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ONE-WAY CONTRACTS: CONSUMER PROTECTION WITHOUT LAW

Omri Ben-Shahar*

ABSTRACT

What if consumer contracts were legally enforceable only against the consumers, but not against the business? This paper, part of my project on the “myths of consumer protection,” describes a regime of “one-way contracts”—contracts between consumers and business to which only consumers are bound, the business is not. A breaching business would face no contractual liability. The paper argues that many consumer contracts are already disguised one-way contracts. It then demonstrates the variety of alternative consumer protections devices that would emerge in the total absence of legal protection. In a one-way contracts world, transactions will be redesigned to limit consumers’ exposure to breach; insurance and bond services would develop to protect aggrieved consumers; reputation services and rating intermediaries would have a greater role; and public enforcement could potentially fill some of the remaining deterrence gaps. Thus, despite weakening the legal protections, the one-way contracts regime has the potential to improve consumer well being. The paper concludes that the focus within the consumer protection movement on enhancing access to, and the scope of, legal remedies may be misguided.

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INTRODUCTION

Suppose standard form contracts between businesses and consumers where “one-way contracts”—enforceable only against one party, not the other. You probably think: enforceable only against the business, not the consumers—an extreme version of the consumer-protection approach that has been percolating broadly. But I actually have in mind the opposite one-way contract—*enforceable only against the consumers, not against the business*. The consumers are bound, unable to escape any of their obligations under the substantive terms or the fine print: they have to pay the contract price, the hidden fees, abide by any restrictive provisions (as long as they are legal), commit to the full term of the service, and so on. The business on the other hand, is not legally bound to anything it promised, and aggrieved consumers are unable to legally enforce any of their rights that appear in what we normally think as the “contract:” not timely delivery, not the return policy, not the warranty, not even the conforming delivery itself. No court-imposed remedy whatsoever.

How in the world can this make sense (even as a thought experiment)? The reality of the market is already such that businesses have greater power and sophistication. Surely, consumers, not the business, are on the side that needs protection. They are less informed, less well funded, plagued by collective action problems, and overall less able to secure compliance with their side of the bargain. If anything, contract law should remedy this asymmetry, not reflect it. Why, then, go astray and imagine a regime of one-way contracts in which only consumers are stripped of the power to sue for breach of promise, thus are further disarmed vis-à-vis their mighty business opponents?

I argue that the concept of one-way contracts is a useful concept that delivers two essential insights. The first insight is a positive-descriptive metaphor—a way to capture much of the reality of business-to-consumer relations and to investigate its effects. The second insight is normative, suggesting that further gravitation towards a one-way contracts module could actually benefit consumers. Rather than augmenting the legal remedies that consumers have under contract law (the stated goal of the consumer protection movement), the social controls of the business-to-consumer deal ought to be restricted to techniques that, unlike contract law, actually work.

The thesis begins with the quite obvious observation that in the existing legal landscape, the power of consumers to legally enforce the terms of the contract provides a very shabby safety cushion. For the great majority

of consumers, the presence of a “contract” accompanying the goods or services, and of contract law at the background, is irrelevant. Recognizing this weakness of the law, solutions can go in one of two ways. One way is to strengthen contract rights and contract law’s involvement. In this spirit, consumer protection oriented reforms that are often advocated include better disclosures, more effective rituals of assent, stronger remedies for breach of contract, and mandatory substantive terms to assure minimum standards. Elsewhere, I expressed doubts concerning the effectiveness of some of these efforts.¹

A second way to address the weakness of contract law in the consumer area is to abandon contract law as the locus of consumer protection, and to seek protection from alternative sources, which do not rely on private enforcement of the contract by aggrieved consumers. A significant component of my thesis in this paper is to describe the value and the trajectory of alternative, non-legal protections of consumer rights. What are these non-legal protections?

First, if consumer transactions are impossible to legally enforce, they might be designed differently, to address consumers’ anxiety about their non-rights. Recognizing that they have no legal recourse, consumers might be reluctant to pay upfront and await, or pray for, timely conforming delivery. Instead, consumers might require (and businesses might accord them) delivery and the opportunity to inspect prior to making commitments or payments. Instead of paying and then relying on promises and assurances—the legal guaranty—consumers will prefer the transaction to be carved up into pieces with corresponding “progress commitments.” One can imagine that instead of buying a computer for \$2000 and putting such big payment at risk, consumers will lease computers for \$250 per year, with the option to terminate each year. Innovations in transactions costs technology can make the divisibility of commitment efficient.

Second, private bonds and assurances can develop to secure the consumers against non-performance. In the same way that eBay Motors provides disappointed buyers a fund from which they can recover the lost payment when the seller takes the money and runs, market makers and intermediaries might offer bonds and set up recovery funds to induce buyers to enter the market. If eBay offers a \$2000 per-transaction bond (financed by a fee on sellers), a buyer might still buy, rather than lease, the \$2000

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¹ Omri Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 Eur. Rev. Contract Law (2009); Omri Ben-Shahar and Carl Schneider, *The Failure of Mandated Disclosure* (Mimeo., University of Chicago Law School 2009)

computer, but do it on eBay. Of course, intermediaries might in turn ask for assurances and bonds from sellers to secure their own risk. But the emergence of such intermediaries would accord them market power against sellers, which would be harnessed to warrant consumers' satisfaction. In this example, eBay would be in effect consumers' enforcement agent.

Third, consumers may have a greater need to insure against bad performance by the business (assuming, again, that insurance transactions—another species of consumer-to-business contract—are effectively enforceable). A buyer of a \$2000 computer might be offered, say, a \$100 insurance policy with coverage for some common problems. In this environment, insurers will have a role that goes beyond passive coverage. They will be able to profit more if they monitor the businesses whose opportunism is the insured peril. I will argue that even if insurers are not subrogated to the right to sue the breaching business, they can use other methods to deter bad behavior, e.g., by threatening to blacklist the business if its record slips, refusing to insure its transactions in the future, and thus alerting consumers and rendering the non-performance risk more salient. Like in many insurance markets, insurers can aggregate and share actuarial data on the non-performance risk that businesses pose, thereby improving the dissemination of information and accurate pricing. The insurance premium can be \$100 for the bad type computer vendor, \$50 for the good.

Fourth, importantly, without effective legal protections consumers have to rely even more on the performance reputation of businesses. Thus, the ability of a business to attract new customers and to charge higher prices would depend on the reliability of feedback scores, ratings, consumer surveys, reports by watchdog groups—that is, on the aggregate measures of the scattered experiences of past customers. These methods exist even in areas in which contracts are enforceable two-way, but they are particularly valuable and more widely available in areas in which consumers fear that the legal rights are worthless. For example, many people buy \$2000 computers on eBay (where it would be close to impossible to get a court remedy for breach), but only because they can check that the seller's feedback score for transactions of this type is satisfactory. Further elimination of legal protections would necessarily breed more of these reputation devices.

Fifth, businesses might have a stronger incentive to go beyond their (legally binding) rights, to “forgive” consumers who request special accommodations, to refrain from enforcing to the letter fine print and the hidden fees—in short, to act cooperatively in the shadow of their enforceable legal rights. Such conduct would be intended to infuse consumer confidence

especially among the otherwise reluctant consumers who, themselves without enforceable contractual rights, are rationally anxious. Thus, ironically, the absence of enforceable contractual rights could boost the bottom line average value that consumers get, all else equal.

Recognizing these (and several other) consumer protections mechanisms, the paper turns to offer its main normative claim. I argue that consumers can potentially benefit if their legal rights, which are almost impossible to enforce in court anyway, would be stripped altogether. Consumer contracts could be transformed into one-way contracts, in which only the business acquires legally enforceable rights, without harming consumers. In fact—and this is the more ambitious normative claim—taking away these legal rights by transforming consumer contracts into one-way contracts could improve matters for consumers. The absence of legal rights could alert consumers and bolster the emergence of the more effective non-legal consumer protections that might otherwise be slow to develop. It would also solve a collective action problem that may stand in the way of more robust non-legal protections.

Before exploring the alternative safeguards that could develop in a one-way contracts world, I argue that this regime is not as bizarre as it might initially seem. In fact, some existing markets can be characterized as *de facto* one-way contract sectors. I am not referring merely to the phenomenon that the most contractual rights that consumers get are ineffective and have no threat value in a lawsuit. Rather, I am referring to consumer transactions that are largely done without a “contract,” at least not one that protects the consumer. Think about supermarket purchases. There is, of course, a legal contract between the consumer and Giant Foods. A staple of first-year contracts courses is deciphering the offer, acceptance, and contract formation moment in such generic transactions. But this is merely a “pedagogical” contract. Unlike many other consumer transactions, in the supermarket there is no boilerplate involved, no click ‘I Agree,’ no shrinkwrap, no additional term-of-service record attached to deal—no explicit moment of assent. Pay-the-labeled-price-and-it’s-yours, this is the contract. How often do consumers sue supermarkets? What can they sue the supermarket for? What are the warranties? Are gap-fillers ever invoked? Have you ever heard of expectation damages assessed against, or disclaimed by, supermarkets? Rarely do these issues come up, because supermarkets will normally accommodate aggrieved shoppers by replacing items or refunding money, and if they don’t they will probably lose business. These are not pure one-way contracts, but many consumers will not know the difference. I will argue that

the same is true with respect to other common consumer transactions, such as taxicab services and restaurants. Consumers do not (and probably cannot) recover for breach of promise.

While the paper takes a highly skeptical view of the role of contract law in consumer protection, it is by no means an “anti-consumer” manifesto. On the contrary: the argument in favor of one-way contracts is not based on the interests of businesses. If my argument is correct, businesses don’t care much whether contracts are one- or two-way, since they do not pose a significant threat of liability either way. The one-way contract thesis is friendly to consumer interests because it suggests that meaningful protection can and should be achieved by the design of more potent substitutes. Within contract law, the plight of consumers is often regarded as a basis for enhancing contract enforcement and of bolstering the access of consumers to breach of contract remedies. The one-way contract idea suggests that this is a misguided priority, barking up the wrong tree. Consumer protection ought to be accomplished by abandoning contract claims.

