."[1]

INTRODUCTION

Do you ask for contract or purchase terms prior to completing your everyday purchases? Typical consumers do not ask for or read their contracts pre-purchase, and companies have become accustomed to burying purchase terms in product packaging or Internet links. These post-purchase, rolling, or "pizza-box" contracts have therefore become the norm in the consumer marketplace, and courts generally enforce them as legitimate contracts although they may leave consumers feeling soggy.[2] Courts reason that access to terms equates assent under current contract law and prevailing notions of contractual liberty.

The *Hill v. Gateway 2000, Inc.* opinion set the stage for this reasoning.[3] The court emphasized the efficiency of such form

* Amy J. Schmitz, Associate Professor of Law, University of Colorado School of Law. I thank Larry DiMatteo, Dean Blake Morant, and the Wake Forest Law Review for organizing this engaging symposium, and all the symposium participants for their insights and comments. I also thank Stefanie Mann and Jeffrey Boman for their research assistance.

1. Licitra v. Gateway, Inc., 734 N.Y.S.2d 389, 391 (Civ. Ct. 2001).

2. *See* James J. White, *Warranties in the Box*, 46 SAN DIEGO L. REV. 733, 747–52 (2009) (characterizing the rolling contract as "a solution disfigured with ugly warts").

3. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) (enforcing a form computer purchase contract requiring arbitration). *But see* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 571–75 (App. Div. 1998) (enforcing the identical Gateway arbitration clause, but vacating the portion of the clause requiring arbitration before a tribunal that may be excessively costly).

contracting in enforcing an arbitration provision buried in the packaging that came with the computer the Hills had purchased over the phone.[4] The court concluded that the Hills assented to the provision by not returning the computer within thirty days as permitted by the approve-or-return proviso in other packaged terms.[5] The court gave little thought to psychological barriers, shipping costs, and other burdens of product returns.[6] It indicated no sympathy for consumers who fail to read and take action with respect to form terms ex ante.[7]

Many courts routinely apply this efficiency-focused and formulaic analysis to enforce consumer contracts despite their nonnegotiable nature.[8] They often justify this strict enforcement as proper under classical contract principles and necessary to the vitality of an efficient market economy.[9] Many economists also assume that form contracts foster convenience and cost-savings that corporations may pass on to consumers through lower prices and better quality goods and services.[10] Theorists further reason that consumers remain free to reject form contracts and bear responsibility for their failures to shop for or negotiate beneficial contracts.[11]

Strict enforcement of post-purchase or pizza-box contracts nonetheless raises textured consideration of consumers' love/hate relationship with form terms. On the one hand, consumers admit

4. *Hill*, 105 F.3d at 1149.

5. *Id.* at 1150–51. The Court also rejected the Hills' claims that the arbitration clause was invalid regardless of its nonconsensual nature because it precluded class relief, curtailed their right to recover attorney fees under the Magnusson Moss Warranty Act ("MMWA"), and required them to arbitrate their claims in a potentially expensive forum. *Id.*

6. *Id.*

7. *See id.*; *see also* Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108–09 (9th Cir. 2002) (finding that an employee assented to an arbitration clause an employer imposed after hiring the employee because the employee could opt out within thirty days). Companies now go further by requiring consumers to revisit companies' "terms and conditions" on their websites to learn of contract changes and additions that consumers are deemed to accept by continuing to use a company's products or services. *See, e.g.*, Meetup Terms of Service Agreement, http://www.meetup.com/terms (last visited Sept. 9, 2010).

8. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 160–73 (1977).

9. *See id.* at 161.

10. *See e.g.*, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–51 (2002) (explaining why electronic contracts are not adhesive per se under contract law, and discussing the efficiency benefits of standard form contracts).

11. *See id.* at 437, 441; s*ee also Hill*, 105 F.3d at 1148–50 (finding assent to a form arbitration clause). *But see* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1382–86 (1996) (critiquing the courts for "drifting away from, or perhaps abandoning altogether, society's traditional notions of meaningful consent").

that they have no interest in reading form contracts, enjoy the convenience and efficiency of form contracting, and routinely accept forms "dressed up" as deals without stopping to read or question their content. On the other hand, consumers are often frustrated with the effectively nonnegotiable nature of these contracts and complain that they lack the requisite time or understanding to read or negotiate companies' impenetrable purchase terms. Consumers then use this frustration to justify their lack of contract vigilance, which, in turn, gives companies more leeway in crafting contracts to their advantage. Some companies misuse this power to impose unfair contracts, but consumers also bear some responsibility for allowing companies to run roughshod over their rights.

These contracting dynamics lie at the heart of what I have termed the consumer "*contracting culture.*"[12] This conception of culture encompasses economic and noneconomic factors that impact parties' contracts, and goes beyond common notions of "culture" focused on ethnicity, nationality, or religion.[13] I also have proposed a continuum analysis of contracting cultures ranging from "intra communal" to "extra communal" based on parties' relations, understandings, and values.[14] I placed consumer form contracting toward the extra communal end of this continuum due to consumers' lack of connections or shared interests with companies that employ adhesive terms.[15] I contrasted this with more intra communal commercial construction contracting to the extent these parties often share interests and industry understandings.[16]

This characterization sought to highlight how form contracts' legitimacy and practical import differ in contrasting contracting cultures.[17] This view of consumer contracting also relied largely on theory and intuition suggesting that most consumers lack bargaining power and have little choice but to accept companies' form contracts.[18] However, all consumers are not the same, and empirical support is vital to any conception of contracting behavior. Some have used this to critique consumer legislation such as the Dodd-Frank Wall Street Reform and Consumer Protection Act

12. *See generally* Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123 (2007).

13. *Id.* at 145; *see also* Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOT. J. 249, 250–53 (1991) (highlighting the importance of considering cultural differences relating to ethnicity or nationality and recognizing similar differences due to race, gender, and age).

14. *See* Schmitz, *supra* note 12, at 145.

15. *Id.* at 159–60.

16. *Id.* at 158. I distinguish commercial from residential construction due to the differing bargaining and relational contexts involved and recognize also that any categorical assumptions regarding contracting behaviors are subject to exceptions.

17. *See id.* at 162–72.

18. *See id.* at 160.

("Dodd-Frank Act"), which calls for a wide array of consumer financial regulations.[19] That is not to say all theory, or the Dodd-Frank Act are faulty, but instead recognizes a need for empirical research to test these ideas and perhaps provide them with more power and legitimacy.

Accordingly, my research, since introducing my notion of consumer contracting culture, has expanded to consider others' empirical studies, as well as my own, of the process and product with respect to consumer form contracts. Although contract research traditionally has focused on doctrine, it increasingly has encompassed psychological, behavioral, and other empirical dimensions of contracting. This Article will present a picture of such research and introduce some relevant findings from my own focus group and e-survey research. Although this introduction will not be comprehensive, it aims to emphasize the need for textured research in designing policies that address the complexities of consumer contracting culture.

Part I of this Article will provide a brief background of the varying theoretical perspectives on post-purchase consent. Part II will then explore the available empirical data relative to whether and when consumers read contract terms and the extent it truly matters or necessarily results in unfair or one-sided terms. Part III will add some relevant results from the recent e-survey I conducted of consumers' contracting behavior, and Part IV will conclude by inviting further study and debate regarding enforcement of post-purchase terms. Further study and consideration is especially important in light of the increasing prevalence of these terms with respect to online/e-contracts.

I. LEGAL AND THEORETICAL PERSPECTIVES ON POST-PURCHASE CONSENT

"Shrink-wrap" and "click-wrap" contract terms have become the norm for consumer purchases.[20] This rise has been fueled in part by

19. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see also* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009) (bill that is now the Dodd-Frank Act, establishing an agency to regulate consumer financial products and services and authorizing the agency to approve pilot programs for effective disclosure of consumer contract terms); David S. Evans & Joshua D. Wright, *How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products* 3–8 (George Mason Univ. L. & Econ. Research Paper Series, Paper No. 09-51, 2009), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/0951HowtheCFPAAct.pdf (questioning the lack of evidentiary basis for the law's broad scope prior to its enactment when it was called the "Consumer Financial Protection Agency Act").

20. *See* Jonathan D. Robbins, *Shrinkwrap and Clickwrap Contracts,* ADVISING EBUSINESSES § 3:50 (2008).

formalistic enforcement of these contracts as necessary to promote market efficiency.[21] It also has gathered steam from contract law and scholarship denouncing courts' so-called "paternalistic" policing of contracts through use of equitable defenses such as unconscionability.[22] Nonetheless, some courts have resisted presumptive enforcement of post-purchase terms based on lack of assent and unconscionability and behavioral theorists have added support for this resistance based on relational and behavioral research.

