National Association of Consumer Advocates

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TERMS IN CORPORATE FORM CONTRACTS THAT *CAUSE THE MOST HARM* TO CONSUMER RIGHTS AND PROTECTIONS

Christine Hines
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I. Background

The principle of freedom of contract in an age of take-it-or-leave-it terms and conditions is often nothing more than a one-sided, harmful illusion. Consumers are free to sign up for any products and services they desire, but the non-negotiable terms and conditions that accompany these products, such as bank accounts or credit cards, loans, cable or streaming services, concert tickets, and any Internet application come with many implications for consumers. Consumers typically will deliberate over factors such as product quality and price, but generally have no real consideration, control or even understanding of requirements in the fine print that systemically remove their rights and protections.[1] Even consumers who notice restrictive provisions in a form contract may have little choice but to agree because most providers today use adhesion contracts with many of the same provisions.

This paper identifies the terms in standard form contracts used in the sale or rental of consumer products and services that pose the greatest risk of harm to consumers. These are provisions in one-sided contracts where consumers have no bargaining power. These conditions force consumers to surrender critical rights and remedies, including their right to go to court, their right to have adequate time to file a complaint, and their legal remedies. Consumers also face added burdensome pre-filing procedures that delay adjudication of their claims. The terms are not only hidden in the fine print, they also take unreasonable advantage of consumers' general lack of understanding of the requirements, which incapacitates their ability to meaningfully consent.

The listed provisions are functionally terms that absolve corporate wrongdoers from liability and intentionally deprive consumers of their legal rights. As an academic previously opined, "(u)nfair provisions create a barrier to the enforcement of substantive laws."[2] These restrictive contract terms burden consumers while giving clear, consequential advantages to the service providers, including reduction in costs and an increase in profits. However, there is no evidence that the removal of consumer rights in the terms lead to reduced or discounted prices or other benefits for consumers.[3]

In 2023, the Consumer Financial Protection Bureau issued a proposed rule to create a registry to identify terms and conditions in non-bank consumer contracts that restrict consumer rights.[4] The below list overlaps with the contractual provisions that the Bureau preliminarily identified. The Bureau's registry aims to promote transparency of the provisions and facilitate its continued monitoring of the consumer finance market.

The legality of most of these terms is subject to state contract laws and may depend on individual courts' case-by-case interpretations. A court's analysis of a state law's standard of reasonableness determines whether the consumer contract terms are legal and enforceable, or whether they are unconscionable and against the state's public policy.[5] However, unfair consumer contracts are rarely determined to be unconscionable and unenforceable.[6] Standard form contracts may exist to serve broad economic

efficiency in the market, but the worst provisions among them deserve the highest scrutiny and action, such as a pre-determined default ban. In certain circumstances where prohibition is not reasonable or fair to consumers, the terms should, at the minimum, be presumed to be unfair or deceptive.[7]

II. Familiar terms in boilerplate contracts that are unfair, deceptive, or even abusive.

In 2022, the Consumer Financial Protection Bureau issued a bulletin to offer guidance on unfair and deceptive acts or practices that impede consumer reviews described in the Consumer Review Fairness Act of 2016.[8] This law protects consumers from restrictive contractual provisions that block them from reviewing products and services. The Bureau's guidance identified ways that regulated entities interfering with consumer reviews could violate the law, such as if they included already-unenforceable terms in their contracts with consumers that restrict online reviews.

Contract terms that unfairly and deceptively restrict consumer reviews deny consumers certain important rights. In this case, they are denied the freedom to speak truthfully about their experiences and their right to evaluate and make informed purchasing decisions based on reviews.

Similarly, boilerplate or adhesion contracts that accompany consumer products and services contain other restrictive terms, however familiar or well-used they may be, that undermine a person's legal rights and protections. These provisions deserve recognition as some of the most hostile and antagonistic to consumers' legal rights.

A. Pre-dispute binding arbitration or forced arbitration clauses.

Forced arbitration clauses are one of the most prevalent tools used to suppress claims and undermine consumer protection. Consumers' lack of meaningful consent and understanding of forced arbitration clauses in boilerplate terms is central to the harm they cause.[9] Forced arbitration outright eliminates a harmed person's ability to choose to go to court and their fundamental right to be heard by a judge and jury. Instead, a consumer must resolve disputes with a corporation in a private arbitration proceeding. Forced arbitration does not have the due process protections available in court, including formal rules of evidence and procedure and the right to appeal decisions.