Part I of this Essay begins with a brief account of the asymmetric enforcement problem posed by consumers-to-business contracts, and why this problem is not solved by standard mechanisms like class actions. Part II of this Essay introduces the conceptual structure of one-way contracts. Which contracts would this regime apply to? Which terms and which violations will be unenforceable? Part III explores some real life examples for the one-way contracts regime. Part IV is the core of the Essay: it discusses the alternative protections that would emerge in the absence of legal enforcement, to safeguard the interests of consumers. Part V explains why the one-way contract structure is necessary to fire up these alternative protections. Finally Part VI concludes, commenting on the value of the one-way contracts template as a conceptual framework.

I. THE PROBLEM WITH CONSUMERS-TO-BUSINESS CONTRACTS

The phenomenon of standard form contracting between consumers and business (B2C) is as troubling for contract law as it is viable for the economy. Much ink has been spilled to explain why standard form contracting is desirable, analogizing it to standard form production of goods. Plenty of attention has also been drawn to the dangers involved in standard-form, fine-print contracting—what many scholars and judges identify as “contract of adhesion.” Bad things can be buried in the boilerplate, and when the time comes for the business to fulfill its part of the obligation consumers might be

surprised to learn that what they thought they bargained for was meticulously drafted away in fine print.

Sometimes the problem with B2C contracts is the bad terms. These are the pro-business terms of the contract: the disclaimers, the limitation of rights, the restrictions on use, the strict procedures, the narrow definitions, and the like. The problem here is that the terms *are* enforceable even when they are quite nasty, and even if consumers expected something better. Other times, the problem with B2C contracts is the opposite: there are good terms in the contract—the pro-consumer terms—securing consumer rights (e.g., the right to get the product as described, the express warranty, property rights, rescission rights), but it turns out that they are *not* easily enforceable. Few if any consumers can overcome the runarounds that a reluctant business, if it decides not to fulfill its obligations, puts them through. Enforcement is costly and largely impractical. In the absence of a credible threat to sue, businesses are undeterred and consumers' contractual rights are in jeopardy.

A prominent occupation of modern contract law is designing solutions to the problems of standard form contracting and advocating protections for frustrated consumers. As to the problem of the business' excessive benefit in the bargain, solutions range from providing consumers opportunities to read the contract, to weeding out the truly unconscionable pro-business terms through surgical judicial ex post intervention. But what about the problem of the under enforced consumer end of the bargain—can the law boost the implementation of the consumer side of the deal?

There are some obvious problems with enforcement. Most contractual claims are small. Damages, even if measured by the expectation measure, are too insignificant to justify a costly suit (whereas large consequential damages are routinely limited in a conspicuous way in the contract). Theoretically, it is possible to aggregate claims into class actions, but the impediments in the contractual setting are significant. For one, it only applies to systematic violations. When the individual claims are small, members of the class are hard to identify and only a small compensatory effect is achieved. And given that a substantial component of the outcome consists of attorneys' fees, there is a non-trivial problem of separating the meritorious suits from the frivolous ones. The fact is that despite a broad push for class litigation in state consumer protection laws, there is a prevailing sense that consumers' plight has not been answered.

Bolstering consumer protection through contract law runs into the additional problem that businesses can draft around various limitations set by law. For example, if the law tries to offer additional protection to

consumers by increasing remedies, businesses can conspicuously limit the remedies. If the law installs procedures securing access to justice, businesses can draft their way out of court through choice of law and mandatory arbitration clauses. If the law finds such arbitration clauses unconscionable and vacates them, business again resort to redrafting to introduce incremental changes to these clauses so as to make them legally tolerable. The target for consumer protection is elusive, the business parties are sophisticated and well-counseled, and as long as the law is unwilling to fully regulate the contract through mandatory terms, there is no clear solution.

Indeed, recognizing that the problems with private enforcement of consumers rights is so basic, legislators have sought to redress them by providing a host of statutory non-disclaimable remedies and procedures, through the enactment of consumer protections laws. Initially, these were public law procedures, initiated by agencies and without direct compensation to consumers. Largely through administrative rulemaking, the FTC developed definitions for unfair and deceptive practices and exercised its powers to enjoin and sanction offending businesses.² Subsequently, all states followed and enacted Consumer Protection Acts (CPAs), taking a significant step further.³ These “little FTC acts” as they are known—often expand the remunerated list of practices that are presumptively unfair or deceptive, but more importantly they allow aggrieved consumers to bring “private attorney general” actions against alleged offenders and make it much easier than traditional contract law to recover damages, including punitive damage and attorney fees. They also render the class action strategy easier to apply.

These remedies are effective. In fact, some commentators worry that they are overly effective, leading to excessive and frivolous suits.⁴ In California, for example, these worries led to a successful referendum to limit “shakedown” suits against businesses.⁵ Indeed, one of my arguments below is that strengthening consumers’ power to bring contractual suits is unnecessary because suits under CPAs accomplish more than contract breach suits can ever hope to. But while CPAs provide legal redress in many

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² Victor E. Schwartz and Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 7 (2005).

³ See, e.g., the Texas Deceptive Trade Practices Act, 17 Tex. Bus. & Com. Code §§17.41— 17.63.

⁴ Schwartz & Silverman, *supra* note 2; Henry N. Butler and Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions under State Consumer Protection Acts* (mimeo. 2008).

⁵ See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE AND SUPPLEMENT TO THE STATEMENT OF VOTE, 2004 PRESIDENTIAL GENERAL ELECTION, NOV. 2, 2004, at 45 (2004), www.ss.ca.gov/elections/sov/2004_general/ssov/formatted_ballot_measures_detail.pdf (Proposition 64 passed with the support of 59.0% of the votes).

contexts, they are not equivalent to contract breach remedies. For one, they apply only to a subset of what is normally regarded as breach of contractual duties. That is, they apply to systematic conduct, mostly precontractual, that is intended to mislead consumers by false promises and deceptive descriptions. CPA causes of actions are aimed at blameworthy behavior by business, often intentional and systematic deception; they thus add an element of fault that is usually not necessary for a showing of breach of contract.

Further, by allowing punitive or statutory damages and authorizing private attorneys general to represent the aggrieved parties, CPAs conform more closely to the deterrence model of criminal law than to the compensation model of private law. Their purpose is to protect the integrity of the public sphere—the consumer market—not the individual victim. Also, even though the incidence of CPA suits increased dramatically in recent years, it is still a far cry from systematically addressing contract breach. The vast majority of consumers who suffer breach of contract by the business are not aware of their CPA rights, do not file or join CPA suits, and will not benefit by the remote chance that there was a filing of a CPA suit by others.

The broad recognition that traditional notions of contract law fail to adequately protect consumers is further demonstrated by the shift towards regulation of the terms of the consumer contract. It is increasingly believed that even in competitive markets consumers agree to contract terms that are undesirable.⁶ To correct for these market failures, many aspects of consumer contracts are regulated and the terms are mandated by the government. For example, the European Community has promulgated rules that forbid particular terms from appearing in consumer contracts.⁷ Similarly, the Obama administration has put forward a set of proposals to regulate consumer financial contracts by mandating not only disclosure, but also the substance of important terms.⁸ Whether these minimum standard regulations can help consumers vindicate their contractual rights is questionable. A business that breaches a mandated contractual right of the consumer still needs to be sued. A contractual right that is effectively

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⁶ For a recent economic analysis of anticompetitive use of contract language, see David Gilo and Ariel Porat, *The Unconventional Uses of Transactions Costs*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 66 (O. Ben-Shahar, Ed. 2006).

⁷ See, e.g. DCFR Intr. 27-28; DCFR II.-9:411 (“Terms which are presumed to be unfair in contracts between a business and a consumer”); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁸ See, e.g., *Credit Card Accountability Responsibility and Disclosure Act of 2009* [cite]; See also FINANCIAL REGULATORY REFORM 15 (Dept of Treasury 2009).

unenforceable is not any more secure by virtue of being government mandated.

Indeed, a substantial part of recent reform proposals is to return to agency enforcement as an alternative to private action by harmed consumers. For example, the proposed new Consumer Financial Protection Agency (CFPA) would have its own supervisory and enforcement authority with subpoena powers and ability to enforce compliance with its regulations in the same way that the Department of Justice enforces civil rights statutes.⁹ Whether or not these reforms would help consumers can be debated, but they do display a fundamental belief that contract law and private actions do not have enough horsepower to carry the burden of consumer protection.

II. ONE-WAY CONTRACTS: THE TEMPLATE

This section describes the legal concept of one-way contracts. The basic feature is simple: the terms of the transaction are enforceable only by one party, the business. They are not enforceable by the other party, the consumer. Thus, if the consumer breaches the terms of the contract, say, by failing to make timely payment, the business can resort to legal remedies. The business can sue the consumer, employ collection agencies, and engage in any self-help measure that is legally available. But if it is the business that breaches the terms of the contract, say, by failing to make timely delivery or by tendering non-conforming goods or services, the consumer cannot resort to legal remedies for breach of contract. Other legal claims, if available, may apply (tort, administrative, criminal), but not consumer-oriented contract remedies.

A. Transforming Consumer Contracts into One-Way Contracts

Consider the standard fine print contract between a business and a consumer, say Apple iTunes “Terms of Service.”¹⁰ The agreement contains numerous terms that are aimed to secure the rights and interests of the business, such as convenient choice of law or forum, disclaimer of warranties, ownership of intellectual property, severe limitations on consumer usage and distribution rights (hence the right to sue when consumers violated these limitations), termination and modification of service rights, and, of course,

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⁹ FINANCIAL REGULATORY REFORM, Id., at 59-60.

