When Reading the Fine Print is Actually Worse for Consumers: The Case of Unenforceable Terms

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Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence From the Residential Rental Market*, 9 **J. Legal Analysis** 1 (2017).

While disclosure has been the preferred regulatory tool to ameliorate problems arising from imperfect information, it often fails. In particular, everyone is familiar with the problems associated with not reading fine print: some blissfully uninformed consumers later regret a transaction once they discover hidden charges or attributes described in the unread contract. Formal research confirms that few consumers pay attention to fine print and that disclosures are poorly designed and too abundant to be effective.[1]

The promise of mandatory rules is to avoid these problems. If sensibly drafted, they can rescue consumers from the perils of their own inattention or laziness. Take landlord-tenant laws. In most states, the warranty of habitability and other rules afford tenants a host of legal rights, such as the right to retain payment of rent if the landlord does not deliver the property in livable conditions or fails to keep appliances functional.

To assert their legal rights, however, tenants must first know them. A natural first place to find this out is the lease. But what if the lease disclaims the benefits mandatory rules intend to confer? Then, ignorance of law replaces ignorance of contract terms. Meirav Furth-Matzkin addresses this important yet little-discussed problem in her article. The paper is comprised of two studies. The first is a comprehensive analysis of the standard terms that govern landlord-tenant lease agreements in Massachusetts. The second is a survey of Massachusetts tenants.

In the first study, Furth-Matzkin analyzes a sample of 70 residential lease agreements from landlords, agents, and tenants, which were mostly students. To her surprise, she finds that most leases include non-enforceable terms. She writes that “[a] total of fifty-one leases, constituting 73 percent of the sample, included at least one unenforceable clause, and sixty-five leases, constituting 93 percent of the sample, included at least one misleading clause. Forty-seven leases, or 67 percent, including both unenforceable and misleading terms, and all of the leases in the sample failed to disclose at least nineteen of the possible twenty-six provisions concerning tenants’ rights and remedies and landlords’ duties and liabilities.”

These are not minor provisions. About one-third of the unenforceable terms involved rights afforded to tenants under the warranty of habitability (i.e., terms relating to maintenance and repair), and the same proportion of landlords sought to disclaim the implied warranty of habitability altogether. The problem is that these rights cannot be waived: Massachusetts law holds the landlord responsible for necessary maintenance and repairs. The tenant can do such repairs herself and deduct the cost from upcoming rental payments. The lease provisions have it backwards. They state that necessary maintenance and repairs are the *tenant’s* responsibility and landlords may charge tenants any repair costs.

It should hardly be surprising that whenever the law does not require landlords to disclose pro-tenant rights, landlords don’t always volunteer to disclose them in their leases. Yet, when the law *mandates*

such disclosures, about half of the leases in the sample fail to comply. For example, over 80 percent of the leases that required advanced deposits failed to notify tenants that the landlord was required to pay interest on such deposits at the end of the lease. Leases also failed to inform tenants of their rights to cure breaches that could result in eviction. Individual landlords were more likely to include these clauses than the commercial ones. The tenants in non-commercial transactions may be less sophisticated, or the landlords themselves may not be aware of the law and view their leases as quite fair, but there is a failure of mandatory disclosure either way.

Of course, none of this would matter if the contracts were not read or otherwise a starting point for disputes. The second study, a survey of 279 tenants in Massachusetts (obtained via Amazon.com's Mechanical Turk), reveals that most respondents read their lease at some point during their lease agreement and their purpose is often to inform themselves of their rights under the lease. Most renters had experienced at least one issue with their landlord, and over 90 percent had looked to their lease to assess their rights and responsibilities. Most concerns related to repairs and a desire for an earlier termination of the lease. In contrast, only a handful of respondents sought the advice of a lawyer (perhaps because the issue was especially important) or even checked the Web or consulted with friends or family to determine their rights. Indeed, almost half of these renters consulted *only* the lease to learn about their rights. It shouldn't be surprising, then, that only three percent threatened legal action against the landlord for failing to comply with the law regardless of the lease, and another small percentage reported reaching an outcome different than the one stipulated by the lease.

Much has been said about the perils of disclosure regulation in consumer markets. The findings of this paper suggest that absent adequate monitoring and enforcement mechanisms, disclosure regulation might fail because sellers might not include mandatory disclosures in their contracts. Indeed, even substantive regulation might not have its intended effect because sellers are misinforming consumers about the law through their standard form contracts, knowingly or not, by including unenforceable clauses. The findings highlight the importance of enforcement and monitoring mechanisms, as well as the effects of inclusion of unenforceable terms. More generally, the analysis and findings contribute to the growing empirical literature analyzing the content of standard form contracts.

1. See, e.g., Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted To Know: The Failure of Mandated Disclosure (2014); Eyal Zamir & Doron Teichman, The Oxford Handbook of Behavioral Economics and the Law (2014); Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012); Yannis Bakos et al., Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts, 43 **J. Leg. Stud.** 1 (2014).

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