Discovery is also greatly limited, and wrongdoing that is revealed through the discovery process is often sealed and kept secret from the public in forced arbitration. Proceedings are left in the hands of a privately hired arbitrator who has free rein over the process. The taxpayer-funded public court system is replaced by a for-profit scheme that incentivizes arbitrator decisions in favor of corporate repeat players, to the detriment of individual consumers.

For decades, the U.S. Supreme Court has steadily expanded its interpretation of the governing Federal

Arbitration Act (FAA), permitting broad arbitration clauses with requirements favorable to the product or service provider. Forced arbitration requirements, for example, limit consumers' ability to invoke longstanding federal and state statutory rights and remedies. Corporate contracts pack forced arbitration clauses with additional unconscionable terms, including limited discovery, limited damages, inconvenient venues, and shortened statutes of limitations.[10] Forced arbitration clauses additionally make it extremely difficult for consumers to challenge other deeply unfair provisions in the contract.

According to a 2020 study, forced arbitration clauses compared to other contract provisions were most often alleged to be unconscionable, and thus void and unenforceable.[11] However, they were found unconscionable at a lower rate than the average for all clauses reviewed, due to the liberal federal policy favoring them.[12] Because forced arbitration clauses can have a devastating impact on their rights, consumers should be able to knowingly and meaningfully consent to arbitration after the disputes arise.[13]

B. Class action waivers.

Many consumer contracts include terms that prohibit consumers from banding together in a collective or class action. Class actions permit individuals with similar harms to group their cases against the same perpetrator and to adjudicate smaller dollar claims that would be economically unfeasible on an individual basis. They have efficiently and effectively resolved widespread and systemic harm related to violations of state and federal consumer protections, civil rights, investor rights, workplace rights and fairness, fair competition laws, and other protections. Fine print class action bans obstruct efficiency in the judicial process and frustrate consumers' ability to fight back against widespread misconduct.[14]

Previously, many courts interpreting state laws determined that class action waivers were unconscionable and against public policy because class actions often were the only means for harmed consumers to vindicate their rights.[15] In 2011, the Supreme Court in *AT&T Mobility v. Concepcion*, relying on the Federal Arbitration Act, held that forced arbitration clauses that prohibit class actions are permitted under law.[16] Thus, corporations can enforce class action waivers and require arbitration on an individual basis, effectively immunizing them from judicial scrutiny and accountability. In most cases that are suitable for class or collective actions, the cost of bringing an individual action often exceeds the maximum potential damage award for the individual.[17] Even a class action waiver without an arbitration clause, where a consumer can go to court but on an individual basis, unreasonably suppresses consumer claims.

C. Pre-dispute waiver of a jury trial.

The federal right to a civil jury trial, ensconced in the Seventh Amendment to the U.S. Constitution, is a well-known right and privilege in American democracy and is even celebrated in popular culture.[18] Yet, many adhesion contracts waive individuals' access to this critical right, unknown to most consumers who sign them.[19] Jury trial waivers are most common in forced arbitration clauses, but these waivers also exist independently of arbitration clauses, in favor of bench trials.

Courts have held that a party may "waive" their federal Seventh Amendment right to a jury trial if it is knowing and voluntary. However, contracts of adhesion deny consumers the ability to negotiate or remove these terms.[20] All states and the District of Columbia also preserve the right in their own constitutions, and the validity of jury trial waivers is subject to different interpretations under each state's law. In California, for example, this protection is "inviolate," and the policy requires that only a state statute can set the parameters for waiving the right to a jury trial, reflecting "California's commitment to protection of fundamental rights within the civil justice system as a whole."[21]

The right to a jury trial helps to level the playing field for consumers against corporate entities who hold all the bargaining power in everyday transactions. Consumers benefit from the ability to present their facts, arguments, and the law to a panel of their peers. Jury trial waivers are one of the most unfair terms in nonnegotiable contracts.

D. Shortened statute of limitations.

Form contracts also weaken laws that set time limits for consumers to bring a case by unreasonably shortening the window for consumers to file their cases. Less time to file means less time in which consumers can potentially discover their injuries, identify the issues or potential wrongdoing, and seek legal assistance. Courts interpreting state laws make case-by-case decisions on whether contractual changes to their statutory limitations periods are unconscionable. Overall, a contractually shortened statute of limitations period restricts consumers' ability to fully enforce and benefit from laws that were passed to protect them.

