Article

Insurers as Contract Influencers

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Contract boilerplate degrading consumers' litigation options is omnipresent, but a little mysterious. And that's not just because no one reads it. We know that terms mandating arbitration, exculpating liability, requiring individualized litigation, and shifting risk have proliferated in the last generation. But consumer contracts' production and efficacy has been understudied. We bring to bear a new source of information about these questions from the insurance-as-governance literature, asking how insurers influence boilerplate's adoption and content.

Interviewing participants in the liability insurance industry, we show that insurers refine boilerplate language, teach policyholders about its efficacy, and decline coverage when it is absent. At the same time, they rarely offer price breaks for adopting boilerplate, suggesting that at least some of the cost savings from consumer boilerplate may end up in the coffers of insurance firms rather than those of their clients. Insurers are surprisingly skeptical about the value of terms that have particularly excited proceduralists and consumer contract scholars—arbitration and liability waiver clauses—and believe their spread does not materially affect the risks that they insure. Overall, these qualitative findings suggest the value of a new, systematic approach to the study and regulation of boilerplate.

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†† Professor, Rutgers Law School. We thank Chris Pingitore (Penn '26) for research assistance. Ken Abraham, Tom Baker, Vince Buccola, Jay Feinman, Camily Hrdy, Mitu Gulati, Omri Ben-Shahar, Daniel Schwarcz, Peter Siegelman, Stephen Ware, participants at a UVA Landmines in Contract Law conference, and the law and business faculties at Connecticut, Richmond, Temple, Tel Aviv, and Penn provided helpful comments.

INTRODUCTION

In recent decades, progressive scholars have sounded ever-louder alarms about the spread of liability-defeating boilerplate in adhesion contracts.[1] They say the fine print distorts procedure by directing disputes to arbitration, waiving class-action rights, and requiring plaintiffs to litigate in places and under legal regimes averse to their interests.[2] Terms and conditions undermine public and private law by exculpating damages and changing the relevant standards of care.[3] As consumer contracts' empire is ever expanding,[4] law reviews are chock-full of claims

1. For a summary, see MARGARET JANE RADIN, BOILERPLATE (2013); David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1370–71, 1417 (2023); James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 276–77 (2018); J. Maria Glover, Feature, *Disappearing Claims and the Erosion of Substantive Law*, YALE L.J. 3052, 3076–83 (2015); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680–81; see also ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 126–27 (2017); Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 217–29 (2016) (arguing that remedies against private firms are increasingly illusory).

2. *See* Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 490 (2020) (focusing on arbitration); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 51 (2019) (arguing that arbitration is "not currently picking up the slack left by the decline of the class action"); Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 133 (2011) (arguing the Supreme Court has given firms "the power to impose a mandatory, no-opt-out system in their own private 'courts' designed to preclude aggregate litigation"); Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1382 (2012) (raising normative concerns about party choice); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 783 (2011) (detailing the same concerns about party choice). *But cf.* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 402–16 (describing lack of evidence); Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 547, 553 (2016) (arguing consumer dispute programs are even worse than arbitration).

3. *See, e.g.*, Debora L. Threedy, *Liquidated and Limited Damages and the Revision of Article 2: An Opportunity to Rethink the U.C.C.'s Treatment of Agreed Remedies*, 27 IDAHO L. REV. 427, 445 (1990–91) (discussing with damage limitations); Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 73–74 (2023) (highlighting the limitations on consumers, courts, legislatures, scholars, and media stemming from a lack of transparency in dispute resolution).

4. Hoffman, *supra* note 1, at 1368–69 (describing the empire rising).

that it increasingly, illegitimately shifts power and wealth to those who already possess more than their share.[5]

It's a powerful story, often told. Is it true? Well, as it turns out, we can't answer basic questions about how liability-defeating consumer boilerplate works, starting with how common it is, when it matters to price or profits, and if it really deters plaintiffs.[6] Defenders and opponents of the empire of forms simply assume that because boilerplate exists, it must benefit firms.[7] And it probably does, even if only on the margin. But even the best accounts of how contracts dismantle consumer rights are dominated by armchair theory.[8]

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5. Many papers in this vein build on the insights of Judith Resnick, Feature, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015). *See* Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485, 1487, 1492 (2022) (articulating and critiquing the view that contract law should be blind to the inequality it creates); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1373 (2004) (explaining that arbitration takes advantage of weaker parties); Deepak Gupta & Lina Khan, Essay, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 515 (2017) ("The distributive implications of forced consumer arbitration are especially pronounced given that the primary users of payday loans and prepaid cards—which include arbitration clauses at particularly high rates—are low-income consumers, [which] suggests that those most vulnerable to exploitation by financial institutions are those most likely to lack effective redress.").

6. *See* Hoffman, *supra* note 1, at 1380–86 (describing lack of data).

7. *See id.* at 1368–69, 1380–86 (describing the "empire of forms"); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 743 (1999) ("[Firms] will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits.").