¹⁰ This is the “clickwrap” contract users accept when they sign up to have an iTunes account and download the software to play music or movies. It is modified from time to time. The updated version can be viewed at <http://www.apple.com/legal/itunes/us/service.html>

the right to charge consumers for purchased item. The agreement also contains terms that confer rights to consumers. Primarily, the consumer acquires downloadable content from a modest price, to be delivered in a convenient and immediate manner. The consumer also acquires rights drafted in the fine print, such as the number of authorized copies of music tracks consumers can make (“burn”), protection of privacy (promise not to sell information about the consumer to third party advertisers), or the right to receive non-defective service or to obtain a refund otherwise.

Under the one-way contracts regime, this contract will be enforceable whenever iTunes has a complaint, e.g., when the consumer fails to make the proper payment, makes unauthorized copies, or distributes files without permission. In these situations, iTunes will be able to apply both its legal remedies to collect damages and self-help measures through digital controls. The contract will not be enforceable, however, if it is the consumer who has a complaint. If, for example, it turns out that the file was defective or not as described and iTunes refuses to issue a replacement or a refund, the consumer would have no legal recourse. Worse, if the business violates its data privacy commitments and collects unauthorized personal information in order to sell it to marketers, again the consumer would have no contract remedy and would not be able to sue and recover damages.¹¹

Here are a few more examples how standard consumer contracts would look under a one-way contract regime:

Airlines will have the right to collect the full payment for the travel from passengers, but any promise to leave on time or to arrive in the destination on time will not be legally enforceable. If they promise that flight 001 would land in a specific destination, they can breach the promise and land in a different destination. None of the consequential harm to the passengers would be legally recoverable within a contract breach action.

Phone companies will have the right to collect timely payment for the services and any termination penalty that is valid under general rules of contract law, but their own obligations to provide adequate uninterrupted service or to refrain from violation privacy concerns will be unenforceable.

Banks and lenders, including credit card issuers, will have the right to collect all the fees and interest rates that they secure in the agreement, but their customers will not have a legal right to enforce the symmetric promises to, say, pay interest on deposits.

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¹¹ Although the privacy violations may give rise to claims under statutory law, e.g., Children Online Privacy Protection Act, 16 C.F.R. 312.5(a)(1) (internet privacy); and Privacy of Consumer Financial Information, 16 C.F.R 313.8.

Sellers of consumer goods (TVs, appliances, computers, etc.) will have the right to collect payment but buyers will not have a legal right to enforce the express and implied warranties, the return policy, low price guarantees, and the like.

In all these examples, the businesses have the right to be paid under the contractually stipulated terms. If the payment was made in advance (as in the iTunes or the TV purchase examples), the business does not need an additional layer of legal protections to enforce its rights. But if the payments are deferred or made on a periodic basis (as in the phone service example) the business needs the legal right to enforce full payment when it is otherwise not made. From the consumers' perspective, in all these examples they receive an "executory" promise—one that is to be performed later, after the contract is signed and some of the money is paid. Rarely would these consumers have self-help measures that would completely shield them from loss. Even when they can withhold some future payment, it is likely that some payment was already made and some reliance was already sunk. Thus, in all these examples, legal enforcement is the standard mechanism to safeguard the otherwise insecure promise consumers received for their money. One-way contracts eliminate this safeguard.

B. Drawing the Line between Business' and Consumers' Rights

But what happens if the business goes beyond its legal right and takes more than it is entitled to? What happens if, say, the business charges more than the authorized amounts from the consumer's credit card—outright fraud!—and, based on the agreement, the consumer is seeking redress? Can the consumer recover the excess charge? The right to be paid no less than \$0.99 per track is iTunes' right and it is fully enforceable, but the right not be charged more than \$0.99 per track is the right of the consumer. The consumer probably shopped around for the preferred deal and chose this particular transaction based largely on the price. Can the consumer enforce this right? Does the one-way contract bar recovery by the consumer even in a case of theft by the business?

The absence of enforceable rights for consumers does not mean lawlessness. Even in a one-sided boilerplate, the limits of the business' rights are clearly marked. The business is entitled to collect the posted price of the service (\$0.99 per track), not more. If the business acts fraudulently and collects \$99 instead of \$0.99, the consumer has a right to recover the funds in excess of its contractual obligation. Restitution of \$98.01 is not a contractual

remedy—it is the same remedy that protects one’s property rights when they are illegally expropriated. Whether it is a stranger or a contractual partner that embezzled the consumer’s money, recovery is available.

This idea, that some consumer rights are “property” rights and not merely contractual seems reasonable, but it creates a line drawing problem: which rights can consumers enforce by law (“the right not to be charged more than \$0.99 per track”) and which rights are not enforceable by law (“receive the selected track without defects”). It is not clear that a coherent line can be drawn. What if the consumer acquired a track but the iTunes, by activating a digital control, caused it later to malfunction or be deleted. Does the consumer have a property right that can no longer be interfered with?

Conceptually, one way contracts deprive consumers of any contractual remedy, but they leave in tact any other legal remedy that is not founded in the contract. First, some of the anti-consumer practices employed by the business are likely to violate state and federal consumer protection laws, anti-fraud legislation, and criminal laws. These statutes often provide separate cause of action to victims, and otherwise empower state attorneys to mount a concerted enforcement effort. If iTunes were to charge \$99 per track instead of \$0.99 it would potentially be liable under consumer protection laws.¹² Second, businesses that embezzle their clients’ assets, make unauthorized charges to their clients’ accounts, or destroy the value acquired by the consumers are committing torts. Here, the consumers’ right to recover the money or the property taken illegally is not contractual. Rather, it is a restitutionary remedy, attached to their property in rem. The consumers are not claiming their property based on the contract. They are claiming their property based on the absence of any contractual obligation in which they agreed to part with this property.

I am drawing a distinction here between contract claims on the one hand, which would be eliminated, and all other legal claims—tort, restitution, public law—which would remain in tact. This distinction is an approximation and does not rest on exact principles. Roughly, the idea is that non-contractual claims can potentially be large in magnitude and thus valuable and practical to the consumer. Even a \$5 contract can give rise to large tort and property claims against a misbehaving business. Still, a cleaner conceptual principle can be developed by proposing the elimination of not only contract claims, but all individual claims that are difficult to vindicate. The next section explores these boundary issues.

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¹² See, e.g., Michigan Consumer Protection Act § 3(1), MCL 445.903(1) (1976).

C. What Is a Business-to-Consumer Contract?

Not all contracts would be one-way. Business-to-Business (“B2B”) would, of course, be outside the one-way realm (for one, it’s not clear which way the one-way would go). They are mutually binding, if only because the right to recover under the contract is practically valuable. Consumer-to-consumer (“C2C”) contracts are also not one-way. It might be that some C2C transactions are in effect no-way contracts, practically unenforceable either way. When one individual sells a second hand item to another individual on craigslist.com or at a yard sale, there is little need and little value for a legally enforceable contract. Little need—because there is a moment of barter, when the good is exchanged for money after being inspected. It might fail to work, but this consequence is often within the reasonable expectations of buyers in such circumstances, reflecting an implicit allocation of risk, so there is no breach. Little value—because an aggrieved buyer who later discovers that the item was deceptively described would not likely go to court for redress. It’s too costly to sue, and the seller is often hard to track down.

In some circumstances, C2C contracts might be two-way contracts. Even though the aggrieved individual would still find it costly to sue, the other party—also an individual of little sophistication and means—might also find the cost to defend prohibitively costly and might settle. Further, some C2C transactions are of substantial value, as in the sale of residential property (although neither the individual buyer nor the individual seller of residential property are “consumers” in the normal sense of the term). When the value is substantial, suits are feasible and preserving the two-way contractual enforcement module is valuable.

The Business-to-Consumer contract (“B2C”) is a transaction between a sophisticated party on one side and an individual acting as a consumer on the other. The sophisticated party’s interest in the legal consequences of the deal go beyond this particular transaction, since it enters a multitude of similar transactions with many other one-time consumers. The sophisticated party also has the resources to engage in legal enforcement measures. It often engages the service of enforcement professionals—lawyers, collection agencies, and the like. Having sunk a fixed cost in setting up an enforcement apparatus, the business has a credible threat to enforce anytime the consumer breaches the contract, even when the stakes are low. The individual on the other side does not have the same repeat game angle. It also does not have the sophistication to know for sure what its legal rights are, whether they were breached, and to what extent would the alleged

breach entitle him to legal remedies. And, above all, the individual consumer does not have the resources to pursue any kind of litigation enforcement strategy. It is unlikely that an attorney will take the case on a contingency fee basis, given the small stakes. And the time, money, and psychic costs involved in pursuing a personal vendetta against the business is often prohibitive.

But not all transactions between consumers and business are subject to the enforcement barrier. For one, individuals sometimes enter contracts with business entities not in their capacity as consumers. An individual hiring a construction company to build a custom-designed house is often dealing at arms length with the business: choosing among custom bids, negotiating idiosyncratic terms, dictating contract language, exerting bargaining power, and so forth. The stakes are high and a lawsuit is a viable strategy in cases of breach by the business.

Thus, the B2C contract can be defined not according to the type of parties—"Business", "Consumer"—but according to the asymmetric enforcement power. It could be defined as any contract in which on one side stands a sophisticated party capable of pursuing legal remedies and on the other side stands an unsophisticated party unable to engage in legal enforcement. This can map on to a different set of parties than the typical business/consumer parties. Big business can exert similar asymmetric enforcement environments on non-consumers, on other business partners such as small suppliers or intermediates that are so dependent on continued business that they will not dare sue their partner. Still, in the remainder of this essay I will consider only asymmetric enforcement environments in which a consumer interfaces with a business. It is in these environments, I will argue, that consumers have protection strategies that outperform the meek legal remedies regime.