E. Waiver of substantive rights and remedies under laws.

Consumer contracts also often include "remedy-stripping clauses" as a stand-alone provision or as part of an arbitration clause.[22] These provisions in form contracts boldly erase rights under state and federal statutes or under common law. For example, corporations have sought to waive warranty protections that ensure reasonable quality of the goods and services. Adhesion contracts that waive implied warranties remove these protections and allow for poor performance that leads to harm.[23] These provisions also preclude certain remedies from being awarded to consumers, such as an order from a court to perform the contract, restitution, or injunctive relief.[24]

At a minimum, consumers' unequal bargaining power and general lack of awareness of their substantive rights make these provisions unfair and deceptive.[25] Courts interpreting their respective state's laws have held that these provisions are unenforceable in certain circumstances.[26] However, terms that outright waive consumer rights and remedies and shield corporations from their obligations should be presumed unconscionable and prohibited.

F. Choice-of-law and forum selection clauses.

Form contracts that designate a governing law or a venue allow product or service providers to choose the most advantageous forums for themselves. Like other contract terms, choice-of-law and forum selection clauses can be challenged as

unreasonable and against public policy.[27] Without such successful challenges, these provisions deprive consumers of the most applicable legal remedies.

This is evident in high-interest loan schemes, where lenders market loans to consumers in states with low interest-rate caps, but use choice-of-law provisions in form contracts to select jurisdictions without usury caps.[28] Some online lenders go as far as partnering with banks located in states with no usury laws, or with Native American tribes that have sovereign immunity.[29] In another example, an Internet provider's forum selection clause designated a state that did not grant class action rights. Upon consideration, a court found that the clause would be so inconvenient that it would deprive the party of a meaningful day in court.[30]

As courts have held, forum selection and choice of law clauses in the fine print in many instances prospectively waive a person's right to pursue statutory remedies. The consequences of these provisions may even go as far as violating state's strong public interest to protect their residents from abusive business practices.[31] Generally, under contract law, forum selection clauses have been held unenforceable when they are unreasonable and hostile to a state's public policy. Depending on the circumstances, they have even been described as "prospective waivers," that can relinquish a person's right to pursue statutory remedies.

G. Limitations of liability and damages.

Limitation of liability provisions aim to cap the amount of remedies available to the parties for claims that arise under the contract. Consumers subject to these provisions may see limits on actual and compensatory damages, punitive damages, as well as equitable relief, and injunctive relief, a crucial remedy to prevent future harm. These provisions functionally exculpate service providers from their own wrongdoing.[32]

In contracts in which all parties can negotiate, consider cost implications, and give informed consent, these provisions may promote efficiency.[33] However, consumer form contracts are typically not negotiated, and consumers likely do not become aware of the provision until after the dispute arises. In addition, limitation of liability provisions in form contracts can disincentivize service providers from carrying out their responsibilities under the contract.[34] Overall, where consumers are less sophisticated and the fine print is presented to them on a take-it-or-leave-it basis, these provisions present another significant obstacle for accessing consumer justice.

H. Pre-dispute resolution processes (not required by law).

Contracts of adhesion now dictate every step in resolving disputes, depriving consumers of legitimate choices and options over how to proceed against alleged wrongdoers that harm them. In addition to forced arbitration clauses and class action waivers, corporate contracts increasingly require consumers to attempt to resolve their claims with the service provider within a required negotiation time before the consumer is permitted to file a legal claim in arbitration or court.[35] These pre-filing dispute resolution requirements delay justice for consumers and delay investigations into flagrant violations of the law.

These pre-dispute requirements interfere with the emerging practice of mass arbitration. Mass arbitration, where consumers join similar claims in arbitration, emerged as a way for injured consumers to bring claims against corporations for misconduct that otherwise would have disappeared due to forced arbitration. In response, corporations require consumers to engage in an individual pre-dispute resolution process to stop mass arbitration.[36] They must file their requests for arbitration individually or in small "batches," forcing them to pay costs associated with arbitration. Courts have previously found some clauses designed to circumvent mass arbitration to be unconscionable and unenforceable due to the long delays on being heard that they would impose on consumers.[37]

I. Loser pays provisions.

Consumers already face an uphill battle when seeking legal accountability for predatory business practices, but the costs of litigation can add an increasingly insurmountable burden. "Loser pays" provisions in form contracts that require the losing party to pay the litigation costs, including attorney fees, of the party who substantially prevails, serve as a major deterrent for harmed consumers seeking redress. Certain state laws provide that consumers who bring good faith claims against suppliers will not have to pay the supplier's attorney fees even if the consumer loses his or her claim.[38] Such a policy encourages consumers to act on their own to enforce consumer laws and thus, incentivizes fair business practices in the market.