8. *See, e.g.*, NANCY S. KIM, WRAP CONTRACTS 29 (2013) (arguing sellers use one-sided clauses to prevent opportunistic and good faith plaintiffs alike); Robert A. Hillman, *More Contract Lore*, 94 TUL. L. REV. 903, 912 (2020) ("[C]ontract law enforces reasonable standard forms, not because consumers have consented to them, but because standard forms reduce costs and therefore facilitate exchange that, on the whole, benefits society."); Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1342–43 (2011) (describing increased use of clickwrap and browsewrap forms in online agreements to do more than protect from liability); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (asserting price savings); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 864–65 (2006); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151,

It would help if we knew more about consumer contracts' production and pricing. Perhaps companies seek to save money by adopting contract defenses and invest those returns in better products, leading consumers to be net better off in the long run.[9] Or maybe they don't realize or invest savings, and the lack of general deterrence preventing small-scale harms leads to worse outcomes for consumers.[10] Sorting out why, when, and how firms adopt contract terms would meaningfully inform the debate about what to do about them. But, in contrast to a rich literature on the production of commercial contracts, the origin story of consumer contract terms remains largely untold.[11]

This Article describes a novel source of information about how consumer boilerplate is created and priced—liability insurance. We provide qualitative evidence that insurance firms help create, disseminate, and price boilerplate affecting litigation risk. Introducing this new actor has the potential to reorient the

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1152–57 (2000) (arguing that choice of law clauses allow parties to mitigate the effects of inefficient substantive laws). For examples of papers offering more specific claims, see Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1317–21 (2015) (offering examples of what the author sees as strategic manipulation of text); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 449–51 (2008) (finding that competition in markets does not improve boilerplate quality); Alexander J.S. Colvin & Mark D. Gough, *Mandatory Employment Arbitration*, 19 ANN. REV. L. & SOC. SCI. 131, 131 (2023) (reviewing evidence of the incidence and effects of employer-employee arbitration clauses).

9. *See, e.g.*, George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981) (finding an informed minority of warranty purchases discipline markets).

10. *See* Hoffman, *supra* note 1, at 1407–09 (discussing the public good/externality account).

11. There are many kinds of stories out there about the genesis of terms. For example, a long and notable tradition argues that courts put out signals that firms follow. *See, e.g.*, Mark A. Lemley, *The Benefit of the Bargain*, 2023 WIS. L. REV. 237, 248–50 (2023) (arguing that *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) created signals). What we mean to say is that there isn't a rich sociology of consumer contract production like there is for commercial boilerplate. The best work, as we describe at *infra* note 25, is based on economic analyses that look across the market. *Cf.* Tess Wilkinson-Ryan, David A. Hoffman & Emily Campbell, *Contracts for Everyone* 3–7 (Univ. of Pa. L. Sch. Pub. L. Rsch. Paper, Paper No. 24-54, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5052807 (noting the commercial focus of the law and sociology tradition).

economics of consumer contracts, while shedding light on several old puzzles about the contracting ecosystem we live in.[12]

An example might help. Consider the country's many trampoline parks. As is well known, these places attract children and adults seeking to bounce.[13] Repeatedly. And, having jumped, those guests suffer injuries at alarming rates.[14] Trampoline park owners thus face extensive liability as a cost of doing business. Derivatively, so do their insurance carriers, who write policies covering injury to guests, charging the parks premiums roughly

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12. The role of insurance in the creation of boilerplate contracts has been glancingly mentioned in the literature. *See, e.g.*, Hoffman, *supra* note 1, at 1386 (suggesting contract mechanisms can affect insurance premia); Edward K. Cheng, Ehud Guttel & Yuval Procaccia, Essay, *Unenforceable Waivers*, 76 VAND. L. REV. 571, 604 (2023) (discussing examples of insurance firms requiring waivers). For a pathbreaking article on the foundational role of insurance in tort law, see generally Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165 (2024). For work on how insurance could help ameliorate the risk of consumer transactions by making firms do better outside of their contracts, see Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 238–42 (2012).

13. *See* Eun Kyung Kim, *How Safe Are Trampoline Parks? As Their Popularity Soars, So Do Injuries*, TODAY (July 25, 2018), https://www.today.com/news/how-safe-are-trampoline-parks-their-popularity-soars-so-do-t134126 [https://perma.cc/9UW3-EP27] ("Less than a decade ago, there were only three trampoline parks in the nation. Now there are roughly 800."); Press Release, Int'l Ass'n of Trampoline Parks, Statement in Response to the American Academy of Pediatrics' Trampoline Park and Home Trampoline Injury Study (Aug. 15, 2016), https://www.atpa.org.au/press-releases [https://perma.cc/BPZ3US88] ("Over the last year alone, it is estimated that more than 50 million people visited trampoline parks in North America."). The global trampoline park market, estimated at over $1 billion in 2023, is projected to grow to almost $4 billion by 2032. *See* Dimension Mkt. Rsch., *Trampoline Park Market Size to Reach USD 3,958 Million by 2032, at 16.2% CAGR*, YAHOO! FIN. (May 27, 2024), https://finance.yahoo.com/news/trampoline-park-market-size-reach-135000396.html [https://perma.cc/6TSK-PASY].