A. Classical and Formalistic Perspectives

Classical contract doctrine posits strict contract enforcement and formulaic rules as means for incentivizing individuals to read their contracts and responsibly protect their economic interests.[23] It further seeks to foster certainty and promote both the parties' long-term interests and optimal overall distribution of resources.[24] The doctrine assumes that buyers and sellers make rational contracting choices that will lead to inclusion of efficient and interest-maximizing terms.[25] Furthermore, it presupposes healthy competition among reputation-concerned sellers.[26]

Classical and economics commentators who focus on efficiency worry that legislative regulation produces negative consequences for consumers and the overall economy.[27] They warn that courts'

21. *See* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1721–25 (1996) (arguing that incorporation of unwritten norms in contracts may foster suboptimal or inefficient results); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 859–61 (2000) (arguing that formalistic contract analysis and enforcement better maximizes parties' value than more flexible relational methodology).

22. *See* Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108–09 (9th Cir. 2002) (enforcing a nonnegotiable arbitration provision in an employment agreement); Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 524 (7th Cir. 1986) (urging courts to refrain from infringing contract freedom).

23. *See* Debra Pogrund Stark & Jessica M. Choplin, *A License To Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 619–23 (2000) (discussing courts' strict enforcement of form contracts when rejecting fraud challenges of contracts containing disclaimer clauses).

24. *See* Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QUINNIPIAC L. REV. 715, 717 (2000) (noting law and economics theorists' suggestion that presumed enforcement of adhesion contracts may be in "the long-term interests of those who sign" them).

25. *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 97 (2006).

26. *See id.* at 90–94 (discussing formalistic application of contract defenses).

27. *See* Bix, *supra* note 24, at 720–21 (proposing that contracts scholars fail to "dig[] down as deep as one might into the moral question: why, or under what circumstances, should 'consent' justify state enforcement of agreements?"); *see also* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975) (discussing strict enforcement under classical contract

unpredictable enforcement of contracts may cause merchants to avoid transactions with those likely to challenge adhesion contracts or to pass on contract litigation costs to consumers through increased prices and decreased quality of goods and services.[28] Furthermore, some scholars argue that strict enforcement of form contracts benefits all consumers regardless of the contracts' adhesive nature because standardization lowers transaction costs and fosters production.[29]

This perspective fueled the *Hill* court's refusal to consider substantively the potentially high costs of arbitration to the consumer under the terms in Gateway's computer packaging.[30] Similarly, another court recently enforced new credit card provisions imposed on consumers if they wished to maintain their accounts.[31] It reasoned:

> These sorts of take-it-or-leave-it agreements between businesses and consumers are used all the time in today's business world. If they were all deemed to be unconscionable and unenforceable contracts of adhesion, or if individual negotiation were required to make them enforceable, much of commerce would screech to a halt.[32]

Courts have used this reasoning to support their enforcement of arbitration clauses coupled with an opt-out provision.[33] This reasoning also has resonated with courts that have enforced post-purchase terms consumers must accept if they want to keep their cell phone service,[34] and software license terms contained inside

doctrine); Peter Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 CARDOZO L. REV. 2263, 2268–69 (1989) (highlighting how classical contract law can "operate very harshly").

28. *See* Hillman & Rachlinski, *supra* note 10, at 440–41.

29. *See, e.g.*, Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1403–04, 1433–51 (2009) (arguing that consumers prefer standardized contracts over spending time negotiating individualized terms, and that standardization allows for innovation through segmented consideration).

30. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149–50 (7th Cir. 1997) (giving little thought to shipping costs and other burdens of requiring the Hills to return the computer in order to reject boxed terms).

31. Cicle v. Chase Bank USA, 583 F.3d 549, 555–57 (8th Cir. 2009).

32. *Id.* at 555 (reversing the district court's finding that the new arbitration terms were unconscionable). Thus, the Court enforced the terms although they were in "fine print" and precluded the consumers from pursuing a class action on their unfair credit practices claims against Chase. *Id.*

33. *See, e.g.*, Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 WL 364450, at *8 (E.D. Pa. Jan. 29, 2010) (holding a thirty-day opt-out provision precluded consumers from showing an arbitration provision was procedurally unconscionable); Martin v. Del. Title Loans, Inc., No. 08-3322, 2008 WL 4443021, at *3–4 (E.D. Pa. Oct. 1, 2008) (finding an arbitration clause valid because it included a fifteen-day opt-out provision).

34. Chandler v. AT&T Wireless Servs., Inc., 358 F. Supp. 2d 701, 706 (S.D.

software packaging or splashed on the computer screen when a user downloads the software.[35] Furthermore, courts focused on efficiency have eased notice requirements for e-contract terms, thereby requiring consumers to be more vigilant in reading terms regardless of whether they appear above an "I accept" button or are only accessible via a link at the bottom of a computer screen.[36] Courts also have expanded this duty of vigilance to require consumers to frequently check a company's website for new terms pursuant to a modification clause.[37]

At the same time, courts have enforced these after-the-fact contract terms in employment contexts. For example, the court in *Circuit City Stores, Inc. v. Najd* rejected an employee's claim that he did not assent to a one-sided arbitration clause that his employer added to his form employment contract after he was hired.[38] The court found that Najd assented by not objecting to the clause within thirty days as was permitted by the clause's opt-out provision.[39] It did not matter to the court that Najd's English proficiency was limited and he did not notice the arbitration clause.[40] Instead, the court seemed to embrace ex post terms as an efficient and inevitable aspect of consumer contracting.[41] It focused on form over substance

Ill. 2005) (granting the cell phone provider's motion to compel arbitration pursuant to a clause added to the consumer's contract, thereby precluding the consumer's right to join any class action).

35. *See, e.g.*, Microstar v. Formgen, Inc., 942 F. Supp. 1312 (S.D. Cal. 1996), *rev'd on other grounds*, 154 F.3d 1107 (9th Cir. 1998) (holding terms contained in computer game packaging were binding); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 529–30 (N.J. Super. Ct. App. Div. 1999) (holding forum selection clause in Microsoft Network's membership agreement enforceable where users had the opportunity to scroll through the terms before clicking "I agree" to complete registration).

36. *See* Feldman v. Google, Inc., 513 F. Supp. 2d 229, 237–38 (E.D. Pa. 2007) (holding a forum selection clause in a reasonably presented click-wrap contract enforceable despite consumer's stated failure to read the contract); Hotels.com v. Canales, 195 S.W.3d 147, 156–57 (Tex. App. 2006) (finding that some potential claimants in a class action would be subject to an arbitration clause in the relevant e-contract although they did not have to actually open and view the terms before accepting the contract); Burcham v. Expedia, Inc., No. 4:07CV1963 CDP, 2009 WL 586513, at *3–4 (E.D. Mo. Mar. 6, 2009) (holding e-contract terms accessible via a link appearing at the bottom of Expedia's webpage enforceable against a consumer who claimed he did not realize he created an account).

37. *See* Juliet M. Moringiello & William L. Reynolds II, *Electronic Contracting Cases 2008–2009*, 65 BUS. LAW. 317, 318–19 (2009) (citing Margae, Inc. v. Clear Link Techs., LLC, No. 2:07-CV-916 TC, 2008 WL 2465450, at *2 (D. Utah June 16, 2008) (holding terms posted per a modification clause enforceable against a sophisticated business contractor, but also noting other cases refusing to enforce such modifications against consumers)).

38. Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1109 (9th Cir. 2002).

39. *Id.*

40. *See id.* (highlighting how the circumstances supported assent by silence).

41. *Id.*

in relying on the opt-out provision as ostensible notice of the added arbitration clause.[42]

B. Relational and Behavioral Views

Formalistic and classical contract approaches have not had free reign. Relational and behavioral theorists have highlighted context and relational dynamics in questioning formalistic notions of consent, especially with respect to long-term and intra-industry transactions.[43] This has led some courts and commentators to question the legitimacy of take-it-or-leave-it and post-purchase contracts companies routinely employ in the consumer marketplace. They worry that companies use these contracts to harness their monopoly power and impose unfair or one-sided terms on consumers.[44]

For example, some courts have refused to enforce the Gateway arbitration terms upheld in *Hill* based on their findings that these terms were unconscionable or constituted proposals for modification the consumers were free to reject.[45] Courts also have found that post-purchase terms cannot be enforced in the absence of express agreement or without reasonable notice.[46] Some also have refused to enforce post-purchase modifications to consumer contracts under

42. *See* Stark & Choplin, *supra* note 23, at 617–28, 700–06 (discussing difficulty of balancing need to promote certainty by enforcing contract terms against goals of deterring companies' fraudulent practices, and study findings confirming low percentages of consumers who read contract terms); *see also generally* Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers,* 63 VAND. L. REV. 1003 (2010) (highlighting contract law's failure to account for the psychological dimensions of breach).

43. *See generally* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (exploring the use of a private legal system in the cotton industry); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMER. SOC. REV. 55 (1963) (studying contextual relations in commercial exchanges); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (discussing the relational nature of long-term contracts).

44. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 302 (5th ed. 2008).

45. *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1138–42 (D. Kan. 2000) (holding shrink-wrap terms were rejected proposals); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572–75 (N.Y. App. Div. 1998) (finding consumers subject to terms in the box but severing the unconscionable arbitration clause).