In addition, loser pays provisions likely violate public policy as a general matter because they go against state and federal consumer laws that award fees and costs to prevailing consumers. Loser pays provisions punish harmed consumers who act in good faith to seek redress and suppress enforcement of public protections.

J. Unilateral amendment of contracts.

Often, form contracts include provisions that permit one party, the service provider, to unilaterally modify the contract at any time.[39] Contracts are routinely changed with updates to terms and conditions, potentially sent to customers by email or mail with a message stating that continued use of the service or product indicated an assent to the new terms.

Service providers have gone so far as to change the rules of the game during legal disputes that may affect customers. Ticketing platform Ticketmaster, for example, sought to retroactively rewrite and apply the rules for its forced arbitration process set out in its terms of use, including choosing a new arbitration provider, while a dispute with ticket buyers was pending in arbitration.[40] Similarly, Heartland Payment Systems, an online payment service provider for public school lunches and other activities, unilaterally changed its terms and conditions to add forced arbitration and class action bans in its contracts with parents and caretakers while a dispute was pending regarding the legality of fees that Heartland tacked on to the costs of meals and other school services.[41]

Unilateral changes to contracts heighten the general consumer harms present in form contracts. Consumers cannot give meaningful consent to the terms; changes in the fine print lack transparency; and

consumers likely have little understanding of the new terms' consequences and impact on their legal rights. Overall, unilateral contract modifications impose "considerable social costs."[42]

K. Confidentiality/secrecy provisions.

Lack of transparency is a major theme in form contracts, including the use of forced arbitration, unilateral changes of contracts, and jury trial waivers. They shut down open discussion and debate over appropriate business practices and remedies for consumer harm in the marketplace. Confidentiality or secrecy provisions that prohibit open or public discussion of the cases exacerbate the coverups. They suppress consumers' exercise of the First Amendment and harm the public interest.[43] Knowledge of consumers' experiences and their transactions with businesses has the potential to benefit many stakeholders, including other customers, researchers, regulators, advocates, and the public.[44]

III. CONCLUSION

The overall treatment and legality of the listed provisions in form contracts are antithesis to freedom of contract for consumers. Millions of consumers in the marketplace sign up for products and services everyday whose fine print erodes the consumers' legal protections. The provisions, despite the clear risks of harm to consumers, are prevalent and mostly accepted in contract law, except in extreme circumstances. Consumers are mostly unaware of the listed terms and lack understanding of the meaning and consequences behind them. The listed terms also undermine the essential purpose of federal and state laws to protect the public interest.

The spirit of contract law should embrace meaningful consent, understanding, and freedom to choose and accept fair and just terms. Consumer contract provisions that overwhelmingly favor the service provider and drafter to the detriment of the consumer's access to justice, should be viewed critically and determined in most instances to be unfair and deceptive.

ENDNOTES

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[1] See, Roseanna Sommers, W*hat do consumers understand about predispute arbitration agreements? an empirical investigation*, PLOS ONE, Feb. 23, 2024, available at https://doi.org/10.1371/journal.pone.0296179.

[2] Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 Tenn. L. Rev. 365, 368, Spring 2008.

[3] Yehuda Adar and Shmuel I. Becher*, Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. Rev. 2405, 2414, Oct. 2021.

[4] Consumer Financial Protection Bureau, *Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections*, 88 Fed. Reg. 6906 (CFPB Feb. 1, 2023).

[5] Christopher R. Leslie, *The Arbitration Bootstrap*, 94 Tex. L. Rev. 265, 266-267, Dec. 2015.

[6] See, Jeff Guarrera, *Mandatory Arbitration: Inherently Unconscionable, but Immune from Unconscionability*, 40 W. ST. U. L. REV. 89, Fall 2012.

[7] See, e.g. Michael L. Rustad and Thomas H. Koenig, *Empirical Study: Wolves of The World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1436, Winter 2014. "Under our proposed reform, nominal caps on damages, shortened statutes of limitations, anti-class action waivers, and mandatory arbitration would be blacklisted. A number of other standard terms, such as choice-of-forum or choice-of-law clauses, would be presumptively unenforceable."

[8] Consumer Financial Protection Bureau, Bulletin 2022-05: *Unfair and Deceptive Acts or Practices That Impede Consumer Reviews*, 87 Fed. Reg. 17143 (March 28, 2022).