14. *See* Jeremy Smith, Brendan Williams & Tricia B. Swan, *Trampoline Troubles: Serious Traumatic Injuries in Children from a Trampoline Park, a Case Series*, 10 INT. J. CLINICAL MED. 452, 453 (2019) ("Trampoline-Related Injuries . . . account[ ] for over 100,000 emergency department visits in the United States annually and represent[ ] a significant portion of pediatric accidental injuries."); Kathryn E. Kasmire, Steven C. Rogers & Jesse J. Sturm, *Trampoline Park and Home Trampoline Injuries*, PEDIATRICS, Sept. 1, 2016, at 1, 1 (finding that trampoline park injuries are less likely than home trampoline injuries to involve head injury but are more likely to involve lower extremity injury, dislocation, and to warrant hospital admission).

reflecting their expected payouts plus a cushion for the insurance firms' trouble.[15]

We had a thought: Perhaps those insurance firms might have a chat with their policyholders—the trampoline parks—and suggest to them that one way to reduce expected liability would be to write enforceable and targeted waivers that made it less likely for guests to win tort lawsuits in court.[16] That conversation could lead the insurers to encourage the use of arbitration tribunals, using their claims experience to suggest that arbitrators are less likely to give a big verdict and more likely to provide quicker resolution. Once in a while, they'd teach their insured about developments in the law—choosing state legal rules that are more likely to be anti-liability, waive class actions, or disclaim damages.[17] And as a carrot for doing so, they'd give the parks a premium break for adopting provisions in their consumer-facing contracts. Or as a stick, they could deny coverage in the absence of a particularly important clause.

To learn if our hypothesis had legs, we spoke to insurance brokers, underwriters, claims professionals, and lawyers at a wide variety of insurance firms.[18] We learned that insurance

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15. According to Sky Zone's 2021 Franchise Disclosure Document, annual insurance premiums range from $50,000 to $165,000, depending on the park's size, among other factors. *See Sky Zone Franchise Disclosure Document*, SKY ZONE FRANCHISE GRP., LLC 20 (Apr. 2, 2021), https://franchisepanda.com/franchises/sky-zone-indoor-trampoline-park [https://perma.cc/RP9S-U97U].

16. *See, e.g.*, Sky Zone Lakewood, *Conditional Access Agreement, Pre-Injury Waiver of Liability, and Agreement to Indemnity, Waiver of Trial, and Agreement to Arbitrate*, https://www.printfriendly.com/document/conditional-access-agreement-sky-zone-lakewood [https://perma.cc/GNR6-3Q63].

17. *See, e.g.*, Cheng et al., *supra* note 12, at 588–92 (finding insurers recommend and sometimes require the use of unenforceable liability waivers by insureds due to their potential "psychological deterrence value").

18. In doing so, we join a line of scholars who have talked to insurers to better understand the role insurance plays in society. *See generally* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION (2010); Shauhin A. Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as "Compliance Managers" for Businesses*, 43 L. & SOC. INQUIRY 417 (2018) [hereinafter Talesh, *Data Breach*] (discussing insurance companies as participants in cyber); Tom Baker & Rick Swedloff, *Mutually Assured Protections Among Large U.S. Law Firms*, 24 CONN. INS. L.J. 1 (2017) (detailing insurance governing large law firms); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017) (assessing insurance companies regulating police agencies); Shauhin Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Antidiscrimination Laws*, 37 LAW & POL'Y 209 (2015) [hereinafter Talesh, *Legal Intermediaries*]

companies have played an active role in encouraging the adoption of litigation-limiting boilerplate. As we'll explore below, they do so by jawboning their insureds about the importance of tightly written, consumer-facing contracts; denying coverage when particular risks aren't well disclaimed; and sometimes calibrating premiums to contract-risk-adjusted levels. In short, they actively influence the boilerplate-generating machine.

There are, however, real limits to this story. Insurance companies only seek to modify consumer contracts for businesses—and liabilities—they cover. Mass torts and high-stakes products liability are less well covered by insurance and consequently not places where insurers directly influence consumer contract terms. And, it turns out, many of the kinds of small-scale nuisance losses that firms might seek to avoid with liability disclaimers are too, since their insurers avoid covering these kinds of claims through deductibles or other limits. We focus on instances where the insured's expected liability is at a Goldilocks level: high enough to have a conversation about with a firm's insurance broker or underwriter but not so extreme as to make the issue existential and thus uninsurable. Insurance governs the middle ground.

That insurance plays a role, even if limited, in the production of consumer contract boilerplate, importantly informs several literatures and should provoke a research agenda of public import.[19]

First, it advances our knowledge of how insurance regulates. Researchers have shown that insurers, having promised to indemnify their policyholders against losses, search for ways to avoid payouts. They do so by giving premium price breaks when insureds engage in risk-reducing behavior, teaching them how to avoid claims, and limiting coverage to force policyholders to

(examining insurance companies regulating policy members in antidiscrimination compliance); Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 10–12 (2005) (discussing the impact of liability insurance on the law of torts).

19. This paper does not speak to how insurance companies use liability-defeating clauses in their contracts with policyholders. The literature on how insurance contracts operate and evolve is fascinating (conditional on it being about insurance). But it is not our concern. For more, see Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 BYU L. REV. 471, 480 (2021).

internalize the risk of claims.[20] They thus act like regulators.[21] Prior research has focused on discrete areas of liability, from cyber to climate risk.[22] Our approach is more generalized: We examine insurers' interest in propagating liability-defeating boilerplate across types of liability and lines of insurance coverage.

Second, we provide tools to better understand how consumer contracting works. Researchers have long thought that firms benefit by modifying their contracts, but their agents—internal and external counsel—resist change and do not want to be additional cost centers.[23] In commercial contracting, such costs result in boilerplate that's sticky and slow to respond to dramatic

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20. *See* Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1416–23 (2013); Ben-Shahar & Logue, *supra* note 12, at 210–12.