There are some transactions even between consumers and businesses that are hard to classify. Take as examples mortgage contracts, new car purchases, or the purchase of time share apartments. On the one hand, these are often standard form contracts in which consumers have the classic passive role in contract formation: no dickering over legal terms, non-readership of the boilerplate, failure to understand some of the deferred consequences. On the other hand, consumers do have substantial bargaining power in negotiating the price. And, importantly, if the business breaches the contract consumers usually suffer a large enough loss to justify the pursuit of contract remedies. Should these transactions be classified as one-way contracts?

At this point I will leave the line distinguishing some B2C transactions from others undrawn. Whether or not high-value B2C transactions like auto purchases and mortgage contracts ought to be treated as one-way or two-way contracts cannot be resolved as a matter of definition. Later, after exploring the alternative safeguards that consumers have, it will be possible to give a functional answer. Even high stakes transactions can be one-way contracts if effective consumer protection is available outside contract law.

D. Insurance Contracts

In a one-way contract regime, any B2C contract is not enforceable by consumers. This includes sales contracts, financial contracts, service contracts like communications, travel, and home improvement, and much more. It should not include, however, one type of B2C contract—the insurance contract. True, insurance transactions are some of the most extreme cases of asymmetric enforcement power, in which giant insurance conglomerates face off against unsophisticated individuals. Still, there are several reasons to let these contracts remain legally enforceable.

First, despite the asymmetric litigation power, individuals are often capable of pursuing litigation against insurance companies. The reason is that when the allegedly covered contingency materializes, the loss to the insured is substantial, worth the cost of suing, high enough to lure an attorney to take the case on a contingency fee basis. That is, even when the insurance company breaches the contract, there is only a small probability that the insured will experience this breach—the probability that the covered peril actually materializes. But the inverse of this probability is (roughly) the multiplier that defines the stakes to the insured, making it very large.

Second, in insurance transactions the “product” *is* the legal terms. In return for the money it pays the insured does not get any product enjoy or any other kind of “performance.” It gets nothing other than a promise to make contingent payments if some conditions occur—an elaborate “warranty” term. If the insurance policy is legally unenforceable, the insured will be receiving nothing for its purchase.

Third, even in mass insurance arrangements conducted under standard policies the right of the insured to receive contingent payment under the insurance policy is idiosyncratic. Since the right arises, and is defined by, some event or loss that occurred, the performance obligation of the insurance company to make coverage payments varies from case to case. It is wholly different than the obligation of, say, Comcast, to provide adequate

phone or high speed internet signal. Thus, despite the fact that insurance transactions are created with standard terms, they are often individualized and involve strong idiosyncratic elements (hence the importance of the neighborhood insurance agent as intermediary between the business and the consumer.) For one, this means that these are not the type of transactions in which individuals can compare the shopping experience of others to inform their own choices. It also means that individuals will not be able to rely on other market-oriented protections (to be discussed below) to provide a substitute for legal enforcement.

Indeed, it is instructive to note that in some consumer protections acts, the term “consumer transaction” is defined to exclude contracts of insurance. Thus, despite the fact that these contracts are generally for purposes that are primarily personal or household related, insurance is excluded.¹³

Finally, there is another reason why the one-way contract regime would not apply to insurance contracts. Even if the three reasons discussed above were not valid and insurance contracts were to be viewed as typical mass markets B2C contracts, a one way contract regime would need to make them enforceable. As I will argue below, one major way to substitute legal enforcement of contracts is to insure against the loss. I will argue that insurance can improve both the compensation and the deterrence roles that are intended to be advanced by contract law. The only way to make insurance available as a substitute for contract enforcement is to leave the insurance contract itself enforceable. This is not an artificial construct: insurance contracts can remain legally enforceable because they do not contain the same systematic failures that other B2C contracts have.

E. Mutuality

Is a one-way contracts regime reconcilable with legal doctrine? The main problem is the conflict with the doctrine of mutuality. Under this doctrine, which is an offshoot of the requirement of consideration in Anglo-American contract law, parties cannot enter a contract in which one side is bound and the other side is not.¹⁴ Such a scheme fails to satisfy mutuality, the contract is not enforceable, and the bound party is free from her obligation. One-way contracts are an extreme example of non-mutuality: the

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¹³ See, e.g., Indiana Deceptive Consumer Sales Act § 2(a)(1); Ohio Consumer Sales Practices Act § 1345.01(A).

¹⁴ E. ALLAN FARNSWORTH, CONTRACTS § 3.2 (4th Ed. 2004)

consumer is bound, the business is not. Accordingly, contract law would refuse to count these contracts as legally enforceable.

Technically, there might be ways to overcome the problem of non-mutuality. Generally, all that is required is that the business have some obligation to the client—that it would not have unfettered discretion to walk away from its obligations. The obligation may be to provide notice of its decision to terminate its performance,¹⁵ or to be bound to perform during some minimal initial duration, or, generally, to provide some measure of value to the consumer. If the business is bound to do something, its promise is not “illusory” and mutuality would be satisfied. Put differently, the problem of mutuality can be circumvented by inserting artificial obligations on the business, for the sole purpose of demonstrating that the business does not have complete freedom to disregard its obligation. All that is needed is the minimal quantum of obligation that counts for the mutuality doctrine.

That said, I am not sure how relevant is the problem of mutuality, or its technical solution, for the present study. It might be that the problem of mutuality is insurmountable, guaranteeing that the one-way contract regime would never be implemented; or it might be solved through some tinkering with the contract design. These are implementation problems. My inquiry here into the one-way contract module is not proposed as a blue print for reform. If it were, the non-mutuality “bug” would render the scheme worthless, or else the fixes would be crucial. Rather, this module is offered here as a challenge to mainstream consumer protection views, which aim to *strengthen* the legal remedies available to aggrieved consumers. The basic point is that consumer protection can be more successful if legal remedies are instead *weakened*. As I will now argue, one-way contracts may foster better ways to protect consumers against businesses. In this spirit, one-way contracts can be regarded as an *ideal type*, which may not be legally implementable but may nevertheless expose desirable directions for development and reform in the law.

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¹⁵ *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 37-38 (8th Cir. 1975)

III. REAL ONE-WAY CONTRACTS

One-way contracts are described here as a hypothetical regime, a species altogether different from the existing model of two-way contracts. But in an important sense already discussed, they are more than hypothetical. When consumers' rights to sue for legal remedies are impractical and ineffective, never invoked, one-way contracts describe an existing reality.

Are there situations in which consumers recognize that there is no legal recovery available against the business—that there are no enforceable rights—and yet continue to patronize the business? The answer, I believe, is that there are many such situations. Think, for example, about supermarket purchases. There is, of course, a legal contract between the consumer and the supermarket. So much so that contracts students were now routinely asked to practice their command of offer-and-acceptance doctrines by identifying the legal status of supermarket ads, store window and shelf displays—all as an exercise of identifying the time of contract formation. No doubt, a strict contract formation moment can be backed out even in a generic supermarket visit. But this is merely a “pedagogical” contract, which has almost no practical traction in the real world.

Unlike many other consumer transactions, in the supermarket there is no boilerplate involved, no click ‘I Agree,’ no additional term-of-service record attached to deal, you can’t even find any contract on the store’s website.¹⁶ There are almost no contract disputes on record that required court proceedings,¹⁷ no expectation damages, no express warranties, no risk-of-loss problems, in short none of the staple legal issues that accompany contracts for the sale of goods. Instead, there is a *deal*. Pay the price and the good is yours. Some stores provide accommodations, such as an opportunity to return the goods after a reasonable chance to inspect it, either for money restitution or for substitute goods. There might be, in the background, another set of contract issues between the consumers and the remote manufacturers. Suits against manufacturers are not uncommon. But it is unheard of that a supermarket would refer an aggrieved consumer to the remote manufacturer. Instead, supermarkets offer replacement or refunds, and then deal directly with the manufacturers. Are they operating as intermediates that assure the

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¹⁶ See, e.g., www.wholefoodsmarket.com, which does not contain any link to the contract that governs the retail grocery transactions. Contrast that with the websites for other retailers, such as www.bestbuy.com or www.dell.com, each of which contains links to the retail contract.

¹⁷ I did a Lexis check of New York and Federal cases showing “supermarket” or “grocer” and “breach /1 contract” or “warranty” or “Restatement /3 Contracts” or “UCC”.

quality of the product in the relationship between the consumer and the business/manufacturer?

Some stores post signs with return policy and low price guarantees, which would count as a contractual obligation. But this is more common in department stores or in businesses that deal with large ticket or durable items. It is quite uncommon in supermarkets. Supermarkets probably accommodate consumers who make reasonable requests to return goods that are visibly non-conforming, but not because they can otherwise be sued.

To be sure, supermarkets can have substantial legal liability to consumers. Tort law is one source of liability, when consumers were exposed to unreasonable risks during the shopping experience. Anti-fraud regulations create additional liability, when the store engages in deceptive practices such as false advertizing or price labeling.¹⁸ Antitrust law can create liability when the store's practice is anti competitive. Food law places requirements of conformity with sanitation and safety standards that, too, can lead to administrative action. And there are probably many additional licensing and administrative regulations that give rise to liability for violations. But one form of enforcement is missing in this generic, everyday transaction: action for breach of contract. What distinguishes these various forms of enforcement from contract suits is the magnitude of the remedy and the incentive to pursue it. In tort or antitrust the harm can be substantial. And in other areas, the absence of private incentive to sue is resolved by public enforcement.

