

Consumer Beliefs About Contracts

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Roseanna Sommers, *Contract Schemas* (Jul. 8, 2021), available at [SSRN](#).

There are some things that we know about contracting behavior even without the benefit of empirical studies. Do we really need studies to prove that nobody clicks on a hyperlink to read Terms of Service when it is something that we ourselves have never done? Do we really need more empirical studies to show us that most people wouldn't understand the fine print even if they did? It is our everyday experience that informs our understanding of contracting behavior, not necessarily our expertise or knowledge of doctrine.

But sometimes, our expertise may cloud our thinking so that we can no longer put ourselves in the shoes of the layperson, and what we assume about contracting behavior turns out to be wrong, incomplete, or misleading. For that reason, Roseanna Sommers's article [Contract Schemas](#) should prove to be a useful resource for those who write on consumer contracts and consumer contracting behavior. Sommers's article is a review of the literature involving "what ordinary people think is happening when they enter into contractual agreements." (P. 2.) It reinforces what we may already have suspected about some things and reminds us that some of what we know and assume others know is, in fact, not universally known. Because Sommers includes somewhat obscure sources as well as more familiar studies, it is a useful overview of the literature of the psychology of consumer contracts for both newcomers and those already familiar with the field.

The review starts with "the array of features that prompt people to categorize an arrangement as a contract, thereby activating their contract schemas." What is a "contract schema"? As Sommers explains, schemas are "stereotype-like cognitive structures" or, "pre-existing cultural scripts" (P. 2) which "allow us to process and navigate situations that are entirely novel, with little effort." Contract schemas then are those things which people believe are true about contracts, the things that make them "contract-y".

So, what do lay people think is a contract? Drawing primarily upon the research of D.P. Stolle, she states that most lay people associate contracts with unreadable text, long complex sentences, and small font. They also think of boilerplate, "loopholes," and "hidden strings." As Sommers notes, the layperson thinks of the "prototypical contract" as "one that you cannot read but that is laced with peril." (P. 3.) Not a very flattering impression of contracts. Above all else, laypeople believe contracts are signed. She notes that "(f)ocus group participants mentioned signing one's name nearly twice as often as any other feature" and "(s)everal studies have confirmed that signatures loom large in the lay conception of contracts." (P. 3.) Thus, "people schematically represent contracts as documents filled with blocks of tiny, inscrutable, jargon-laden text, with a signature at the bottom." (P. 4.)

As for the substance? Perhaps unsurprising given the jargon, fine print, and legalese, "(p)eople rarely have more than a vague sense of what is contained within the dense text." (P. 4.) The dispiriting conclusion is that "when people encounter an object that has these characteristic features – long, complicated sentences; fine print; legalese, signature block; and so on – they heuristically represent it as a contract even as they fail to engage with the substance." (P. 5.)

So much for the look of contracts. What do laypeople expect from these off-putting blocks of text? What psychological and behavioral effects do these schemas trigger? According to the review, they believe that contracts “will be enforced as written” and “generally do not contemplate the possibility of unenforceable clauses.” (Pp. 6, 11-12.) In fact, the “lay expectation that contracts are enforced as written is so strong that people often look to their contracts for *guidance* on their legal rights and obligations.” (P. 7.)

All this fine print has a “demoralizing” effect which leaves consumers feeling helpless and blaming themselves for failing to read contracts more carefully – even though it would be unrealistic for them to do so. (P. 9.) Moreover, “socioeconomic status” was an “important predictor of whether people view contract terms as authoritative.” (P. 9.) MBA students, lawyers and law students were all less inclined to view clauses as binding or unchallengeable which “may leave some groups more open to exploitation by sophisticated parties, who can use laypeople’s contract schemas against them.” (P. 10.)

Perhaps the average consumer’s belief in the immutability of contract terms is warranted. As [Manisha Padi](#) (reviewed [here](#)) documented, sophisticated parties negotiate and take advantage of unclear terms to get more lenient treatment from firms, which means that one-sided adhesive terms would more negatively impact those with fewer resources.

Sommers review of contract schemas provides an additional dimension and an exclamation point of sorts to the concerns raised by scholars like [Danielle Kie Hart](#) who have expressed concerns about the pitfalls of relying upon contract defenses like unconscionability to get out of unfair contracts. It also raises additional questions about how to best incorporate the findings from the literature on consumer beliefs about contracts into contract law. If consumers believe in contract formalities, such as a signature block, shouldn’t we refuse to recognize a click on an “Accept” icon as a manifestation of assent because it is not “contract-y” enough? If consumers believe contracts are unchallengeable, should we require more to find contract formation and rely less on contract defenses such as unconscionability to avoid socially undesirable bargains? The research as summarized by Sommers in this literature review requires contract law – and contracts scholars – to ask better questions and demand more realistic doctrinal solutions.

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