21. *See* Tom Baker & Jonathan Simon, *Embracing Risk*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE RESPONSIBILITY 13 (Tom Baker & Jonathan Simon eds., 2002) ("Whether obtained as a result of compulsion or simple prudence, insurance is a form of regulation."). *See generally* RICHARD V. ERICSON, AARON DOYLE & DEAN BARRY, INSURANCE AS GOVERNANCE (2003); CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS (1985).

22. *See generally* BAKER & GRIFFITH, *supra* note 18 (corporate malfeasance); Tom Baker & Thomas O. Farrish, *Liability Insurance & the Regulation of Firearms*, *in* SUING THE GUN INDUSTRY 292 (Timothy D. Lytton ed., 2005) (gun violence); Tom Baker & Anja Shortland, *How Crime Shapes Insurance and Insurance Shapes Crime*, 15 J. LEGAL ANALYSIS 183 (2023) (crime); Tom Baker & Anja Shortland, *Insurance and Enterprise: Cyber Insurance for Ransomware*, 48 GENEVA PAPERS ON RISK & INS. 275 (2023) [hereinafter Baker & Shortland, *Cyber Insurance for Ransomware*] (cyber); Kyle D. Logue & Adam B. Shniderman, *The Case for Banning (and Mandating) Ransomware Insurance*, 28 CONN. INS. L.J. 247 (2021) (cybersecurity and ransomware); Shauhin A. Talesh & Bryan Cunningham, *The Technologization of Insurance: An Empirical Analysis of Big Data and Artificial Intelligence's Impact on Cybersecurity and Privacy*, 2021 UTAH L. REV. 967 (2021) (cybersecurity); Marcos Antonio Mendoza, *The Limits of Insurance as Governance: Professional Liability Coverage for Civil Rights Claims Against Public School Districts*, 38 QUINNIPIAC L. REV. 375, 416–26 (2020) (civil rights violations in public schools); Talesh, *Data Breach*, *supra* note 18 (cybersecurity); Rappaport, *supra* note 18 (police behaviors); Baker & Swedloff, *supra* note 18 (legal malpractice at large law firms); Talesh, *Legal Intermediaries*, *supra* note 18 (employment discrimination); Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559 (2008) (climate change); Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 GEO. L.J. 1795 (2007) (corporate malfeasance).

23. *See* David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1451–52 (2018) (describing the costs of innovating in terms and lawyers' incentives).

changes in law and enforceability of terms.[24] In consumer contracting, there is very weak evidence of change over time in controlled studies, but we lack any controlled accounts at all of how and why firms adopt terms despite agency costs.[25] Our research suggests agents inside consumer firms could be spurred to change their contracts by their insurers, which monitor and depress their insured's agency costs by making sure they adopt liability-limiting terms.

Third, finding that insurance firms influence change in consumer contracting offers a different perspective on who those clauses ultimately benefit. The study of boilerplate's welfare effects has been notably unable to demonstrate that their adoption increases firm value or that changes to enforceability affect prices. Perhaps, we'll argue, the reason is that scholars have been looking at the wrong firms. If insurers claim some of the ultimate rewards (fewer claims) when boilerplate "works," we can learn the value of particular clauses by studying insurance firms, not their policyholders.

Stepping back, the evidence we gather also suggests that the stakes in this debate may be a bit lower than scholars have feared. Insurers—with skin in the game—generally tend to dismiss the value of arbitration as reducing costs, particularly given mass arbitration's countervailing force on judgments. They are similarly skeptical about the value of most damage limitations and waivers, which they think ultimately won't prevent liability, no matter what the formal doctrine says. Insurers would like to see more clauses that choose law and forum, which they see as more likely to affect exposure, as well as those that make class-wide adjudication difficult to achieve. In short, insurers told us that only some of the procedural world's bugaboos

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24. *See* Robert E. Scott, Stephen J. Choi & Mitu Gulati, *Commercial Boilerplate: A Review and Research Agenda*, 20 ANN. REV. L. & SOC. SCI. 201, 211 (2024).

25. *See* Giuseppe Dari-Mattiacci & Florencia Marotta-Wurgler, *Learning in Standard-Form Contracts: Theory and Evidence*, 14 J. LEGAL ANALYSIS 244, 247 (2022) (offering evidence of change in terms over time); Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 341 (2009) (finding relatively modest change between even rolling contracts and standard-form contracts). *See generally* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240 (2013) (suggesting change as a result of court decisions).

were really saving them money, or at least enough to try to increase their incidence in their insured's consumer-facing contracts.

Putting this together, our research enables a more complete understanding of how boilerplate is produced, what it does, and who benefits by its spread. With that in hand, we suggest a new approach to governing this important legal technology, particularly the unenforceable contract terms that are increasingly the subject of widespread condemnation. After all, insurers, being boilerplate's regulators, can also be regulated.

We'll proceed by first, in Part I, providing an overview about what we know about the production of consumer contract terms that limit liability. Part II is the heart of this Article, laying out our interview method and summarizing our key findings. Part III both provides some limitations (where insurance firms don't act, and what holds them back) and the implications of our findings for consumer contract law. We then conclude.

I. WHAT WE KNOW ABOUT CONSUMER-FACING BOILERPLATE

The modern consensus about consumer-facing terms that limit liability—often described as consumer boilerplate—rests on two essentially uncontested facts. First, the number of written contracts governing our lives as consumers has skyrocketed in the last generation.[26] Second, no one reads those forms.[27] But outside of this core of agreement, scholars and policymakers agree on very little about our consumer contracting universe.