46. *See, e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 105 (3d Cir. 1991) (holding that a buyer could not be subject to shrink-wrap terms on a software box he received after purchasing the software over the telephone); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 21–25 (2d Cir. 2002) (finding arbitration terms in an e-contract unenforceable because they were presented below the "I accept" button and therefore a reasonably prudent Internet user would not notice the terms).

terms giving the company free rein in changing the contract at any time.[47]

Similarly, some courts have highlighted relational dynamics in determining e-contract enforcement. In *Register.com., Inc. v. Verio, Inc.*, for example, the court highlighted Verio's repeated use of Register.com's computer processes and domain name registrant data services in enforcing Register.com's post-purchase provision of terms restricting use of its data for mail, e-mail, and telephone solicitations.[48] The court recognized that Verio may not have been bound by the terms if it was a first-time or sporadic user of Register's website.[49] However, Verio submitted queries to the database daily and was thus akin to a grifter who continually takes apples freely from a roadside fruit stand despite its exit sign alerting takers that apples cost fifty cents each.[50]

The research by behavioral and cognitive theorists also has illuminated individuals' propensity to assess improperly the importance of contract terms.[51] They note that individuals' hindsight and outcome biases cause them to ignore long and complex form provisions.[52] Furthermore, contracting inertia causes individuals to accept preprinted terms even if the terms defy industry practice or legal defaults.[53] Individuals also may fail to seek contract changes due to fear such requests will backfire or "rock the boat."[54] Individuals' rationality is therefore "bounded" to

47. *See* Moringiello & Reynolds, *supra* note 37, at 318–20 (discussing e-contract cases).

48. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 401–02 (2d Cir. 2004).

49. *Id.* at 401.

50. *Id.* The court also rejected Verio's claim that it was not bound by the restrictive terms because they were not accompanied by an electronic button stating "I agree." *Id.* at 403–04.

51. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–22 (2006) (discussing cognitive biases generally); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204–06, 1222–25, 1243–44 (2003) (discussing law-and-economics' assumptions regarding consumer rationality and proposing that "buyers are boundedly rational rather than fully rational decisionmakers" and, therefore, market forces often will lead to inefficient terms in sellers' form contracts).

52. Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 122–25 (2007) (explaining behavioral law and economics basics); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1607–09, 1627 (1998) (noting individuals' "tunnel vision" is skewed by their biases). *But see* RICHARD A POSNER, FRONTIERS OF LEGAL THEORY 264–65 (2001) (critiquing behavioral law-and-economic assumptions as merely a psychological and sociological account of human behavior that confuses explanation and prediction and lacks "theoretical ambition").

53. *See* Korobkin, *supra* note 51, at 1626–27 (advancing the "inertia theory" that parties prefer default contract provisions).

54. *See id.* (explaining how negotiators may avoid potentially deal-breaking departures from status quo contract terms); Macaulay, *supra* note 43, at 60–64

the extent they do not properly assess contracts to protect their long-term economic interests.[55]

Psychological and social theories also suggest that consumers acquiesce in a low power status that hinders their insistence on fair treatment.[56] Sellers then may use their power to capitalize on consumers' overconfidence regarding their purchases and failures to properly weigh and consider contract risks and information.[57] In addition, theorists propose that individuals may fall prey to psychological and behavioral patterns such as sunk cost effect, cognitive dissonance, confirmation bias, and low-ball techniques.[58]

Some scholars and policymakers accordingly argue that consumer protection legislation is necessary to account for these cognitive errors and contracting patterns, especially when coupled with some companies' irreverence for trade and fairness norms.[59] For example, one scholar has proposed an independent mechanism for reviewing and approving standard form contracts similar to current website certification and Housekeeping Institute seal

("Detailed negotiated contracts can get in the way of creating good exchange relationships between business units.").

55. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–80, 1546–47 (1998) (also indicating hope that economists and lawyers would incorporate empirical findings into their assumptions). *But see* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72–74, 125–32 (2002) (critiquing behavioral law-and-economics' view as based on only limited empirical research and failing to precisely apply data to account for variation among decision makers).

56. *See* Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 29–33 (2002).

57. *See* Becher, *supra* note 52, at 136–77 (noting consumers' failure to properly assess low-probability risks, recent versus future incidents, and information buried in impenetrable forms).

58. Full discussion of these patterns is beyond the scope of this Article, but I invite you to see Becher, *supra* note 52, at 124–35, for further explanation of these various patterns.

59. *See* Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 750–55, 800–04 (2009) (proposing reforms); Jolls et al., *supra* note 55, at 1510–15 (discussing behavioral law and economics theory with respect to lending laws); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1325–26 (1993) (calling on courts to consider "what the consumer actually knew" or should have known in assessing enforcement of form contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1231–43 (1983) (rejecting the general rule that contracts of adhesion are presumptively enforceable); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 566 (1971) (proposing that adhesion contracts can only gain legitimacy if they conform to higher public laws and standards).

programs.[60] Furthermore, the recently enacted Dodd-Frank Act provides for sweeping measures aimed to combat unfair consumer contracts.[61] Meanwhile, other countries impose stiff criminal penalties on companies that use form consumer contracts containing terms that do not meet professional diligence standards and may distort economic behavior.[62]

II. EMPIRICAL INSIGHTS ON CONSUMER CONTRACTING

As noted above, I first introduced my "contracting culture" conception without full exploration of empirical data. I had considered limited data regarding arbitration clauses in order to contrast parties' different degrees of shared or disjointed interests and understandings in varied exchange contexts.[63] However, this Article goes further to provide a synopsis of the bargaining process and product research as it relates to questions regarding pizza-box, or post-purchase, contracts. This research sheds light on realities and complexities policymakers should consider in designing consumer protection legislation that addresses consumer and marketplace needs.

A. Process: Exchange Behavior Studies

The available research has generally confirmed reports that consumers do not read or "shop" for contract terms.[64] In Professor Hillman's survey of 92 law students, only 4% of respondents

60. Becher, *supra* note 59, at 750–55, 800–04 (advancing central clearing house); *see also* Robert A. Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications* 1–30 (Cornell Law Sch., Legal Research Paper Series No. 05—12, 2005), *available at* http://ssrn.com/abstract=686817 (proposing requirements that e-businesses make terms available on their websites and follow substantive mandatory rules for forum selection and choice of law provisions).

61. *See* Pub. L. No. 111-203, 2010 Stat.

62. *See* Rebecca de Lorenzo, *On Good Terms*, 153 SOLICITORS J. 16, 16 (2009) (discussing the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999, Unfair Contract Terms Act 1997, and Consumer Protection from Unfair Trading Regulations 2008, and how they may impose criminal sanctions for unfair consumer contracts).

63. Despite emerging research, there is still a need for more empirical studies exploring consumer attitudes and behavior with respect to form contracts. *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?* 104 MICH. L. REV. 837, 840–43, 841 & n.24 (2006) [hereinafter *Boilerplate*]; *see also* Sumit Agarwal et al., *Do Consumers Choose the Right Credit Contracts?* (Fed. Reserve Bank of Chi., Working Paper No. 2006-11, 2006), *available at* http://finance.wharton.upenn.edu/~souleles/research/papers/ContractChoice_1207s.pdf (reporting on a large U.S. bank's experiment comparing consumer credit card choices with respect to no annual fee and higher interest rate versus annual fee and lower interest rates when consumers do or do not carry balances).

64. Hillman & Rachlinski, *supra* note 10, at 446–85.

reported that they read their online contracts "as a general matter."[65] Forty-four percent reported that they usually do not read terms beyond price and product description, while 17% said that they read only key terms such as warranties, product information, disclosures, and warnings for purchases.[66] Students reported not reading contracts due to being "in a hurry" (65%), believing nothing will go wrong (42%), lacking contract diversity (42%), assuming fair terms (32%), and believing law will cure unfairness (26%).[67] Only 7% indicated that they compare terms beyond price and product description, despite the arguable ease of "shopping around" via the Internet.[68]

In a more recent laboratory-based study, researchers Debra Stark and Jessica Choplin tested whether university students required to participate in an experiment as part of a class would read a purported consent form prior to signing it. They found that 95.6% of study participants signed the form without reading even when it contained outrageous terms that differed from what the researcher had orally promised.[69] When the researcher asked the participants why they did not read the form, "participants rated themselves in highest agreement with the statement that they . . . trusted what the researcher had told them," and, secondly, that they trusted the university had complied with protective regulations.[70]

This is not a surprising reaction for students in a university setting, but nonetheless adds evidence for the human propensity to be overly optimistic and trusting with respect to purchases. The results also call into question the efficacy of disclosures to the extent participants generally agreed with statements that they did not read the form because it was long, it was boring, they were lazy, and they assumed the form was unimportant or would replicate others they had read. Nonetheless, the results did not support assumptions that individuals do not read forms due to fear they will not be able to understand or negotiate them or want to protect their reputations as good and trustworthy.[71]

Stark and Choplin then followed the lab experiment with a survey of law students and individuals approached in public

65. Hillman, *supra* note 60, at 1–30 (survey asking students thirty questions, including three questions about gender, marital status, and age).

66. *Id.* at 6–10 (also finding that thirty-six of the fourty non-readers said they would not read under any circumstances, although one-third stated that they are more likely to read e-contracts for higher-value products or from unknown vendors).