[9] Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001, Regulations.gov, Nov. 14, 2023.

[10] Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266, Dec. 2015.

[11] Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773 (2020).

[12] Id.

[13] Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001, Regulations.gov, Nov. 14, 2023.

[14] See, Michael C. Duffy, *Comment: Making Waives: Reining in Class Action Waivers in Consumer Contracts of Adhesion*, 80 Temp. L. Rev. 847, 868 (2007).

[15] Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) overruled by AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333 (2011).

[16] 563 U.S. 333 (2011).

[17] Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 267.

[18] National Constitution Center, *The Seventh Amendment*, available at https://constitutioncenter.org/the-constitution/amendments/amendment-vii/interpretations/125 and Hon. Pierre H. Bergeron, *The Promise of State Constitutions in Restoring Jury Trials*, STATE COURT REPORT, April 19, 2023, available at https://statecourtreport.org/our-work/analysis-opinion/promise-state-constitutions-restoring-jury-trials.

[19] See, Roseanna Sommers, at 10, available at https://doi.org/10.1371/journal.pone.0296179.

[20] Shropshire v. Bank of Am., 2021 U.S. Dist. LEXIS 19226, at *3 (M.D. Fla. Jan. 29, 2021).

[21] Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 8 Cal. App. 5th 1, 15, 213 Cal. Rptr. 3d 410, 421 (2017)

[22] See, David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (Spring 2003).

[23] William R. Peterson, *Symposium: Hoping for The Best, Preparing for the Worst: Waiver Provisions*, 78 The Advocate 16, Spring 2017.

[24] See, David S. Schwartz infra 20.

[25] See, Rheinhart v. Nissan N. Am., Inc., 92 Cal. App. 5th 1016, 1016, 309 Cal. Rptr. 3d 859, 863 (2023).

[26] Michael v. Opportunity Fin., Ltd. Liab. Co., No. 1:22-cv-00529-LY, 2022 U.S. Dist. LEXIS 192946, at *14 (W.D. Tex. Oct. 24, 2022)

[27] Vnue, Inc. v. LG Capital Funding, LLC., 2024 U.S. Dist. LEXIS 7054, at 17 (E.D.N.Y. Jan. 12, 2024). "In consumer loan contracts, choice-of-law provisions specifying foreign jurisdictions without usury laws are unenforceable in New York as against its public policy."

[28] See, e.g. Michael, 2022 U.S. Dist. LEXIS 192946, at 2-3 and Vnue, 2024 U.S. Dist. LEXIS 7054, at *17.

[29] See, Michael, at *2-3 and Williams v. Big Picture Loans, LLC, 2023 U.S. Dist. LEXIS 170641 (E.D. Va. Sep. 22, 2023).

[30] Dix v. ICT Group, Inc.,125 Wn. App. 929 (Wash. Ct. App. 2005).

[31] Williams v. Big Picture Loans, LLC, 2023 U.S. Dist. LEXIS 170641, at *23 (E.D. Va. Sep. 22, 2023).

[32] Laflam v. Am. Sugar Refin., Inc., 2024 U.S. Dist. LEXIS 7055, at *9 (S.D.N.Y. Jan. 12, 2024).

[33] S. Harrison Williams, *Survey Of South Carolina Law: Contract Law: Consumers and Remedies: Do Limitation Of Liability Clauses Domore Harm Than Good?*, 65 S.C. L. Rev. 663 (Summer 2014).

[34] S. Harrison Williams, at 665-666.

[35] See, e.g. Allison Frankel, *Could states block corporate tactics to avert mass arbitration? This law prof says yes*, REUTERS, March 13, 2024.

[36] Id.

[37] MacClelland et al. v. Cellco P'ship et al., No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022).

[38] See, Gaither v. Wall & Assocs., Inc., 79 N.E.3d 620 (Ohio Ct. App. 2017), 2017 Ohio 765, (Mar 3, 2017).

[39] Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 Ga. L. Rev. 657 (Winter 2021).

[40] Heckman v. Live Nation Entm't, Inc., 2023 U.S. Dist. LEXIS 145793, at *22, appeal filed (C.D. Cal. Aug. 10, 2023).

[41] Story v. Heartland, https://www.publicjustice.net/case_brief/story-v-heartland/.

[42] Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 Ga. L. Rev. 657, 663 (Winter 2021).

[43] See, Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150, Ninth Appellate District (Feb 25, 2004).

[44] See, Eagle infra 41.