Let's start with the obvious next step outside the core: Given that the number of written contracts has increased over time, is it true that these contracts are *worse* on some consumer-facing

26. *See* Hoffman, *supra* note 1, at 1394–97 ("[A]t 30,000 feet: there are simply orders of magnitude *more contracts* than there used to be.").

27. *See, e.g.*, Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (explaining that consumers read terms and conditions clauses 0.2% of the time); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2102–05 (2014) (surveying evidence on non-readership); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 984 (2006) ("[M]ost consumers do not read boilerplate provisions or, if they do, find them hard to understand.").

dimension? Most scholars think the answer is yes.[28] And there is plenty of evidence that arbitration clauses have become more common in consumer contracts.[29] (Though, as a leading recent work acknowledged, even on the "basic issue" of the percent of firms requiring consumers to arbitrate, researchers can't agree).[30] But our understanding of the rise of class-action waivers, exculpation clauses, choice of forum, and choice of law is more impressionistic.[31] We have longitudinal data about the growth of aversive forms only in one or two consumer contract fields, and only for a decade or two at most.[32] That consumer contracts are worse than they used to be is the table stakes for most normative consumer protection scholarship in the last generation, but it's an underbaked empirical point.[33]

Now, if contracts are both more common and contain more anti-consumer terms than they used to, what happened? Here, there are many schools of thought. Some say that the rise of forms—that is, the rising number of consumer transactions reduced to writing instead of the normal defaults—primarily results from falling transactional costs in a digitized world[34]:

> In many cases, they are nearly zero-cost products, thrown into commerce without real thought about the benefits they bring firms, because technology made them an afterthought. Simply put, without our phones, iPads, and tablets, we wouldn't see, or agree to, nearly so many written contracts: [O]ur swelling empire of forms is built on the portable screen.[35]

But this technology-centered view is not the mainstream. Most contract and consumer scholars today maintain that firms have purposefully pushed forms over time to mitigate changing litigation risks. They think that firms deliberately trick

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28. *See* Hoffman, *supra* note 1, at 1387–88 (describing the feedback loop).

29. *See* David Horton, *Forced Arbitration in a Pandemic: Corporations Double Down*, AM. ASS'N FOR JUST. (Oct. 27, 2021), https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic [https://perma.cc/T5WG8N85] (observing that consumer-forced arbitration has increased, post-COVID-19 pandemic.).

30. David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. 2165, 2197 (2025).

31. *See generally* Hoffman, *supra* note 2 (cataloging growth in certain contract clauses controlling litigation).

32. *See, e.g.*, David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 J. EMPIRICAL LEGAL STUD. 90 (2022) (studying twenty years of lease data).

33. *See* Hoffman, *supra* note 1, at 1387–88 (collecting modest data).

34. *Id.* at 1397–1401 (making an argument about transaction costs).

35. *Id.* at 1371.

consumers to surrender rights they would otherwise value.[36] Thus, the movements against "forced arbitration" and "rip-off clauses"[37] have gained traction, asserting that firms have vacuumed up consumer surplus on the sly.[38] Others, though agreeing that firms are being purposeful, are less attracted to the extraction story and instead argue that boilerplate has grown in response to pushes from the United States's regulatory-disclosure state.[39]

An inconvenient fact for the stories scholars tell about intentionally (evil) design is that there's essentially no direct evidence for it. Many scholars think that firms gain, and consumers lose, when consumer contracts adopt terms limiting liability.[40] But the proof that contract drafters deliberately set out to create unreadable or unenforceable contracts is inferential.[41] That's

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36. *See, e.g.*, KIM, *supra* note 8, at 29; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) (arguing that development of contract law must include an understanding of decision-making); Peter Linzer, *Contract as Evil*, 66 HASTINGS L.J. 971, 975 (2015) (arguing that sellers take advantage of asymmetries to "win over the weak and the trusting"); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115, 136 (2020) (discussing how design choices can make terms invisible to the firms' benefit).

37. *See* Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873, 877–83 (2019) (describing the debate about arbitration/rip-off clauses).

38. *See, e.g.*, RADIN, *supra* note 1, at 15–17 (arguing strict adherence to boilerplate can degrade democratic rights); Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1644–60 (2006) (describing firms' techniques to avoid scrutiny of terms); Willis, *supra* note 8, at 1317–21 (suggesting strategic manipulations of contractual text); *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 416–20 (2016) (modeling how firms can reduce public-protecting judicial decisions by moving claims to arbitration).

39. *See* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 56 (2014); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1640 (2014) (describing the effect of the National Bank Act and disclosure mandates on usury laws); Omri Ben-Shahar, Review, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 888–89 (2014) (reviewing RADIN, *supra* note 1).

40. *See supra* note 8.