In the end, with all these legal controls, consumers may be more or less satisfied with their supermarket experience, but this depends on factors like service, cleanliness, selection, ease of product return, and the price/quality ratio.¹⁹ The quality of the “contract”—problems with warranties, breach, non-performance, fine print, and the like—does not feature in the measures of satisfaction.²⁰

Supermarkets are not unique in operating in a de-facto one-way contract regime. Taxicabs are another example. It is telling that when a passenger hops into a New York or Chicago medallion cab, she immediately

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¹⁸ FTC Regulations – Retail Food Stores Advertising and Marketing Practices, 16 C.F.R. 424.1 (defining deceptive and unfair marketing acts by food stores)

¹⁹ See, e.g., Dirk Dusharme, *2007 Retailer Customer Satisfaction Survey*, available online at www.qualitydigest.com/pdfs/2007retailsurvey.pdf.

²⁰ Measures of the customer satisfaction in the supermarket industry include factors such perceived quality, perceived value, customer complaints, and customer retention. See, e.g., www.theacsi.org/index.php?option=com_content&task=view&id=147&Itemid=155&i=Supermarkets.

views the “Passenger Bill of Rights”—a list of substantial obligations that the taxi company and its operator have to comply with to make the service better.²¹ When posting the Bill of Rights, the cab company is probably conveying the following message: “we know you have no effective legal recourse against us, but we nevertheless promise to make our service comply with your reasonable expectations.” For a variety of reasons, the passenger would find it exceedingly impractical to recover from the cab company if any of the billed rights is breached – if say, the cabin is dirty, the driver plays loud music, or takes a long route to the destination. Indeed, in a search I conducted through the entire case law of New York, I found no breach of contract cases that were successfully brought by consumers against taxi companies.²²

What about restaurants—do consumers have a *de facto* contractual right against the restaurant, which can give rise to remedies for breach? What if the food is not as described, in terms of ingredients or preparation? There are, to be sure, situations in which patrons are injured as a result of inadequately prepared food and seek recovery. It is likely, though, that a combination of tort recovery for personal injury and administrative action by licensing bureaus can achieve all of the compensation and deterrence goals that a contract recovery would. A consumer right to sue on the “contract” here is either inexistent or redundant—two sides of the one-way contract coin. Here too, a search through case law revealed a reality in which no contracts suits are ever brought.²³

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²¹ See New York City Taxi and Limousine Commission, Passenger Information: Taxi Cab Rider Bill of Rights, at www.nyc.gov/html/tlc/html/passenger/taxicab_rights.shtml

²² I did a Lexis search for New York and federal cases with text including “taxi” or “cab” and “breach /1 contract” or “warranty” or “Restatement /3 Contracts” or “UCC”. I found seven cases that seemed relevant, but only one that included a pure contractual claim (as opposed to veil piercing or tort)—a claim of implied warranty. The claim against the cab company was rejected. *See Ruse v Inta-Boro Two-Way Radio Taxi Associates, Inc*, 166 AD2d 641 (NY App 1990).

²³ I did a Lexis search of New York and Federal cases with text including (“restaurant” or “bistro” or “pizzeria”) not w/5 “v.”) and ((breach /1 contract) or warranty or (Restatement /3 Contracts) or UCC) and not CORE-TERMS(employ*) and not CORE-TERMS(labor) and not CORE-TERMS(lease) and not CORE-TERMS(insurance) and not CORE-TERMS(tenant) and not CORE-TERMS(landlord). I found many cases in which a contract warranty claim against the food provider was brought along with a claim for recovery in tort, relating to injury from defective products. Beyond that, I only found a few suits. In one, a plaintiff unsuccessfully made a breach of contract claim against a restaurant that had video surveillance in the restroom. Damages for emotional distress were awarded in tort. *See Dana v. Oak Park Marina*, 230 A.D. 2d 204, 212 (1997). In another, a plaintiff sued a restaurant owner on a contract claim for failing to break up a fight in which he was injured, but the suit was denied because statute of limitation applied to the same act with respect to liability in tort. *See Smith v. Whit Tower Management*, 129 N.Y.S 545, 549 (NY 1954). In another suit, a plaintiff injured by consuming toxic whiskey during the national Prohibition was denied in its tort claim because of the (then) narrow definition of sellers’ liability. A split court allowed the contractual

There is another, altogether different, reality that embodies the one-way contract model—the presence of mandatory arbitration clauses. These clauses make it impossible for consumers to vindicate their right in court, sending them instead to arbitration proceedings. There is an ongoing debate whether mandatory arbitration blocks or facilitates suits. The different cost structure of arbitration, the different procedural rules, and the different patterns of recovery awards make it difficult to compare the expected recovery in arbitration versus litigation for a generic consumer complaint.²⁴ For a while, mandatory arbitration clauses had a distinct asymmetric element: they applied only to complaints by consumers, not to claims brought by the business. This element of “non-mutuality” has been the subject of close scrutiny by courts. Indeed, in several prominent decisions courts have held that the non-mutuality feature renders the mandatory arbitration clauses unconscionable.²⁵ Other courts disagreed: nothing in consumer contracts is mutual, and neither should the arbitration mandate be.²⁶ To be on the safe side, business now draft mutual, or symmetric, mandatory arbitration terms.

Technically, arbitration clauses, even if non-mutual, do not render the contract one-way. Consumers can still seek legal remedies through arbitration. But these remedies are different. For one, it is quite more difficult to certify a class action in arbitration, or to join suits. For consumer contract claims to be pursued individually, they need to involve such high stakes that is almost never the case. Indeed, in scrutinizing these clauses courts often require minimum procedural accommodations, such that would guarantee effective access to arbitration and prevent these contracts from remaining one-way.²⁷

To the extent that arbitration effectively blocks class actions and access to increased remedies (such as exemplary damages and attorney fees), it has a significant effect of transforming many low-stake consumer contracts into one-way contracts. This effect is often viewed as denying consumers their rights to legal remedies. Thus, the mandatory arbitration clauses have been denounced as “the Yellow Dog Contract of the 1990’s,”²⁸ a “monster,”²⁹ and that as a

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claim for breach of warranty despite the illegality of the contract. See *Bolivar v. Monnat*, 232 A.D. 33 (NY 1931).

²⁴ See, e.g., Symposium on *How Bad Are Mandatory Arbitration Terms?*, 41 Mich. J. L. Reform 777 (2008).

²⁵ *Armendariz v. Foundation Health Psychcare Services Inc.*, 6 P.3d 669 (Cal.2000)

²⁶ *Obliv, Inc. v. Winiecki*, 374 F.3d 488 (2004).

²⁷ Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L. Rev. 185 (2004); *Brower v. Gateway 2000*, 246 A.D.2d 246 (N.Y. 1998).

²⁸ Katherine Van Wesel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denver U. L. Rev. 1017 (1996)

result of them “large areas of U.S life and commerce have silently been insulated from the lawsuit culture.”³⁰ Descriptively, then, they are perceived to have transformed consumer contracts into one-way contracts.

IV. CONSUMER PROTECTION SUBSTITUTES

Stripping consumers of the right to pursue legal remedies in the event of breach weakens their contractual entitlement and reduces its value. It can be debated how significant this weakening would be, given that legal remedies are hard to get, but let’s assume for now that the insecurity generated by the formal elimination of the legal enforcement rights is substantial. That is, let’s assume that if all else remains equal, consumers would perceive this regime to make them significantly worse off. This insecurity would translate into reduced willingness to buy: lower prices to reflect the lesser value consumers get and, at the extreme, exit of consumers from markets. These are market effects, and it is therefore natural to ask what other market responses might emerge to mitigate these effects? How will markets adjust to provide consumers with the protections that they perceive to have lost under a one-way contracts regime? The following discussion sketches several plausible market responses

A. Redesigned Transaction

Consumers are likely to be concerned about putting much money on the line when all they get is a promise that not legally enforceable. One extreme response is to return to the mode of transaction that preceded contract law – a barter exchange. When the buyer gets the return value on the spot, he is less likely to be cheated. Of course, in modern transactions this is not much of a solution. For one, the value of the good sold cannot always be assessed at the time of the exchange and buyer would have to rely on affirmations and promises regarding quality and durability that are not enforceable. Moreover, many transactions involve ongoing consumer services which by their nature are provided over time and cannot be tendered upfront.

But transactions might still be designed differently, to address consumers’ anxiety about their non-rights. Recognizing that they have no legal recourse, consumers might be reluctant to pay upfront and await, or

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²⁹ David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in the Ages of Compelled Arbitration*, 1997 Wisc. L. Rev. 33, 36 (1997).

³⁰ Patti Waldmeir, *How America is Privatizing Justice by the Back Door*, FINANCIAL TIMES 12 (June 30, 2003).

pray for, timely conforming delivery. Instead, consumers might require (and businesses might accord them) a different sequence of payments and commitments to reduce the magnitude of the consumers' losses in the event that they are cheated. One simple way to achieve this is to defer payment till some measure of consumer satisfaction is achieved. Consumers would be accorded a more substantial set of rights to inspect the value of the goods or services, to reject them if they are non-conforming, all before making any substantial payment. Instead of paying and then relying on promises and assurances—the legal warranty—which will no longer be binding, consumers will only have to pay upon some verifiable satisfaction.

One way to redesign transactions to enhance consumers' rights to inspect and reject is by carving up an otherwise integrated transaction into many small pieces, with the right for the consumers to exit in many specified location. For example, a long-term cell phone contract would be broken down to pay-as-you-go structure without any commitment, giving the consumer the right to pursue his reasonable expectations by switching to another provider. Or, to think of another example, an expensive product may be offered in "pieces"—leased rather than sold—thus reducing the consumer's anxiety about malfunction. As I suggested in the Introduction, we can imagine that big-ticket items like computers and home appliances will be offered for rental or through a rent-to-own arrangement, with option to terminate after specified (short) intervals. The overall cost to consumers would not need to rise because in equilibrium consumers will choose not to terminate—the threat they have to terminate would assure that the value they get is satisfactory.