67. *Id.* at 9.

68. *Id.* at 12.

69. Stark & Choplin, *supra* note 23, at 627, 677–83.

70. *Id.* at 684–85 (noting the problems inherent in asking individuals to report and rate their own actions).

71. *Id.* at 685.

places.[72] Results from the ten-question survey confirmed that individuals generally agree to contracts without reading them.[73] Of the public and student respondents that had rented cars, only 55.7% of the public sample and 56.8% of the law students reported reading rental agreement terms, and 48.6% of the public and 78.6% of the students in the pool of readers said that they do not read all of the terms.[74] Similarly, 71.3% of the law students and 62.1% of the public sample admitted that they do not read any of the terms enclosed in packages with goods delivered to them post-purchase.[75] Although the reading rates were higher for home and lease contracts, these percentages were still fairly small.[76] In addition, findings again highlighted contracting optimism in that respondents generally said they do not read contracts because they expect companies to "stand behind" their "verbal representations."[77]

Becher and Unger-Aviram surveyed 147 consumers about their expected behavior in scenarios dealing with car rental, checking account, laundry services, and nursery school contracts.[78] In an initial survey, 81% of the respondents said they would not read the car rental contracts, 92% reported that they would not read the checking account contracts, and 75% expected that they would not read the laundry services contracts.[79] As may be expected in these time-pressured or immediate-need contexts, respondents said they would be more inclined to skim these contracts (60%, 47%, and 61%, respectively) or read them later if they were to experience problems.[80] Furthermore, 76% reported that they *would read* nursery school contracts, which is not surprising considering these contracts would affect family members, involve more relational negotiations, and likely provide more freedom of choice than the other studied contexts.[81]

72. *See id*. at 677–78, 688–90 (noting that the 91 student participants were fulfilling a course requirement, although they were offered other options for the course requirement, and describing the later survey of 106 people approached in a public location as well as 101 law students).

73. *See id.* at 691–99.

74. *Id.* at 692.

75. *Id.* at 692–93.

76. *See id.* at 694–96.

77. *Id.* at 694–97.

78. Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 200–09 (2010). Notably, these surveys focused on how consumers expected to act in the future per the presented scenarios and offered only four or five responses, and did not ask about consumers' actual past practices. My study includes these later questions.

79. *Id.* at 212.

80. *Id.* at 212–14.

81. *Id.* (also finding another 17% would skim the nursery school contract, but concluding that the minority who reads contracts in their entirety in the four scenarios as a whole would not rise to the one-third level theorists expect to read and thus provides a policing mechanism contracts).

These same scholars then surveyed 120 students regarding the factors that influence whether they would read a car rental contract.[82] The survey respondents indicated that cost, contract length, and opportunity to change terms would have the most influence on their intent to read the contract ex ante.[83] They also said that these factors, along with opportunity to learn about the transaction, would be most influential in their decision to read the contract ex post.[84] Contrary to what some have assumed, however, respondents ranked contract density and font size as the least influential on their intent to read the contract ex ante or ex post.[85]

Bakos, Marotta-Wurgler, and Trossen studied consumers' Internet browsing behavior with respect to sixty-six online software companies to explore what influences consumers to access the associated standard form contracts, called end-user software license agreements ("EULAs").[86] The researchers found that roughly one or two in one thousand shoppers accessed software EULAs for at least one second. This led them to question economists' assumption that an informed minority of shoppers police fairness of contracts by spreading information regarding corporate overreaching.[87] The researchers nonetheless found that shoppers are more prone to access EULAs of small companies or for "free" or otherwise suspect products.[88] They also found that older and higher-income consumers are more likely to access EULAs.[89]

Eigen also studied online contracting behavior.[90] He worked with researchers in soliciting 1860 participants to take a survey about work in exchange for a free DVD, and then assigned participants to control groups with no contract or a contract coupled

82. *Id.* at 209–12. This questionnaire was very basic and answered only by a fairly limited number of student volunteers.

83. *Id.* at 212–15.

84. *Id.*

85. *Id.* (also finding that respondents ranked contract length at the bottom of their ex post importance scales, and proposing that empirical research is necessary to enlighten consumer protection policy).

86. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, (N.Y.U. Law and Econ. Research Paper Series, Working Paper No. 09-40, 2009), *available at* http://ssrn.com/abstract=1443256 (studying the browsing of 45,091 households).

87. *See id.* at 1–4.

88. *Id.* at 3–5.

89. *Id.* at 34–37 (noting also their in-progress study indicating that increased accessibility or disclosure would not cause more consumers to read EULAs).

90. *See* Zev J. Eigen, *Towards a Behavioral Theory of Contract: Experimental Evidence of Consent, Compliance, Promise and Performance* (2009 4th Annual Conference on Empirical Legal Studies, Working Paper, June 1, 2010), *available at* http://ssrn.com/abstract=1443549 (exploring interactions of law, morals, and social norms on individuals' behavior with respect to adhesive contracts).

with different levels of assent to complete the survey.[91] Researchers found that nearly all participants sought to quit the required survey before completion regardless of whether they signed a contract.[92] Participants were more likely to perform, however, when they saw and actively selected contract terms.[93] In addition, the amount and conspicuousness of information provided upfront had an inverse effect on the likelihood of reading fine print, thereby raising questions regarding the efficacy of disclosure rules. Furthermore, Eigen found that moral appeals had a more positive impact than legal threats on participants' finishing the survey.[94]

Some researchers have focused on credit card contracts. For example, a Visa-commissioned study generated findings suggesting that consumers are careful to avoid annual fees on their credit cards, and that the majority of those who do pay fees carry revolving balances (presumably opting to pay a fee to receive a lower interest rate).[95] The study results also discounted earlier data indicating that "teaser" introductory rates lure consumers to sign up for and continue to use credit cards even after teaser rates expire.[96] Other research also has suggested that, on average, consumers generally choose economically beneficial credit cards for their borrowing practices and pay fairly small additional charges due to their erroneous choices (i.e., fairly low annual fees).[97]

Nonetheless, scientific research has shown that individuals with a specific gene engage in more impulsive, present-oriented, and addictive behavior, and thus are more likely to incur credit card

91. *Id.* at 26–35 (providing a detailed description of the fairly complicated research design).

92. *Id.* at 30–36 (finding also that participants reacted differently to prompts they received that appealed to legal, moral, instrumental, or social forces for finishing the survey).

93. *Id.* at 41–42.

94. *Id.* at 43–47 (concluding that contract promises creating obligations are different from consent setting limits on rights foregone).

95. *See* Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. CHI. L. REV. 63, 63–83 (2006) (discussing the Payment System Panel Study).

96. *Id.* at 80 & fig.2, 81 & fig.3, 82–83 (indicating that consumers generally do not fall prey to "teaser" rates and high-interest reward cards). *Cf.* David B. Gross & Nicholas S. Souleles, *Do Liquidity Constraints and Interest Rates Matter for Consumer Behavior? Evidence from Credit Card Data*, 117 Q.J. ECON. 149, 180 (2002) (finding consumers fail to use available funds in low-rate checking accounts to pay off high-rate credit card debt); Haiyan Shui & Lawrence M. Ausubel, *Time Inconsistency in the Credit Card Market*, 14th Annual Utah Winter Fin. Conference (May 3, 2004), *available at* http://ssrn.com/abstract=586622 (suggesting consumers are lured by "teaser" rates).

97. Agarwal et al., *supra* note 63, at 15–17 (finding a majority of consumers studied selected the economically beneficial credit card for their borrowing practices, assessing "beneficial" in terms of a card with a higher interest rate and no annual fee versus one with a lower rate but with a fee).

debt.[98] Research also has indicated that credit and banking markets have not responded efficiently with respect to interest rates and changes in the opportunity costs of capital.[99] Credit card terms and fees also have become increasingly onerous and consumer debt has risen substantially during the current economic downturn.[100]

This sampling of research provides mixed and uncertain evidence regarding consumers' propensities to obtain, read, negotiate, and otherwise act in "rational" ways with respect to their contracts. However, it does suggest that consumers have become accustomed to not reading contracts due to limited access, time, and ability to negotiate contract terms. Consumers generally assume that they lack power or contracting choices. Still, consumers may be more vigilant with respect to higher cost purchases or what they deem more important contracts or terms. For example, the consumers studied above reported higher likelihood to read nursery school contracts,[101] presumably because they impact their children's well-being and may involve significant costs. Overall, this research shows that consumer contracting culture is more nuanced and complex than most behavioral or economics models predict.

B. Product: Contract Term Studies

Other empirical studies of consumer contracts shed light on whether contracting practices really matter with respect to the contract terms they produce. For example, the study of EULAs noted above included Professor Marotta-Wurgler's classification of 647 EULAs per what she labeled "pro-buyer" or "pro-seller" provisions covering warranties, dispute resolution, liability limits, and other common areas.[102] Overall, the data indicated that

98. Jan-Emmanuel De Neve & James H. Fowler, The MAOA Gene Predicts Credit Card Debt (Jan. 27, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1457224 (using data from the National Longitudinal Study of Adolescent Health to show how the MAOA gene relates to impulsivity and debt).