41. *But cf.* Jeff Sovern, *Report That Companies Include Provisions in Arbitration Clause That They Know the Arbitrator Won't Enforce—but That Might Suppress Claims Even More*, PUB. CITIZEN: CONSUMER L. & POL'Y BLOG (Mar. 8, 2018), https://clpblog.citizen.org/report-that-companies-include-provisions-in-arbitration-clause-that-they-know-the-arbitrator-wont-en [https://perma.cc/

true, although there are plenty of studies showing that contracts are, in fact, difficult to read.[42] And it's widely accepted that the incidence of unenforceable provisions in certain contracts is staggeringly high.[43]

A different strand of scholarship, built by Florencia Marotta-Wurgler, shows that at least some kinds of contracts appear to evolve rationally over time, becoming more consumer unfriendly following courts' invitation.[44] But the effect isn't present in all contract types.[45] Marotta-Wurgler further suggested that in-house counsel made firms more likely to innovate around consumer boilerplate because such lawyers are better able to learn from experience.[46]

There is limited evidence of pro-consumer intentional contract design, mostly in niche settings where firms have tried to align boilerplate with their brands.[47] In particular, entrepreneurial lawyers for several platform-economy firms worked to build translations of their terms of use into regular English. For instance, Tumblr's then-general counsel led a revision of its terms that included helpful (and humorous-for-the-law) explanations:

4R4K-K4TE] (reporting suggestive evidence that arbitration drafters know of certain terms' unenforceability).

42. Most of these papers rely on unreliable reading measures, as Yonathan Arbel points out in a brilliant paper. *See* Yonathan A. Arbel, *The Readability of Contracts: Big Data Analysis*, 21 J. EMPIRICAL LEGAL STUD. 927, 927 (2024) (discussing literature on readability and criticizing both the construction and use of most public scales used in contracting papers).

43. *See, e.g.*, Hoffman & Strezhnev, *supra* note 32, at 99–100 (finding that most contracts studied contained an unenforceable term and that the use of terms was increasing over time); Daniel Wilf-Townsend, *Deterring Unenforceable Terms*, 111 VA. L. REV. 943, 943–44 (2025) (summarizing evidence of unenforceable provisions being used in a wide range of cases and how those terms "impose costs on consumers and employees despite being formally toothless").

44. *See* Dari-Mattiacci & Marotta-Wurgler, *supra* note 25, at 247 (offering evidence of change in terms over time).

45. Marotta-Wurgler, *supra* note 25, at 341 (finding boilerplate has not gotten worse for buyers).

46. Dari-Mattiacci & Marotta-Wurgler, *supra* note 25, at 283–86 (reporting on interviews with general counsels).

47. *See* Hoffman, *supra* note 23, at 1458.

FIGURE 1: TUMBLR TERMS OF SERVICE: AGE PROHIBITION (2016)[48]


You have to be at least 13 years old to use Tumblr. We're serious: it's a hard rule, based on U.S. federal and state legislation. "But I'm, like, 12.9 years old!" you plead. Nope, sorry. If you're younger than 13, don't use Tumblr. Ask your parents for a Playstation 4, or try books.

As that lawyer explained, the term revision was intended "to genuinely make sure people saw them—but it also ended up being great marketing."[49] He also suggested that:

> [T]he business case for friendly and precatory contracts is not obvious for all firms. Though being user-friendly "is still surely a net positive," the advantages to being able to exploit consumers' data through contract terms are also undeniable: they make the "marginal consideration [of user-friendliness] worthless as it is incredibly hard to build and maintain . . . one of these [social media] platform businesses at this point [outside of Google/Apple/Facebook's orbit]."[50]

Outside of these two narrow lines of literature, the evidence that firms gain (or lose) from adopting liability-limiting boilerplate is thin. There are no studies finding that firms adopting boilerplate see returns to their stock price.[51] And it's now widely acknowledged that firms rarely, if ever, adjust prices of goods in response to changes in expected liability expressed through boilerplate.[52] In part, that's true because consumers don't read

48. *Id.* at 1425.

49. *Id.* at 1427.

50. *Id.* (alteration in original).

51. *Cf.* Takuya Hiraiwa, Michael Lipsitz & Evan Starr, *Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach*, REV. ECON. & STAT., Sept. 16, 2024, at 1, 31 (finding no stock market reaction to changes in noncompete law).

52. The literature on the economics of boilerplate mostly sounds in commercial contracts. The first generation of that scholarship appears, in retrospect, to have been overly optimistic about the rationality of drafting. *See, e.g.*, Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) (discussing network effects which promote use of inefficient boilerplate). But more recent literature finds that pricing effects are rare. *See* Scott, et al., *supra* note 24, at 202 ("As we describe, the research on commercial boilerplate reveals that even sophisticated parties frequently fail to read, comprehend, or bargain over critical terms. And at least some of the time (perhaps generally), the markets do not price the boilerplate until the transaction disintegrates."). In consumer contracts, the literature has been more skeptical of price effects for boilerplate. *See* Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1183 (1976) (discussing inefficiencies in

terms—competitive pressure would have demanded at least some people know the score.[53] Without the pressure that knowledge creates, it makes no sense for firms to charge more for terms that benefit consumers (or less for terms that hurt them).[54] With a few notable exceptions—think warranties on expensive consumer electronic items—liability-limiting terms are not directly a part of the price of products they govern.[55]

Some argue that because consumers ignore liability-defeating boilerplate, it is "shrouded" from market discipline.[56] As Natasha Sarin concluded, where consumers don't have the ability to experience such terms before purchase, they rationally do not buy with it in mind, permitting firms to successfully extract rents from consumers.[57] Shrouded pricing may, in some contexts, transfer value from consumers who are harmed by such terms to those that are not—think, for example, of who is hurt by a term that permits a bank to assess high overdraft fees.[58] But others point to markets like residential leasing, where aversive terms appear more likely in the contracts of richer tenants,

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standard form contracting). *See generally* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991) (analyzing the relationship between contract terms and consumer demand as a function of price); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716–21 (1992) (rejecting economists' assertions that contracts of adhesion are efficient).