The basic element of redesign is the increased domain for "self-help"—measures that consumers can take when they perceive the promise made by the business to have been breached. The most effective self-help measure is to stop the payment. The business can sue for a payment that was inadequately withheld, and so the consumer would have to make sure that payment is stopped only when the promise was indeed breached. To make these determinations simple contracts could be designed to give consumers right to terminate prospectively *at will* and withhold payment only for future performance, not for past inadequate performance. For example, many telecommunications companies not offer service without a fixed-term commitment. Trying to lure consumers who are weary of contractual commitments that are replete with unpleasant surprises, companies like Comcast and AT&T provide telephone and cable service that can be cancelled any time without penalty. It is quite telling that the market term for these

types of agreements “No Contract Required.” Consumers receive the desired protection with *less* contract, rather than *more*.

Not all transactions can yield to simple piece-by-piece break up or at will termination by consumers. Cars, for example, are already offered for lease, but the commitment required from the consumer is long, at least several years. A smaller commitment—car rental—is disproportionately expensive not only because of the transactions costs, but largely due to asymmetric information and incentive problems. But markets can experiment with small commitments that are not disproportionately costly. For example, many consumers rent cars from zipcars.com, shielded from any long term commitment, without incurring a disproportionate cost and with surprisingly low transaction cost.

It is quite possible that any kind of market protections that might develop to substitute for legal enforcement would involve some transactions costs that would otherwise, under a perfect legal enforcement regime, be saved. But we can also expect that market experiments would develop with designs that reduce the added transactions costs. In the present context, contract designs that carve up long-term contract into pieces may introduce new switching and set up costs, but like the case of zipcars or prepaid cell phones these transactions costs can be cleverly minimized.

B. Private Bonds and Assurances

If a transaction is perceived to involve some risk of non-performance or forfeiture, consumers can turn to private bonds and assurances to secure their payment. In some limited way, retailers already provide this service. If you buy a product at Macy’s and find it lacking in any way, you can return it to the store with little hassle and receive a refund. The fact that the manufacturer made a defective product and refuses to repair it is of less consequence to the customer who can return to the retail outlet and receive adequate attention. High-end retailers bundle the sale transaction with some form of assurance and charge an appropriate premium, depending on the generosity of the plan. Discount outlets often unbundle the two.

But what if the retailer itself is the irresponsive business? What guarantees can a consumer turn to? In the internet, intermediaries specializing in consumer protection services are already budding. SquareTrade, for example, warrants internet purchases of electronics in a

way that is relatively cheap and hassle free.³¹ It supplements the warranty term provided by the retailer or the manufacturer (probably the most important legal right that the consumer has) with its own repair and replace warranty. Its service is easy to price and to purchase and claims are relatively easy to administer.

SquareTrade's warranty kicks in only 60 days after the product was received. But what if the product was never shipped, or arrived defective? Another group of intermediaries that provide some protection immediately after the purchase is payment intermediaries. Credit card companies provide purchasers with purchase protection, usually restricted to a period of 90 days from the date of purchase. This coverage is broader than for contract breach by the seller; it covers losses from, say, theft or accident as well. But this coverage is also narrower in several ways. It does not apply to items lost in the course of delivery; and it is capped by the purchase amount charged to the credit card.

Credit card issuers provide purchase protection to buyer in order to induce buyers to make purchases that they might otherwise not make, and to use the credit card as the form of payment. Other payment intermediaries do the same. For example, PayPal offers a Buyer Protection Plan that reimburses buyers for the full price and shipping costs in the event that they complaint against the seller is found to be meritorious.³² In similar fashion, companies that operate market platforms can provide customers who enter their market with protections. As mentioned in the introduction, eBay Motors provides disappointed buyers a fund from which they can recover the lost payment when the seller defrauded them, up to \$50,000.³³ This coverage is provided free for most of the vehicles purchased. It can be extended also to cover the car's condition—the express warranty—but only if the seller opts in (and presumably pays eBay to supply this added coverage). As an intermediary between many buyers and sellers, eBay can monitor the conduct of sellers “on behalf” of the buyers. It can (and does) charge sellers for the cost of the buyer protection program, but it can differentiate the price according to seller's record and it can expel sellers who breach their obligations, preventing future abuse.

These examples demonstrate the emerging role of intermediaries in securing contractual rights that are currently also legally enforceable. It is

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³¹ See www.squaretrade.com/pages/learn-more-warranty-buyer

³² See <https://www.paypal.com/us/cgi-bin/webscr?cmd=xpt/UserAgreement/ua/USUA-outside#pbp-policy>

³³ See www.pages.ebay.com/help/buy/ebaymotors-protection.html#vehicles

plausible that in a one-way contracts regime, where promises would no longer be legally enforceable, the function of such intermediaries would be expanded. eBay, for example, could offer a buyer protection program for all purchases, not just automobiles. Credit card issuers could offer broader guarantees, covering not only an extended warranty term or outright fraud, but also various other types of non-performance.

In these situations, the intermediaries provide not only an insurance function, but also a monitoring and deterrence function. These systems work because the intermediaries care to protect the integrity of the market in which they are operating, to attract as many buyers. eBay would surely kick out a seller whose pattern of performance gives rise to higher incidence of claims. Strong intermediaries like eBay or Visa harness their market power to warrant consumers' satisfaction. The intermediaries effectively operate as sophisticated enforcement agents for dispersed, unsophisticated buyers.

To be sure, the expansion of the guarantees provided by intermediaries is limited by the intermediaries' own verification problems. Visa cannot, for example, confirm whether the hotel room was clean enough, and eBay cannot confirm whether the iPod was refurbished with a sub-par sound. Their advantage, though, is that monitoring can be done through aggregation. As long as the intermediaries can perform some limited monitoring of individual claims and weed out the most frivolous ones, they can credibly compare the performance of businesses. A business that receives a higher ratio of complaints is underperforming relative to market averages, suggesting that buyers' expectations are collectively not met. This business will find it more difficult to compete once the coverage premium attached to its sales increases.

Of course, the intermediaries themselves are businesses whose obligations to the buyers are contractual. The problem then becomes circular: without enforceable legal rights against businesses, consumers do not acquire any legal right against the intermediaries. What guarantees do buyers have that the intermediaries will indeed make good of the bonds and assurance they provide? In the end, I will have to argue that the contractual promises made by intermediaries are safe for reasons other than the one discussed here. That is, the bond promises are safe not because of some other bonds that secure them or some other intermediary services. If they are safe, it must be due to other market related mechanisms, such as reputation and ratings. In this sense, the bond mechanism has only a limited role. It alone cannot provide the ultimate security for contractual promises. But the presence of assurance intermediaries does facilitate the work of other informal

enforcement mechanisms. The bond intermediaries specialize in aggregating information about the performance of the business and manage the claims of the consumers in an efficient way, providing a more solid informational basis for the application of other enforcement mechanisms.

C. Insurance

Like any measurable risk, breach of contract is a risk that might create opportunities for insurance. If the removal of legal remedies imposes greater risk on consumers, there would be increased demand for coverage against this type of hazard—an insurance arrangement against bad performance by the business. And if the patterns of this risk can be measured and predicted in a systematic way, insurance companies would supply this coverage.

The insurance arrangement is conceptually different than the bonds and protection intermediaries. For one, it can apply to more hazards than merely warranty-related defects or fraud. It can potentially apply to consequential losses and to personal injuries and thus go beyond the more limited refund/repair/replace remedy offered by various assurance intermediaries. It could also provide recovery in contingencies that technically do not constitute breach, but are nevertheless costly to the consumer. For example, when an airline or a cruise departs late the traveler might experience significant losses, which are not compensable under the contract but could potentially be compensable under an insurance scheme. Moreover, insurance coverage can apply even when the consumer had some contributory fault—dropped the iPod or arrived late for the flight—situations which are usually excluded under intermediary protection plans.

Insurance can be sold on a transaction-specific basis, whereby it can be tailored to the specific actuarial risk. This, however, would impose a significant transaction costs and would make it look more like SquareTrade. To the extent that the insurance coverage goes beyond an extended warranty service, it is more complex to underwrite, making it difficult to supply on a per-transaction basis. More likely, the insurance coverage would be sold per-consumer—applying to the entire defined class of B2C transactions that the insured would enter during the term of the policy, say one year. It can attach, for example, to the consumer’s home owners’ insurance policy, as yet another covered risk—the “contract breach peril.”³⁴

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³⁴ Many homeowners policies cover personal property including property not located at the residence, and losses arising from unauthorized use of credit cards. See, e.g., Insurance Services Office HO-3 Policy, Section I Coverage C and D.

It is possible that insurance markets would have to innovate and develop new practices to make coverage for the contract breach peril work. It might require, for example, simplified procedures for filing claims and investigating their validity. It could also be that consumers would choose to have arrangements with their insurers to cover only certain types of B2C transactions (e.g., all transactions over \$1000), where the costs of administering claims would not overrun the utility of the insurance.

In this environment, insurers will have a role that goes beyond passive coverage. One obvious role is to manage the claims of the consumers and separate the valid from the frivolous. In many areas, this verification role is precisely the craft that insurers perform best. Medical insurance plans, for example, are often nothing more than claim administrators (the risks are borne by employers). Insurance investigators have the best access to evidence regarding the merits of any individual claim *ex post*, better than courts and surely better than the consumer service department of the business who sold the complained-over product. And since the insurer has a significant sanction against frivolous claims—increased future premia, forfeiture of other coverage—it can deter such claims better than other potential claim administrators. There is of course room for abuse—for frivolous claim denials by insurers—but this is a standard problem that insurance law is well equipped to deal with, particularly through punitive damages.