99. *See generally* 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 (2006) (discussing "sticky" interest rates and their interaction with consumer behavior); Paul S. Calem & Loretta J. Mester, *Consumer Behavior and the Stickiness of Credit-Card Interest Rates*, 85 AM. ECON. REV. 1327 (1995) (also finding sticky credit card rates); Ronald J. Mann, *Credit Cards, Consumer Credit, and Bankruptcy* 30 (Univ. of Tex. Sch. of Law, Law & Econ., Research Paper No. 44, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690701 (finding that contrary to economic models, interest rates have fallen during periods of rising credit card debt and bankruptcy filings).

100. Federal Reserve, Consumer Credit, http://www.federalreserve.gov/releases/g19/current/g19.htm (last visited Sept. 9, 2010).

101. *See* Becher & Unger-Aviram, *supra* note 78, at 212–15.

102. *See* Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 447–50 (2008) [hereinafter Marotta-Wurgler,

competition impacts price and other "salient aspects of product quality" but has weak impact on boilerplate.[103] This led Marotta-Wurgler to conclude that companies generally do not use their higher market shares to impose more pro-seller fine print.[104]

In another study of these EULAs, Marotta-Wurgler explored claims that "pay now, terms later" ("PNTL") contracts are more onerous for buyers than those presented pre-purchase.[105] She correlated the EULAs' classifications on her aforementioned pro-buyer or pro-seller index with how accessible the EULAs were pre-purchase, and found that the EULAs generally available pre-purchase were more pro-seller than the PNTL EULAs.[106] She also found that the most pro-seller EULAs were those that buyers must explicitly accept before completing a purchase.[107] She surmised that companies may police their own PNTL contracts due to the contracts' vulnerability to attack, thereby alleviating the need for state regulation of PNTL contracts.[108] Nonetheless, this study only focused on software EULAs, which likely involve Internet-savvy consumers with more relevant experience and marketplace power than in other consumer contracting contexts.

III. SNAPSHOT OF "CONSUMER CONTRACTING CULTURE"

Although interest in empirical contract research is growing, many commentators and policymakers on all sides of consumer protection debates continue to rely on old assumptions about consumer contracts without consulting empirical evidence. This can lead to shortsighted policies that do not truly respond to consumer

Competition]; *see generally* Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677 (2007); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements* (N.Y.U. Law and Econ. Research Paper Series, Working Paper No. 05-11, 2005), *available at* http://ssrn.com/abstract=799274 (creating seven categories of standard terms and using a system of adding/subtracting points depending on her assessment of terms as more "pro-buyer" or "pro-seller" than the applicable UCC Article 2 default rules).

103. Marotta-Wurgler, *Competition*, *supra* note 102, at 451.

104. *Id.* at 475.

105. Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 309–12 (2009) (addressing efficiency versus fairness critiques of PNTL contracts).

106. *Id.* at 315–20. After narrowing the sample to 515 of the EULAs, she correlated their accessibility with a pro-seller or pro-buyer index falling into seven categories: acceptance, scope, transfer, warranties and disclaimers, limitations of liability, maintenance and support, and conflict resolution. *Id.* at 331–32.

107. *Id.* at 330–37 (indicating that courts' more stringent analysis of rolling contracts helps stop sellers from using PNTL processes to impose unfair contracts, at least with respect to software EULAs).

108. *Id.* at 336–37.

and business needs, as some worry is true regarding the Dodd-Frank Act.[109] Again, this does not necessarily mean that the Act or other consumer protections are faulty. Indeed, consumer protections can be very beneficial. However, it is important to go beyond rhetoric to consider empirical evidence in crafting reforms. My research regarding consumer contracting culture, therefore, has included consideration of data from consumer focus groups, collected common consumer contract terms, and an e-survey of Colorado consumers. Below is a brief snapshot of this research as it pertains to post-purchase contracts.[110]

A. Qualitative and Focus Group Evidence

The stories are common: Consumers report how they often cannot obtain contract terms even when they proactively request them. For example, a consumer reported on a negotiation blog that a Sprint representative replied "Huhhhhhhhhhh?????????" and "Uhhhhhhhhhhhhhh—you mean the, uh, Plan Brochure?" when she requested a copy of a Sprint phone service contract for review prior to making purchasing decisions.[111] The consumer further relayed that the Plan Brochure eventually provided failed to include all the contract terms, which contained an arbitration clause requiring the consumer to waive all access to court and any class action relief.[112]

Similarly, my students and I had trouble gathering copies of credit card contracts for a comparison study of the contracts' arbitration terms.[113] We found that credit card companies usually provide only basic interest rate and "special offer" or "bonus" information on their websites and in mailed offers. They rarely will provide consumers with copies of full contract terms and conditions in advance of their becoming a customer, or at least applying for a card.[114] Nine of the largest credit card companies we called refused

109. *See* Evans & Wright, *supra* note 19, at 3–8.

110. More comprehensive explanation and analysis of the survey research will be the focus of future papers.

111. Victoria Pynchon, *The Fine Print: Sprint's Arbitration Clause*, Settle It Now Negotiation Blog, Consumer Contracts, http://www.negotiationlawblog.com /2007/07/articles/arbitration/the-fine-print-sprints-arbitration-clause/ (July 7, 2007).

112. *Id.* (reporting that she read all the terms in the brochure and it said "Nothing, Nada, Nichts" about arbitration but, in fact, the incorporated "Terms and Conditions" buried on Sprint's website included the quite detailed and onerous arbitration clause).

113. Collected Wireless Phone and Credit Card Arbitration Provisions (on file with author) [hereinafter Collected Arbitration Provisions]; s*ee also* E-mail from Derek Nelson White, University of Colorado Law Student, to author (Aug. 28, 2007) (on file with author) (reporting inability to obtain the terms applicable to online purchases from customer service representatives who were surprised and unprepared for such contract requests).

114. *See* E-mail from Aaron Clippinger, Research Assistant, to author (May 31, 2008) (on file with author) (Chase representative nonetheless suggesting

to send us preapplication copies of their consumer credit card contracts, and none of the twenty companies I wrote to complied with my requests for advance copies of their contracts.[115]

In addition, consumers in the three small focus groups I held in Denver voiced dissatisfaction with companies' imposition of adhesive contract terms.[116] Casual discussions with consumers who volunteered to participate in these groups indicated a consumer contracting culture devoid of substantive negotiation or assent. The participants generally reported helplessness to the extent they assume that they must accept form contracts in their everyday purchases.[117] They also reported perceptions that it is a waste of time to read or retain any copies of form contracts because they are nonnegotiable.[118] The consumers therefore said they regularly throw out mailings with modified terms, and bypass "terms and conditions" links in contracts they enter into over the Internet.[119]

At the same time, consumers in the focus groups explained that they usually prefer to discuss contract complaints with a company representative, rather than through letters or formal complaint processes.[120] However, consumers also reported frustrations they had experienced in seeking to discuss problems with company representatives by telephone or e-mail.[121] This was especially true when purchasing goods or services via the Internet.[122] They also recounted instances in which company representatives told them that they lacked power to change company terms.[123]

Of course, this research is anecdotal and unscientific evidence

that the terms might be available to someone who has been pre-approved for a credit card).

115. *See, e.g.,* Letters from author to credit card companies and research assistant chronicles (Feb. 6, 2008) (on file with author) (showing attempts to obtain contracts).

116. *See* Consumer Focus Group Notes, conducted by author, Denver, Colo., Nov. 18, 2006 (notes on file with author) [hereinafter Consumer Focus Group] (recording consumers' negative experiences and feelings of powerlessness with companies that sell consumer goods and services). I recruited the consumers by offering $25 to participate in the discussions in announcements placed in newspapers and on Craigslist and other such online sources. All was done with the approval of the University of Colorado Human Research Council ("HRC") after my completion of the application and training processes.

117. *See id.*

118. Some of the consumers nonetheless reported a sense of freedom from their ability to "shop around" even if they cannot effectuate changes in companies' form contracts. One consumer explained her belief that "the nice thing about competition is that if you don't like the contract you can just move on." *Id.*

119. *Id.* (also reporting difficulties reaching company representatives to seek contract changes, and representatives' statements that they cannot change form terms).

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

regarding consumer contracting, and involved a fairly small pool of participants. It also is subject to perception and reporting biases, as well as the bandwagon effect of group discussions. Reported perceptions nonetheless matter and illuminate consumers' concerns. Consumers who assume they lack contracting power lack incentive to request or read pre-purchase copies of their contracts. With the spread of these negative perceptions and feelings of helplessness, it is hard to accept arguments that proactive consumers will adequately police the fairness of companies' form contracts.