53. *See* Bakos et al., *supra* note 27, at 4 ("We find that the fraction of consumers who read [standard-form] contracts is so small that it is unlikely that an informed minority alone is shaping software license terms.").

54. *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1347–48 (2011) (discussing the lack of shopping between insurance carriers despite differences in policies); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 94, 115–16 (2012) (finding that exposure to a one-sided term in a software license agreement has no effect on the likelihood to purchase the product in question).

55. *See, e.g.*, Priest, *supra* note 9, at 1347 (finding an informed minority of warranty purchases discipline markets); *cf.* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 659–60 (2010) (finding lab participants more likely to breach a contract containing a liquidated-damages clause).

56. *See* Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1589–91 (2019); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 506–09 (2006) (providing examples of shrouded pricing).

57. *See* Sarin, *supra* note 56, at 1568–78.

58. *See id.* at 1552–58 (discussing overdraft).

and suggest that terms spread in such markets are almost entirely a result of strategies to minimize transaction costs, not ones focused on expected outcomes in court.[59]

Complicating this already complex story, consumer boilerplate is the creation of firms' agents: mostly in-house and outside counsel who stand to gain by exaggerating their principal's gains from legal innovation. The evidence that agency costs cause unproductive churn in commercial contracts is compelling.[60] But that proof is weaker in the consumer context.[61]

Evidence of whether boilerplate *even saves firms litigation costs* is also largely impressionistic. The most comprehensive study in existence, published in 2015 by the Consumer Financial Protection Bureau, threw up its hands:

> The assertion that pre-dispute arbitration clauses generate cost savings, in itself, is difficult to test and has not been established or disproved. Whether such savings, to the extent they exist, are passed along to consumers is even more difficult to establish or disprove.[62]

Indeed, for each of the major categories of liability-defeating boilerplate, scholars assert enormous benefits to firms but deliver little in the way of proof. Arbitration may save firms money, or not.[63] Defense lawyers tout class action waivers, but there are

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59. *See* Hoffman & Strezhnev, *supra* note 32, at 105–13, 124.

60. *See* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 142–44 (2013) (describing the role of elite lawyers in creating obscure terms).

61. *See* Dari-Mattiacci & Marotta-Wurgler, *supra* note 25, at 283–86 (discussing the role of counsel in revising consumer contracts and suggesting experiential learning and changing circumstances drive most revisions).

62. *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(A)*, CONSUMER FIN. PROT. BUREAU § 10, at 5 (2015) [hereinafter *Arbitration Study*], https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015 [https://perma.cc/99GJ-ZS9K].

63. For a comprehensive collection of the (mostly anecdotal) evidence of arbitration cost savings, see Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 813 (2008); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001) ("What little empirical data we have suggests that properly designed employment arbitration systems can out-perform court-based litigation systems. There seems little dispute that because arbitration proceedings tend to be informal (and quicker), they require less lawyer time and resources."); see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 397 n.123 (2005) ("Alan Kaplinsky, an attorney representing major financial services institutions, was quoted as saying that '[a]rbitration is a powerful

no controlled studies finding that they in fact reduce the incidence of lawsuits.[64] The arguments for exculpatory clauses are mostly theoretical.[65] Scholars have shown that choice of forum clauses can affect win rates, but not that they improve the firms' balance sheet.[66] Choice of law clauses and damage limitations also (probably) help firms by diverting cases, but the magnitude of that benefit is unclear.[67]

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deterrent to class action lawsuits against lenders . . . . Stripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue.'" (alteration in original) (quoting Paul Wenske, *Some Cardholders Are Signing Away Their Right to Sue*, KAN. CITY STAR, May 1, 2000, at A8)).

64. *See* Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191, 251 (2020) (doubting claims of savings); Albert H. Choi & Kathryn Spier, *The Economics of Class Action Waivers*, 38 YALE J. ON REGUL. 543, 543 (2021) (analyzing situations in which arbitration requirements do and do not maximize social welfare); Keith N. Hylton, *The Economics of Class Actions and Class Action Waivers*, 23 SUP. CT. ECON. REV. 305, 305 (2015) (arguing that not all class action waivers are likely to enhance social welfare); *cf.* Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 975 (2014) ("[O]ur point is simply that, because of the bundled nature of arbitration, there are costs to using an arbitral class waiver, and these costs provide a reason for some businesses not to use an arbitral class waiver even after *Concepcion* and *Amex*.").

65. *See* Ben-Shahar, *supra* note 39, at 896 ("[I]t is hard to imagine that the savings due to, say, stingy warranties or restricted use of information products, would have no price effect."); *see also* Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583, 648–49 (2019) (considering the theoretical arguments for exculpatory clauses and describing how these damage limitations may harm consumers).

