

Minding the Gap: Consumer Contracts in the Age of Online Information Flow

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Abstract : The digital world becomes part of our DNA now. The way e-commerce, human behavior, and law interact and affect one another is rapidly and significantly changing. Among others things, the internet equips consumers with a variety of platforms to share information in a volume we could not imagine before. As part of this development, online information flows allow consumers to learn about businesses and their contracts in an efficient and quick manner. Consumers can become informed by the impressions that other, experienced consumers share and spread. In other words, consumers may familiarize themselves with the contents of contracts through the experiences that other consumers had. Online and offline, the relationship between consumers and businesses are most frequently governed by consumer standard form contracts. For decades, such contracts are assumed to be one-sided and biased against consumers. Consumer Law seeks to alleviate this bias and empower consumers. Legislatures, consumer organizations, scholars, and judges are constantly looking for clever ways to protect consumers from unscrupulous firms and unfair behaviors. While consumers-businesses relationships are theoretically administered by standardized contracts, firms do not always follow these contracts in practice. At times, there is a significant disparity between what the written contract stipulates and what consumers experience de facto. That is, there is a crucial gap ("the Gap") between how firms draft their contracts on the one hand, and how firms actually treat consumers on the other. Interestingly, the Gap is frequently manifested by deviation from the written contract in favor of consumers. In other words, firms often exercise lenient approach in spite of the stringent written contracts they draft. This essay examines whether, counter-intuitively, policy makers should add firms' leniency to the growing list of firms suspicious behaviors. At first glance, firms should be allowed, if not encouraged, to exercise leniency. Many legal regimes are looking for ways to cope with unfair contract terms in consumer contracts. Naturally, therefore, consumer law should enable, if not encourage, firms' lenient practices. Firms' willingness to deviate from their strict contracts in order to benefit consumers seems like a sensible approach. Apparently, such behavior should not be second guessed. However, at times online tools, firm's behaviors and human psychology result in a toxic mix. Beneficial and helpful online information should be treated with due respect as it may occasionally have surprising and harmful qualities. In this essay, we illustrate that technological changes turn the Gap into a key component in consumers' understanding, or misunderstanding, of consumer contracts. In short, a Gap may distort consumers' perception and undermine rational decision-making. Consequently, this essay explores whether, counter-intuitively, consumer law should sanction firms that create a Gap and use it. It examines when firms' leniency should be considered as manipulative or exercised in bad faith. It then investigates whether firms should be allowed to enforce the written contract even if the firms deliberately and consistently deviated from it.

Keywords : consumer contracts, consumer protection, information flow, law and economics, law and technology, paper deal v firms' behavior

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