B. Survey Results

In order to go beyond stories and focus group discussions, I designed and administered an e-survey over the Internet that explored the processes, behaviors, and perceptions impacting consumer form contracting. The e-survey aimed to provide a deeper and more quantitative view of consumer contracting culture.[124] It therefore explored consumers' attention to contract terms, perceptions of common provisions, contract understandings, and negotiation of form contracts applicable to typical consumer purchases. This Article will provide a snapshot of survey findings pertaining to questions related to post-purchase contracts.[125]

1. Research Design and Implementation

After extensive research, testing, and editing, a survey taking roughly twenty minutes to complete was created, coded, and administered with the assistance of the Institute for Behavioral Science ("IBS") at the University of Colorado.[126] It was sent over the Internet to 1100 participants on Survey Sampling International's ("SSI") panel of Colorado consumers over 18 years old, producing a research sample of 306 completed surveys from Colorado residents ages 18–88.[127] Roughly one-third of the respondents were male and

124. *See* Schmitz, *supra* note 12, at 123–27 (introducing this concept and analysis).

125. Future reports and publications will discuss the broader data.

126. Survey Data (on file with author). Survey development included extensive planning and design research, followed by editing and testing survey drafts in order to cure ambiguities and errors. For example, I completed several rounds of administering the survey to students, colleagues, and other volunteers, gathered feedback, and edited accordingly. I thank Michelle Walker for her assistance with this process.

127. Use of the SSI panel ensured confidentiality and full approval from the Human Research Council at the University of Colorado. Using the SSI panel, the survey first was sent between October 22 and 25, 2007 to 8000 Colorado residents 8% of whom responded. The responses were then coded and correlated with the demographic information SSI had previously gathered for the respondents through their assigned identifying numbers or codes. We then dropped from the sample all incomplete responses (i.e., the individual did not complete all pages of the survey), were completed in six minutes or less (an unreasonably short time for this survey), skipped many or essential questions,

two-thirds were female; half were married; 7.5% lived with domestic partners; and the remaining respondents were single, separated, or widowed.[128]

Three-quarters of the sample identified themselves as Caucasian or white; 10% as African American or black, Hispanic or Latino, Asian, American Indian or Alaska Native, or multiple races; and the remaining respondents did not identify a racial category.[129] Forty-three percent reported that they held bachelor's or postgraduate degrees, 44% indicated some college but no degree, and the rest said they had a high school diploma or less.[130] Forty-two percent reported full-time employment, 16% reported part-time jobs, and the rest reported no employment outside the home.[131]

Although the survey was carefully crafted and administered, this type of survey research must be considered in light of individuals' reporting and perception biases. Individuals are inclined to report behavior they view as "good" or fiscally responsible, and are prone to over optimism regarding their likely behavior.[132] This may lead consumers to indicate higher levels of vigilance to contract terms and proactive contracting than they pursue in reality. That said, this survey is different from many discussed above in that participants were not students or required to take the survey, and anonymously completed the survey in the

"flat-lined" responses, provided nonsensical answers, or otherwise "cheated" in some way. We also sought to correct underrepresentation of younger men by sending out between November 8 and November 13 an additional 2000 invitations to males 18–49 (from whom we received a response rate of 2.5%), 1000 reminders to previously invited males 18–29 (from whom we received a response rate of 1.5%), and 1000 invitations to males 50+ (from which we received a response rate of 14%). We again dropped apparent "cheaters" using the same methodology we used for the first group of responses and sent out additional reminders to males 18–45 in order to fill out a sample of 306 Colorado consumers that was fairly balanced with the Colorado census information we obtained from the U.S. Census Bureau. The process of gathering and checking responses took over a month but allowed us to arrive at what we believe is a solid sample.

128. Survey Data (on file with author). Women were much more receptive to answering our survey. Also, roughly 51% were 40–59 years old, 14% were 30–39, 16% were 60–69, 11% were under 30, and 7% were 70 or over.

129. *Id.*

130. *Id.*

131. Many did not identify themselves with respect to occupation. Of the 82% of those who reported income, roughly 30% made under $29,999; 30% made $30,000–49,000; 19% made $50,000–$74,999; 9.6% made $75,000–$99,999; and 11.2% made over $100,000. *Id.*

132. *See* Thea F. van de Mortel, *Faking It: Social Desirability Response Bias in Self-Report Research*, 25 AUSTL. J. ADVANCED NURSING 40, 40–48 (2008) (discussing "social desirability response bias," which prompts survey respondents to have a tendency to present a favorable image of themselves and "may 'fake good' to conform to socially acceptable values, avoid criticism, or gain social approval").

comfort of their own homes and offices.[133] This research, therefore, adds to the empirical picture of consumer contracting.

2. Sampling of Relevant Survey Findings

Although the survey included a broad array of questions about consumers' contracting practices and perceptions, several of the survey questions were especially relevant to whether and when consumers see or read form contracts. For example, the survey asked respondents how they purchased their last electronic item. Out of 306 respondents, 249 (81.4%) bought the last item at the store, 42 (13.7%) bought over the Internet, and the rest chose "other" or that they never purchased an electronic item.[134] The store and Internet purchasers were then directed to an appointed store or Internet list using skip logic that funneled them to the appropriate list per their responses to prior questions. They were then asked to select *all* the ways they received purchase terms when making their electronic item purchases. Accordingly, percentages for these responses do not add up to 100%.

The consumers who stated that they last purchased an electronic item at the store indicated as follows: 30.1%, "terms were provided before [the consumer] purchased the item at the store"; 30.9%, "terms were in the box or packaging with the item"; 19.3%, "terms were on the bill or invoice for the item"; 37.8%, "terms were explained to me by the salesperson at the store"; and 15.7%, "I did not notice any terms at any point before or after purchase."[135] The consumers who bought their last electronic item over the Internet selected as follows: 23.8% "had to read or scroll through terms on the computer screen and indicate that [they] accepted or agreed to the terms" before purchasing the item; 9.5% were required to accept "terms that were not on the computer screen but [they] could access through a computer link"; 23.8% saw or could access terms but did not have to indicate acceptance before making the purchase; 30.9% either received terms on an invoice or in the packaging when the item arrived; and 28.6% never noticed terms before or after purchase.[136]

133. *See supra* notes 72–77 & 82–86 and accompanying text (discussing other surveys involving students or respondents approached in public places).

134. Consumer Survey, *infra* Appendix B Section 2, Question 1 (backup on file with author).

135. Consumer Survey, *infra* Appendix C Section 2, Question 1 (backup on file with author). Respondents were given a list with these different ways of receiving purchase terms and could choose *all* that applied, thus the percentages do not add up to 100%. Nonetheless, a hand tally indicated that 56 of the in-store purchasers reported that they only received terms post-purchase in product packaging or on the bill, and 37 did not notice any terms pre- or post-purchase. Consumer Survey, *infra* Appendix C (backup on file with author).

136. Consumer Survey, *infra* Appendix D Section 2, Question 1 (backup on file with author). 7.1% also indicated "other," and again because they could

These results demonstrate the web of disjointed terms consumers may receive at various points in the purchasing process. They also support claims that consumers usually do not receive or have to indicate acceptance to contract terms before paying for a product.[137] This is especially true with respect to in-store purchases, which is not surprising because it would be time consuming and tedious to wade through fine print at the store checkout.[138] However, a significant percentage of the respondents also indicated that they discussed terms with a salesperson, although this likely included only such terms as price or payment options and not the fine print that usually comes in product packaging.[139] Furthermore, only fourteen (33.3%) of the forty-two consumers who bought their last electronic item over the Internet reported that they had to indicate acceptance to the terms before making the purchase.[140] Overall, 17.5% of the total store and Internet purchasers reported never seeing any terms before or after completing their purchases.[141]

The next questions asked about the extent to which respondents read or cared about any contract terms they received in conjunction with their last electronic item purchases. Only 41.7% of respondents said they read applicable terms before making their purchases.[142] Furthermore, 52.1% of the respondents who read the contract terms said that they did not consider any of the reviewed terms important in deciding whether to complete their purchases.[143] This means that out of the 291 respondents who reported buying electronic items, only 57 read purchase terms and thought they were

choose all that applied, the percentages do not add up to 100%.

137. Questions remain as to whether respondents who report that they did not receive terms simply did not *notice or recall* receiving terms. Indeed, companies may shroud terms while consumers often lack vigilance. Lack of clear notice has, therefore, prompted regulators to suggest heightened disclosures such as the Model GLB Privacy Notice. *See In Brief: Legal News*, 78 U.S.L.W. 2303, 2303–04 (2009) (summarizing the final rule posted at http://www.sec.gov/rules/final/2009/34-61003.pdf, which provides a new safe harbor for notifying consumers of how their information is used in compliance with Gramm-Leach-Biley Act).

138. Imagine how long the lines would be at common consumer haunts like Target, Wal-Mart, Best Buy, and the like.

139. It is unclear whether the respondents distinguished broad "terms" "discussed" at the store from more specific "terms" provided in a paper of some sort.

140. Consumer Survey, *infra* Appendix D Section 2, Question 1 (backup on file with author).

141. Consumer Survey, *infra* Appendix E Section 2, Question 1 (backup on file with author) (taking into account the 39 from the store and 12 from the Internet sample who all reported never seeing terms out of the 291 total who had purchased an electronic item).