Another obvious role of contract breach insurers is to efficiently underwrite the risk. Insurers have more information about the likelihood of a potential claim—the insured’s “propensity” to file claims—because they can keep records of the rate of past claims by the insured, or infer this from other correlated behaviors. Whereas the SquareTrade warranty can, at most, aggregate information about a particular seller or product, an insurer can cross the same information with each insured’s record. Moreover, insurers have an infrastructure for aggregating data across the industry, something that other assurance intermediaries don’t have.

Insurance can also have a deterrent effect against misbehavior by business, but the deterrent mechanism here is a bit more subtle than either in other insurance contexts or in the intermediary bonds case. In other insurance contexts, the insurer is subrogated to the insured’s right against the liable party. The medical plan or the first party auto insurance can recover their coverage expenditures from the injurer. Contract breach insurers would not be able to sue bad-behaving businesses that imposed “occurrences,” because the aggrieved consumers would not have any legal right to subrogate. Moreover, in the context of intermediaries and bonds,

deterrence operates through the price mechanism. SquareTrade charges higher price to warrant a bad product, making the overall package of product+warranty more expensive and thus less purchased, thereby providing incentive for businesses to reduce the incidence of claims. Insurance, however, cannot price coverage according to the business-specific risk, because it is not sold per transaction.

Still, insurers can deter bad behavior by business through other practices. For example, they can threaten to blacklist any business which exhibits a record of high incidence of claims, refusing to insure its transactions in the future, and thus alerting consumers and rendering the non-performance risk more salient. Insurers can write exclusions such as “this policy does not cover purchases from Gateway.” Because insurers can aggregate and share actuarial data on the non-performance risk that businesses pose, these blacklists can be reliable. Or, if blacklists are distasteful, a different practice can be to offer a menu of premia: the insurance premium can be \$400 if it applies to all purchases, and only \$100 if several exclusions apply. Insurers, for example, can provide a list of businesses with whom the contracts are fully insured, and apply a significant deductible or cap to contract breaches with any business not on the list.

It is not my intention here to go through all possible contours of the contract breach insurance arrangement. The point is more general. Insurance is not only a mechanism for spreading risk. Importantly, it is often an efficient institution for handling and verifying claims, administering them, pricing them, and creating accurate deterrence. Currently, insurance companies have no role in administering consumer claims for contract breach. Rather than relying on the legal system to clumsily micro-manage such claims, private insurance markets can provide an alternative platform.

D. Ratings

When deciding whether to enter a transaction with a business, individuals would care more about their legal “exposure”—how likely they are to be affected by the absence of remedies for breach. They would have a greater need to predict the degree of overall satisfaction that they will obtain, in light of the price charged, and relative to other transactions offered by other businesses. Knowing that there are no legal remedies, consumers would have a greater motivation to know how likely is breach to occur, or when it does, the extent to which the business will redress their dissatisfaction. They would therefore turn to find out how satisfactory was the

experience of previous consumers who dealt with this business in this type of transaction.

Ratings of the quality features of the transaction is a deep-rooted market practice that allows consumers to conduct price/satisfactions predictions. For example, when reserving a hotel online, Expedia.Com and other reservations services rate each hotel on the basis of average customer reviews along several attributes (cleanliness, service, comfort). When deciding how to vote for a senator, voters can check how the candidate is rated by the Environmental Defense Fund or the NRA. When choosing a restaurant, Zagat and other review networks provide a score and a simple breakdown of features that reflect the quality of the establishment relative to its cohort. When buying a new car, Consumer Reports provides a variety of ratings of performance, safety, durability, as well as overall recommendations. When purchasing goods from an online retailer, various intermediaries provide ratings that help shoppers predict the quality of the goods sold and the reliability. Cnet.Com, for example, refers buyers who search for electronic appliances to various retailers and models, rating each over a variety of parameters that affect consumers' satisfaction, aggregating the experience of prior buyers. Likewise, eBay uses a well-known feedback rating of each seller, showing the number of prior sales, the percentage of satisfied customers, and its score over several dimensions of satisfaction. In fact, it is hard to think of market transactions that are not subject to consumer or expert ratings: movies, restaurants, music, new books, used books sellers, blenders, pizzas, coffee, ...

In a one-way contracts regime, consumers will have to rely even more on the performance reputation of businesses and less on their promises. Thus, the ability of a business to attract new customers and to charge higher prices would depend all the more on the reliability of feedback scores, ratings, consumer surveys, reports by watchdog groups—that is, on the aggregate measures of the scattered experiences of past customers.

These rating scores aggregate some, but not all aspects of the transaction with the business. Averages might not capture the subtleties. Still, individuals who are not interested in spending the time to study the details can rely on the ratings to chaperone them through the comparison shopping process. Their advantage is that they put weight on those aspects that average consumers and users actually care about most, the factors that predict the ex-post degree of satisfaction. Moreover, techniques that provide relevant and reliable aggregations are likely flourish. It is imaginable that a more fine breakdown of aspects can be offered, including for example a rating of the “contract” or of the “legal” experience—the quality of the boilerplate terms once they are brought to bear on the transaction. It is not clear, of course, that consumers care to know about the legal terms. Usually they care to know about how good the transaction will be when it is *performed*, not how bad it

will be when *breached*. But they do like to know the likelihood of breach and how the legal terms handle it. How good is the warranty and repair service? How difficult it is to return the goods for replacement, repair, or refund? How effectively did the vendor respond to problems with the service? Were there hidden fees and surprising burdens originating from the fine print? Were there restrictions—legal or digital—on the types of permitted uses? Was the contract modified post-purchase in an unfavorable way? To the extent that consumers want to know these issues in advance, independent of any other overall measures of satisfaction, ratings can provide such of information.³⁵

Ratings and similar reputation scores have become all the more important in electronic commerce, and the inner works of rating schemes have been perfected by successful web services like eBay, Amazon, and Expedia. But this does not mean that ratings are uniquely useful on the internet. The reason why internet commerce relies so heavily on ratings and reputation is precisely that standard remedies for breach are significantly weaker in internet transactions. Businesses are remote, unfamiliar, small, under-capitalized, sometimes deal in used or refurbished goods, and offer significant discounts—all are factors that normally increase consumers' apprehension and require extra assurances. Remedies for breach of contracts in these settings are extremely weak. There is nothing much the law can do to help a consumer defrauded by a fly-by-night business. Contracts here are perceived to be one-way not by legal design but by practical constraints. It is quite telling, therefore, how the pragmatic decline of traditional legal remedies went hand-in-hand with the phenomenal rise of ratings and reputation scores.

The internet facilitates the dissemination of ratings, but this does not mean that the mechanism works only for ecommerce. Zagat and Cnet.com are good examples to the contrary. The internet can be a locus where consumers can search for ratings and scores for every type of transaction, even if that transaction would eventually take place in the brick-and-mortar world. With the advent of internet user-based wiki-style information aggregators, reputation has become an effective source of discipline against opportunism everywhere, beyond its traditional role in close-knit communities.

Indeed, the power of each consumer to post a negative feedback provides powerful deterrence. In ebay, for example, __. Moreover, consumers can provide detailed accounts of their experience, highlighting horror stories in a way that received attention from future users. While this provides little or no redress (once the negative feedback is posted, it is often difficult to undo and thus businesses have no incentive to remedy the particular complaint), it provides significant deterrence.

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³⁵ For discussion of some issues related to ratings of contracts, see Omri Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 *European Review of Contract Law* 1 (2009).

For one, the effect on future business from consumers who are exposed to the negative rating could be more painful than a legal remedy for breach. More importantly, these ratings are very easy to post and thus the threat to inflict then on a misbehaving business is far more credible than the threat of an aggrieved consumer to file suit.

E. Voluntary Accommodations

The mechanisms discussed thus far suggest that businesses' obligations, while legally unenforceable, could nevertheless be largely complied with even in a regime of one-way contracts. But it is possible that legal non-enforceability will nurture compliance beyond the letter of the promise. Businesses may be ready to accord their customers more accommodations, to go beyond the contractual language, to forgive immaterial burdens and fees, in short, to provide consumers with value that exceeds what was literally promised.³⁶ Such conduct would be intended to infuse consumer confidence especially among the otherwise reluctant consumers who, themselves without enforceable contractual rights, are rationally anxious. Thus, ironically, the absence of enforceable contractual rights could boost the bottom line average satisfaction that consumers get, all else equal.

Their obligations being unenforceable, businesses don't have to grant any value to consumers, and certainly don't have to grant any voluntary accommodation. But they can do so *selectively*. Consumers who are regarded by the business as honest or as source for continued profit, or who are regarded as likely to leave a positive feedback that would affect the business' rating if treated well and negative feedback otherwise, would be treated to more accommodations than consumers who are suspected of cheating or chiseling, or whose further business is no longer sought. Thus, in a one-way contract regime, given that businesses can easily "stick it" to some consumer, a greater wedge can be created between the values received by desired versus undesired consumers.

Of course, this ability to selectively abuse some consumers is troublesome, and hopefully the mechanisms discussed above diminish such

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³⁶ For an analysis of how and why businesses already go beyond the contract language and accord consumers accommodations, see Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 3-11 (O. Ben-Shahar, Ed., 2006); Jason S. Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 12-28 (O. Ben-Shahar, Ed., 2006).

potential. But the upside—the ability to accommodate “good” consumers—can be an important source value.

V. WHY ARE ONE-WAY CONTRACTS NECESSARY

The substitute protection devices described above may very well arise in the absence of contract enforcement, but would they not also arise in the *presence* of contract enforcement? Aren’t these devices—fragmented transactions, insurance services and purchase protection plans, ratings, consumer protection acts—already available, alongside contract enforcement? Is it necessary to transform contracts into a one-way module to attain the benefit of the various alternative protection devices? If one-way contracts benefit both business and consumers, why do parties not opt into such a regime voluntarily, writing contracts with minimal legal protections for consumers?

To be sure, some of the alternative protection devices are emerging side-by-side with the (de jure) availability of contract remedies. And yet we don’t see, for example, an insurance product for the contract breach peril. Consumers are not willing to pay for an assurance that is perceived to merely replicate the assurance they receive from the business (say, double up a new product warranty). That is, despite the fact that contract promises made by businesses are almost impossible to legally enforce, many individuals maintain a potentially false sense of security in the knowledge that they are contractually protected, and are unwilling to buy additional insurance (other than warranty extension programs). Most consumers have not tried to sue businesses or to pursue legal remedies for breach and thus have not experienced the futility of this strategy. For them, having an enforceable contract creates a perception of security that makes other protections seem less necessary.

While this false perception of security can be irrational, it may also have a rational foundation, which explains why it persists and why the alternative protection devices are slow to emerge. Even in the absence of a credible threat to sue, breach of contract is an infrequent event. The great majority of consumer transactions are adequately performed by business. The great majority of products and services consumers purchase live up to the expectation. Even if consumers interpret episodes of non-performance as indication of the weakness of contract, these may be offset by the inverse interpretation of more numerous episodes of adequate, or above-expectation

performance. In short, it is difficult to generate an accurate assessment of low probability events.

There are additional, more subtle reasons why the alternative protections are slower to develop in a two-way contract world. One reason is asymmetric information. The business would often be in position to direct consumers to alternative protections such as insurance, warranty services, and ratings. But when consumers' prior is that the business is also providing an enforceable contractual promise, the business has no incentive to endorse any complementary assurances. If the business were to do so, this could be taken as a signal by consumers that there are greater-than-otherwise-perceived grounds for insecurity. Why else would the business promote or refer to other protections? That is, all else equal, the protections are more necessary the weaker the contractual commitment, or the greater the propensity to breach. Since the business has private information about this propensity, the endorsement of such protections would lead to a negative inference by consumers about this information. In this setting, efficient protective devices will not be promoted by the business. It is still possible that they will be developed by third parties, but without the bundling of these assurance services with the purchase itself, such devices would impose added transactions costs and will be slower to develop.

Indeed, on eBay, where the value of legal remedies for breach of contract is known to be low, vendors openly refer buyers to their rating scores, to assurance program like SquareTrade, to non-legal dispute resolution services, and other protections. Here, there is no asymmetric information: consumers know that the value of legal remedies for breach is negligible. Businesses who acknowledge this fact by highlighting the presence of other protections do not suffer a penalty in the form of reduced willingness to pay. In contrast, when selling insurance policies, car leases, or cellphone calling plans, the vendors emphasize the policy and the legal terms, and do not refer the customers to consumer satisfaction ratings or other assurances.

This is an unraveling problem. Another way to think about it is the following. Suppose the market developed a new insurance instrument—the contract breach hazard policy, and would price it in accordance with the actuarial risk that different businesses pose. The business would then have an incentive to induce the consumer *not* to purchase this insurance, by providing it in-house, bundled with the primary consumer transaction (in the same way that stores offer extended warranty programs). Even if the business knows that there is a substantial likelihood of breach, it would offer

the consumer discounted or “free” insurance, in attempt to signal quality and boost product price. The business would have an incentive to underprice this component, because it increases the willingness of the consumer to enter and to pay for the primary transaction. Thus, in a world of two-way contracts, the threat by the business to appropriate the insurance component of the service undermines the emergence of such independent insurance products. This problem would not arise in a one-way contract regime because consumers—having no legal remedies to fall back on—would not be willing to rely solely on the business’ unenforceable contractual promise.

One-way contracts could strengthen the alternative consumer protections for another reason, by refocusing social controls and reforms. Currently, much of the consumer advocacy effort is directed at improving the legal terms associated with contract, the opportunity of consumers to read the fine print in contracts, the access of consumers to courts, and the legal remedies available against a breaching business. For example, the two main proposals made in the ALI’s Principles of Software Contracts, which represent the latest effort to protect the rights of consumer-users against software vendors, are (1) to provide users with a “robust” opportunity to read the terms upfront,³⁷ and (2) to strengthen or make mandatory some warranties.³⁸ Or, to take another prominent example, it is often argued—and held by courts—that mandatory arbitration terms ought not be enforced because they deprive consumers the power to file private suits, vindicate their contractual rights and breach remedies in court.³⁹ Similar agenda is pursued by the European Community, focusing on sharpening the legal remedies available to consumers in private law.⁴⁰

If one thinks that these reforms would help many consumers, then the one-way contracts regime ought to be rejected. One-way contracts do not strengthen private suits but eliminate them. My own view is that these legal-power-to-the-consumer reforms would do far too little to help. Improving the consumers’ opportunity to read would help very few potential readers (estimated at far less than 1% of the population of consumers).⁴¹ Providing

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³⁷ American Law Institute, Principles of the Law of Software Contracts § 2.01 and comment c (Discussion Draft, March 30, 2007).

³⁸ American Law Institute, Principles of the Law of Software Contracts § 3.02 (Discussion Draft, March 30, 2007).

³⁹ *Armendariz v. Foundation Health Psychcare*, 6 P.3d 669, 689-90 (Cal. 2000).

⁴⁰ Council Directive 99/44, OJ 1999 L171/12 (remedies); Directive 2001/95 (transparency). See, generally, Stephen Weatherill, *EU CONSUMER LAW AND POLICY* (2005).

⁴¹ Florencia Marotta Wurgler, *Are ‘Pay Now, Terms Later’ Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. Legal Stud. (2009); Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to*

mandatory quality and striking arbitration terms would help very few potential litigants, the sophisticated ones who can secure legal representation in adjudication.

If, instead, one thinks that these reforms are not particularly helpful, then it is good news that such futile efforts to bolster the efficacy of contractual rights through private law enforcement would become irrelevant under a one-way contracts regime. Instead, efforts should be redirected towards improving the availability of effective ratings, reducing transactions costs for redesigned deals which give consumers more choice and more ways out, creating easy-to-use insurance products, improving platforms for reputation to develop, and the like. Rather than provide an opportunity to read for consumers who would never utilize this opportunity, or provide a theoretical opportunity to sue for consumers who are exceedingly unlikely to pursue this strategy (or gain any meaningful compensation through it), consumer protection would follow a different path. Thus, the value of one-way contracts regime would be to shift reform effort to areas where it would actually help.

This is not to argue that one-way contract solution is the only viable consumer protection regime. There may be other models of government control, which, if correctly calibrated, could help. Indeed, various recent reforms are concerned with government regulation of consumer transactions and products like credit cards and mortgages. Under these reforms, public agencies would reassume a central role in determining which products can be offered and which not, and monitor against violations. It is beyond the scope of this article to examine the merits of this approach and I have nothing to say *prima facie* against this more ambitious form of intervention. These reforms harness the enforcement power of the government to protect consumers, and in a fundamental way share the premise underlying the one-way contracts regime, that consumers cannot defend themselves alone. It takes more than private lawsuits by aggrieved consumers to discipline an opportunistic business. It might require some government intervention, but the scope of this paper is on the availability of market substitutes to private suits.

Standard Form Contracts (Mimeo. 2009). See, generally, Ben-Shahar, *supra* note 1. **Error! Bookmark not defined.**

VI. CONCLUSION

It is well recognized that consumers' well being depends on factors other than the protection afforded to them by private law. I am surely not the first to argue that other safeguards are important. My purpose here was to go beyond some of the age-old truths, e.g., that competition among businesses or that education of consumers and disclosure of information can help bolster the integrity of consumer transactions and improve consumer satisfaction. I highlighted some additional devices, independent of competition and disclosure, which can substitute for legal protection of consumers.

The claim in the paper, though, is more ambitious than merely identifying several substitutes for contract enforcement. After all, the fact that substitutes exist is not a reason to eliminate one of the devices, however ineffective it might be. Instead, I argue that consumers can benefit from the elimination of the contract enforcement device. It is in the interest of consumers, I argued, to transact within a legal regime that strips them of the power to seek contract remedies for breach, while at the same time reserving the business side's power to enforce contracts. The removal of one protection device would strengthen the other devices and would render consumer protection more robust overall.

There is a sense in which the one-way contracts idea is merely a thought experiment. For one, I conceded up front that as a pure doctrinal move it is likely to be a non-starter, conflicting with very basic notions of contract law. One-way contracts are not contracts: in law, either both parties are bound, or none are bound—this is a fundamental corollary of the consideration doctrine. Further, the arguments developed here are exploratory in nature. I have not measured, neither analytically nor empirically, how much protection would be lost and how much would be gained by the removal of contract enforcement. I have also not proved, in any rigorous manner, that the alternative protection devices would indeed develop faster in the absence of contract enforcement. Some anecdotes might suggest that much, but they are subject to various possible interpretations, not all consistent with the logic of one-way contracts. Indeed, I left some of the boundaries as to what are B2C contracts vague, precisely because the value of the contract enforcement device can vary.

There is a payoff to such thought experiment even if it does not lend itself to immediate law reform, because it sheds light on which factors matter when we talk about consumer protection. As I remarked in the Introduction, the paper is meant to be friendly to the interests of consumers. But it's a

different version of friendliness. Rather than paying lip service to consumers' "vindication of rights," "access to justice" or proposing make-believe solutions like mandatory disclosure, the paper takes the reality of non-enforcement as given and considers ways to overcome it. It is the cultivation of more potent substitutes that can help consumers.

So, in the end, it might be that the law will not relinquish consumers' right to legally enforce their contracts. The message, though, remains. The way to help consumers is not to secure their rights to go to courts and get "meaningful" legal remedies. The one-way contract idea suggests that this is a misguided priority. Consumer protection ought to be accomplished by focusing on alternative protection devices.

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