142. Consumer Survey, *infra* Appendix F Section 2, Question 1c (backup on file with author).

143. Consumer Survey, *infra* Appendix G Section 2, Question 1d (backup on file with author).

important before buying the item.[144]

Nonetheless, survey respondents reported greater attention to contract terms when signing up for their last credit card. Of the respondents who had signed up for a credit card, 73.1% reported that they signed a contract received in the mail or at an institution, or indicated acceptance to terms on the Internet, before getting their last card.[145] In addition, 73% of the 244 respondents who stated that they received contract terms at some point in getting a credit card reported reading those terms ex ante or ex post.[146] Of the 177 respondents who read credit card terms, 70.6% indicated that they read the terms before they got their credit cards, and 75% of these 120 respondents considered some of the read terms important in their decision-making process.[147]

Although these responses indicate some attention to credit card terms, this attention is not that significant when viewed in proper perspective. In total, only 90 of the 264 survey respondents who recalled signing up for a credit card indicated that they read credit card terms and found them important.[148] In addition, although the survey asked explicitly about form terms, it is unclear whether respondents interpreted "terms" to include the fine print usually contained in "bill stuffers" or Internet links.[149] Furthermore, 73.9% of respondents who reported reading contract terms ex post or ex ante indicated that none of the terms were important when they had a problem with the card.[150] This comports with focus group participants' noted preferences for settling purchasing problems through discussions with company representatives, rather than more formalized processes.[151]

The survey results overall nonetheless support other study findings that consumers may be more inclined to receive and read terms before agreeing to what they view as more significant contracts, assuming they view credit card agreements as more significant than electronic product purchase terms. In addition,

144. Consumer Survey, *infra* Appendices F & G Section 2, Questions 1c & d (backup on file with author). Terms these individuals stated as important included warranty, return policy, service, and interest/payment terms.

145. Consumer Survey, *infra* Appendix H Section 2, Question 2 (a)–(h) (backup on file with author).

146. Consumer Survey, *infra* Appendix I Section 2, Question 2b (backup on file with author).

147. Consumer Survey, *infra* Appendices J & K Section 2, Questions 2c & d (backup on file with author).

148. Consumer Survey, *infra* Appendices J & K Section 2, Questions 2c & d (backup on file with author).

149. Consumers in the focus group discussions I held in Denver reported that they regularly throw out "bill stuffers" with terms companies add to consumer contracts. *See* Consumer Focus Group Notes, *supra* note 116.

150. Consumer Survey, *infra* Appendix L Section 2, Questions 2e (backup on file with author).

151. *See* Consumer Focus Group Notes, *supra* note 116.

consumers may deem it more worthwhile to compare credit card terms due to wider variation and options for those with adequate credit scores than is typically available with respect to pre-packaged fine print accompanying electronic item purchases. Furthermore, credit card terms affect consumers' immediate and ongoing credit costs and relationships, whereas electronic item terms usually do not matter unless and until there is a problem with the purchase.

At the same time, survey findings indicated that most consumers are aware of contract terms' importance when asked about their purchases *generally*. 77.1% of the survey respondents reported that they generally believe contract terms are "very important" or "somewhat important" in helping them make purchasing choices.[152] In addition, 39% of respondents stated that they "always read contract terms" at some point ex ante or ex post with respect to their purchases generally.[153] Respondents also ranked terms "very important" as follows: price (83.2%), warranties (77.9%), fees and penalties (71.9%), credit payment (74.7%), returns (66.6%), and cancelling services (67.7%).[154]

As noted above, these responses should be viewed in light of individuals' propensity to overstate their competence or socially desirable behavior.[155] Respondents also may be overly optimistic with respect to their general practices and aspirations, and seek to avoid discomfort or dissonance from acknowledging that their beliefs and behaviors conflict. Individuals may generally believe that contract terms are important and hope that they *would* read them, but fail to actually read or consider terms in the midst of particular purchases. Therefore, the percentages of those who truly read their contracts is likely lower than the results indicated. This also helps explain why fairly low percentages of respondents said that they read terms when making their recent purchases, despite the high percentages indicating general belief that purchase terms are important.

152. Consumer Survey, *infra* Appendix M Section 2, Question 3 (backup on file with author).

153. Consumer Survey, *infra* Appendix N Section 2, Question 4 (backup on file with author) (also indicating they were most likely to read contracts as follows: 20.7% Internet; 19.3% mail; and 14.1% store; while 6.9% stated they never read contracts).

154. Consumer Survey, *infra* Appendix O Section 2, Question 7. The question asked: "Think generally about the times when you have looked at contract terms at any point with respect to your purchases of products or services. Were any of the terms important to you? Indicate how you generally view the importance of the following types of terms." Consumer Survey, *infra* Appendix O Section 2, Question 7. With respect to other terms, respondents chose "very important" as follows: arbitration (39%), disclaimers/waivers of liability (48.4%), and freebies and incentives (27.1%).

155. *See* van de Mortel, *supra* note 132, at 41 (discussing socially desirable behavior and propensity to report competent or other socially desirable behavior).

CONCLUSION

Pizza-box post-purchase contracts have become the norm in consumer purchases with the blessing of formalistic contract rules, efficiency-focused theory, and law-and-economic models that assume a sufficient number of consumers read and negotiate contracts to adequately police their fairness. Meanwhile, critics of these contracts advance strict consumer protection legislation based on popular stories of corporate abuse and behavioral predictions regarding consumers' cognitive biases, bounded rationality, and lack of interest and understanding with respect to their contracts.

Empirical research helps bridge this divide to explore beyond assumptions and predictions to reveal the true complexities of consumer contracting culture. It indicates that consumers' negative perceptions, feelings of helplessness, and lack of time in making purchases may prevent them from reading or negotiating contracts in sufficient numbers to police contract fairness. However, the data also indicates that consumers are rational to the extent they read contracts that involve greater choice of terms, more relational contexts, or larger costs and concerns. Furthermore, one study suggests that companies make their e-contracts more accessible pre-purchase when the contracts contain pro-seller terms that may be vulnerable to judicial scrutiny. Nonetheless, the data is limited and results are mixed. Broader and deeper research is, therefore, vital to development of balanced policies that address realities of consumer contracting culture.

APPENDICES: SURVEY RESULTS RELATED TO POST-PURCHASE CONTRACTING*

APPENDIX A: DEMOGRAPHIC INFORMATION

Age

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
18–24 yrs old	19	6.2	6.2	6.2
25–29 yrs old	16	5.2	5.2	11.4
30–39 yrs old	40	13.1	13.1	24.5
40–49 yrs old	73	23.9	23.9	48.4
50–59 yrs old	81	26.5	26.5	74.8
60–69 yrs old	54	17.6	17.6	92.5
70 yrs or over	23	7.5	7.5	100.0
Total	306	100.0	100.0	

Household Income

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid:				
less than $20,000	43	14.1	17.1	17.1
$20,000–$29,999	33	10.8	13.1	30.3
$30,000–$39,999	43	14.1	17.1	47.4
$40,000–$49,999	32	10.5	12.7	60.2
$50,000–$59,999	22	7.2	8.8	68.9
$60,000–$74,999	26	8.5	10.4	79.3
$75,000–$99,999	24	7.8	9.6	88.8
$100,000–$149,999	23	7.5	9.2	98.0
$150,00+	5	1.6	2.0	100.0
Total	251	82.0	100.0	
Missing System	55	18.0		
Total	306	100.0		

* I thank Jeffrey Boman for his assistance with data analysis.

Marital Status

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Single, never married	58	19.0	19.0	19.0
Carried	150	49.0	49.0	68.0
Separated/divorced /widowed	75	24.5	24.5	92.5
Domestic partnership	23	7.5	7.5	100.0
Total	306	100.0	100.0	

Employment Status

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Full-time	129	42.2	42.2	42.2
Part-time	49	16.0	16.0	58.2
Not employed	128	41.8	41.8	100.0
Total	306	100.0	100.0	

Education Level

	Frequency	Percent	Valid Percent	Cumulative Percent
Some high school	5	1.6	1.6	1.6
High school grad	34	11.1	11.1	12.7
Some college	135	44.1	44.1	56.9
College degree	78	25.5	25.5	82.4
Some postgrad	17	5.6	5.6	87.9
Master's degree	27	8.8	8.8	96.7
PhD/law/prof degree	10	3.3	3.3	100.0
Total	306	100.0	100.0	

Respondent Occupation

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Exec/upper mgmt	12	3.9	4.5	4.5
IT/MIS professional	11	3.6	4.1	8.6
Doctor/surgeon	2	0.7	0.7	9.4
Educator	11	3.6	4.1	13.5
Homemaker	33	10.8	12.4	25.8
Student	13	4.2	4.9	30.7
None of the above	168	54.9	62.9	93.6
Small business owner	17	5.6	6.4	100.0
Total	267	87.3	100.0	
Missing System	39	12.7		
Total	306	100.0		

Racial/Ethnic Identification

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Unspecified	45	14.7	14.7	14.7
Other	6	2.0	2.0	16.7
Hispanic	6	2.0	2.0	18.6
Multi: hispanic/other	2	0.7	0.7	19.3
Pacific islander	2	0.7	0.7	19.9
Indian	2	0.7	0.7	20.6
Multi: hispanic indian	1	0.3	.3	20.9
Asian	3	1.0	1.0	21.9
Black	2	0.7	0.7	22.5
White	228	74.5	74.5	97.1
Multi: white/other	1	0.3	0.3	97.4
Multi: white/hispanic	4	1.3	1.3	98.7
Multi: white/pacific/hispanic	1	0.3	0.3	99.0
Multi: white/indian	2	0.7	0.7	99.7
Multi: white/indian/hispanic	1	0.3	0.3	100.0
Total	306	100.0	100.0	

Gender

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Male	103	33.7	33.7	33.7
Female	203	66.3	66.3	100.0
Total	306	100.0	100.0	

APPENDIX B

Section 2, Question 1: Think about when you last bought an electronic entertainment item such as a television, DVD player, VCR, iPod, stereo, or stereo equipment. Did you purchase this item at a store, on the Internet, or through other means?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
In store	249	81.4	81.4	81.4
Over Internet	42	13.7	13.7	95.1
Other	3	1.0	1.0	96.1
Never purchased this type of item	12	3.9	3.9	100.0
Total	306	100.0	100.0	

APPENDIX C

Section 2, Question 1 Store(a)–(f): If you purchased the item at the store, which of the following choices describe what you recall about any purchase or contract terms you noticed at any point before or after the purchase? Check all that apply (you may find more than one applies because terms covering one purchase may appear at various times and in various ways).

	Frequency	Sample Size	Valid Percent
Terms were provided before I purchased	75	249	30.1
Terms were in box/packaging	77	249	30.9
Terms were on bill or invoice	48	249	19.3
Terms were explained to me by a sales person	94	249	37.8
I did not notice any terms at any point	39	249	15.7
Other	2	249	0.8

APPENDIX D

Section 2, Question 1 Internet(a)–(h): If you purchased the item on the Internet, which of the following choices describe what you recall about any purchase or contract terms you noticed at any point before or after the purchase? Check all that apply (you may find only one that applies, or you may find more than one applies because terms covering one purchase may appear at various times and in various ways).

	Frequency	Sample Size	Valid Percent
Terms on screen; had to indicate acceptance	10	42	23.8
Terms provided through link; had to indicate acceptance	4	42	9.5
Terms on screen; did not have to indicate acceptance	6	42	14.3
Terms provided through link; did not have to indicate acceptance	4	42	9.5
Terms in the box or packaging	9	42	21.4
Terms on the bill or invoice	4	42	9.5
Did not notice terms at any point	12	42	28.6
Other	3	42	7.1

APPENDIX E

Section 2, Question 1, Store (e) and Internet (g). 17.5% of the total sample of store and Internet purchasers reported never seeing any terms before or after they purchased their items. This represents the 39 individuals from the store purchasers that never noticed any terms and the 12 individuals from the Internet purchasers that never noticed any terms. Therefore, 51 individuals out of our sample of 291 that reported buying an electronic item did not notice any terms at any point before or after purchase.

	Frequency	Sample Size	Valid Percent
Did not notice any terms (Store)	39	249	15.7
Did not notice any terms (Internet)	12	42	28.6
Total that did not notice any terms	51	291	17.5

APPENDIX F

Section 2, Question 1c: Did you read the purchase terms ***before*** *you bought this item?*

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
No	169	55.2	58.3	58.3
Yes	121	39.5	41.7	100.0
Total**	290	94.8	100.0	
Missing System	16	5.2		
Total	306	100.0		

APPENDIX G

Section 2, Question 1d: *If you answered "yes" to 1c, did you consider any of these terms important in deciding whether to complete the purchase of the item?*

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
No	62	20.3	52.1	52.1
Yes	57	18.6	47.9	100.0
Total***	119	38.9	100.0	
Missing System	187	61.1		
Total	306	100.0		

** Total is out of 290 and not 291 because one individual failed to move on and answer this question.

*** This is out of 119 individuals. Above, 121 individuals said yes to 1c and should have answered this question. However, two individuals failed to move on and answer this question.

APPENDIX H

Section 2, Question 2(a)–(h): Regardless of how you got the card, please indicate which of the following choices describe what you recall about any contract terms with respect to the credit card. Check all that apply (you may find only one that applies, or you may find more than one applies because again, terms may appear at various times and in various ways).

	Frequency	Sample Size	Valid Percent
Had to sign contract in mail before receiving card	76	264	28.8
Had to sign contract at bank before receiving card	32	264	12.1
Had to agree to terms on computer screen before receiving card	61	264	23.1
Had to agree to terms that could be accessed through link	24	264	9.1
Terms on computer screen; did not have to indicate acceptance	11	264	4.2
Terms accessible through link; did not have to indicate acceptance	13	264	4.9
Terms were sent in mail/email after card received	83	264	31.4
Did not notice any terms at any point	20	264	7.6

APPENDIX I

Section 2, Question 2b: If participants had received contract terms at some point in the process of getting a card, participants were asked if they read those terms BEFORE or AFTER getting the card?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
No	66	21.6	27.0	27.0
Yes	178	58.1	73.0	100.0
Total	244	79.7	100.0	
Missing System	62	20.3		
Total	306	100.0		

APPENDIX J

Section 2, Question 2c: If you answered yes to 2b, when did you first read the terms?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Before got card	125	40.8	70.6	70.6
After got card	52	17.0	29.4	100.0
Total	177	57.8	100.0	
Missing System	129	42.2		
Total	306	100.0		

APPENDIX K

Section 2, Question 2d: If you read the terms before you got the card, what, if any, terms did you consider important in deciding you wanted the card?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
No terms	30	9.8	25.0	25.0
Listed terms	90	29.4	75.0	100.0
Total	120	39.2	100.0	
Missing System	186	60.8		
Total	306	100.0		

APPENDIX L

Section 2, Question 2e: If you read the terms either again or for the first time after you had a question or problem with the card, what, if any, terms were important regarding your question or problem with the card?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
No terms	122	39.9	73.9	73.9
Listed terms	43	14.1	26.1	100.0
Total	165	53.9	100.0	
Missing System	141	46.1		
Total	306	100.0		

APPENDIX M

Section 2, Question 3: Now consider your purchases generally, and various terms you have noticed when buying products and services. How important were these terms to you in helping you make purchasing choices?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	96	31.4	31.5	31.5
Somewhat important	139	45.4	45.6	77.0
Minor importance	52	17.0	17.0	94.1
Not important	18	5.9	5.9	100.0
Total****	305	99.7	100.0	
Missing System	1	0.3		
Total	306	100.0		

APPENDIX N

Section 2, Question 4: Are you more likely to read purchase terms when you receive them over the Internet, through the mail, or at a store?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Internet	63	20.6	20.7	20.7
Mail	59	19.3	19.3	40.0
Store	43	14.1	14.1	54.1
Never read	21	6.9	6.9	61.0
Always read	119	38.9	39.0	100.0
Total*****	305	99.7	100.0	
Missing System	1	0.3		
Total	306	100.0		

**** Total is out of 305 because one participant failed to answer this section of survey.

***** Total is out of 305 because one participant failed to answer this section of survey.

APPENDIX O

Section 2, Question 7: Think generally about the times when you have looked at contract terms at any point with respect to your purchases of products or services. Were any of the terms important to you? Indicate how you generally view the importance of the following types of terms.

Price

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	252	82.4	83.2	83.2
Somewhat important	50	16.3	16.5	99.7
Minor importance	1	0.3	0.3	100.0
Total	303	99.0	100.0	
Missing System	3	1		
Total	306	100.0		

Warranties

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	236	77.1	77.9	77.9
Somewhat important	61	19.9	20.1	98.0
Minor importance	5	1.6	1.7	99.7
Not important	1	0.3	0.3	100.0
Total	303	99.0	100.0	
Missing System	3	1.0		
Total	306	100.0		

Fees and Penalties

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	218	71.2	71.9	71.9
Somewhat important	72	23.5	23.8	95.7
Minor importance	13	4.2	4.3	100.0
Total	303	99.0	100.0	
Missing System	3	1		
Total	306	100.0		

Interest Rate for Credit Payment

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	227	74.2	74.7	74.7
Somewhat important	48	15.7	15.8	90.5
Minor importance	15	4.9	4.9	95.4
Not important	14	4.6	4.6	100.0
Total	304	99.3	100.0	
Missing System	2	0.7		
Total	306	100.0		

Terms for Return

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	201	65.7	66.6	66.6
Somewhat important	85	27.8	28.1	94.7
Minor importance	13	4.2	4.3	99.0
Not important	3	1.0	1.0	100.0
Total	302	98.7	100.0	
Missing System	4	1.3		
Total	306	100.0		

Terms for Cancelling Services

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid				
Very important	205	67.0	67.7	67.7
Somewhat important	84	27.5	27.7	95.4
Minor importance	13	4.2	4.3	99.7
Not important	1	0.3	0.3	100.0
Total	303	99.0	100.0	
Missing System	3	1.0		
Total	306	100.0		