66. *See* Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1, 16 (2021) ("[L]itigators perceive the forum as an important determinant for the outcome of the dispute and are willing to fight over it fiercely."); Goldman, *supra* note 52, at 722–23 (discussing burdens associated with choice of forum clauses); David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMPLE. L. REV. 785, 785 n.3 ("Therefore, that which was intended to reduce litigation costs has actually served to contribute to them."). *But see* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1980 (2006) ("A substantial body of contract theory suggests, therefore, that choice of law and choice of forum provisions may have an impact on corporate value."). For an analysis of forum selection clauses in international transactions, see John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323, 373–82 (2019) (summarizing the common provisions of choice of forum clauses across 157 supply agreements).

67. *See* John F. Coyle, *The Mystery of the Missing Choice-of-Law Clause*, 56 UC DAVIS L. REV. 707, 707 (2022) ("There is widespread agreement among experienced contract drafters that every commercial contract should contain a

In sum, what consumer boilerplate does, whether it benefits firms, and how it is built are all topics on which we know less than we should, especially if boilerplate is as important as some think it is. Scholars endlessly fret about boilerplate's impact on public law. But irate proceduralists and worried consumer protection advocates proceed without any direct evidence that firms benefit from its adoption.

Perhaps they've been looking in the wrong places.

II. HOW INSURERS GOVERN BOILERPLATE

Indemnity makes the indemnified reckless. Or so the story goes. Without the cautionary threat of financial consequences for liability—because the insurer will pick up the tab—policyholders have no reason to avoid it. This is *moral hazard*.[68] Insurers naturally seek to mitigate moral hazard so they can avoid paying claims.[69] In the last couple of decades, empirically oriented scholars have tried to figure out how.

They've found that insurers encourage precautions on many fronts. They educate their policyholders about risk management strategies and offer price breaks for firms that take steps to mitigate risk. They'll force insured firms to share the risk of loss by covering less of the firm's total exposure (a *coverage limit*) or making policyholders pay for a certain amount of claims before the insurance kicks in (a *deductible* or a *retention*). And sometimes they'll simply refuse to cover bad risks at all. Sometimes they'll educate their insureds about ways to avoid claims or advocate for changes to liability rules.[70] Altogether, this is

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choice-of-law clause. Among their many virtues, choice-of-law clauses facilitate settlement and reduce litigation costs."); Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1103 (2012) ("Software publishers have been triumphant in creating a contractually based 'liability-free' zone to insulate themselves from paying consequential damages or other significant remedies in the event that defective software failed causing damages to the user's computer system. Hence, defectively designed software costs consumers and other users millions of dollars per year in consequential damages.").

68. *See* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 237 (1996).

69. *See generally* Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120, 121–22 (1982) ("Although the purchase of liability insurance changes the incentives created by liability rules, the terms of the insurance policies sold in a competitive setting would . . . provide an appropriate substitute (but not necessarily equivalent) set of incentives to reduce accident risks.").

70. *See supra* note 20 and accompanying text.

insurance as governance.[71] Scholars have looked at how insurers manage the liability risks of driving,[72] medicine,[73] law,[74] policing,[75] corporate governance,[76] environmental pollution,[77] and cyber.[78]

Our goal is to bring this insurance-as-governance literature into conversation with that on consumer boilerplate. Doing so

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71. *See supra* note 22 (citing examples of insurance as a form of regulation). *But see* Kenneth S. Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance*, 98 IND. L.J. 215, 219 (2023) (arguing that the scholar's claims of insurers as governors is overstated).

72. *See* Baker & Swedloff, *supra* note 20, at 1427–31 (discussing the theory and data on how auto insurers encourage precaution-taking); *see also* Yizhou Jin & Shoshana Vasserman, *Buying Data from Consumers: The Impact of Monitoring Programs in U.S. Auto Insurance* 19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29096, 2021) (finding that telematic devices promote safer driving).

73. *See* Baker & Swedloff, *supra* note 20, at 1434–37 (describing the ways liability insurers interact with hospitals and doctors to modestly encourage safety precautions); *see also* Kathryn Zeiler, Charles Silver, Bernard Black, David A. Hyman & William M. Sage, *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990–2003*, 36 J. LEGAL STUD. S9, S20–23 (2007) (demonstrating that insurance is the primary asset used to pay for malpractice claims); David M. Lang, Commentary, *Sexual Malpractice and Professional Liability: Some Things They Don't Teach in Medical School—A Critical Examination of the Formative Case Law*, 6 CONN. INS. L.J. 151, 159–60 (1999) (discussing insurance policy exclusions used to deny coverage and control behaviors); Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L., no. 1, 2008, at 1, 34 (reporting on the use of claims information by a hospital system to manage risk).

74. *See* Baker & Swedloff, *supra* note 18, at 6 (finding that mutual insurers encourage various forms of precaution taking at large law firms).

75. *See* Rappaport, *supra* note 18, at 1548 (finding that insurers influenced police policies through education, training, and departmental auditing).

76. *See* BAKER & GRIFFITH, *supra* note 18, at 20 (analyzing the extent to which liability insurers undermine or retain the deterrence objectives of corporate and securities laws).

77. *See* Haitao Yin, Howard Kunreuther & Matthew W. White, *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J.L. & ECON. 325, 326–27 (2011) (finding that a policy switch in Michigan to private insurance corresponded to a reduction in accidental underground fuel tank releases).

78. *See* Talesh, *Data Breach, supra* note 18, at 420 (finding that insurance companies and institutions, through cyber insurance, act as compliance managers); *see also* Talesh & Cunningham, *supra* note 22, at 975 (exploring how technology shapes the delivery of insurance and examining the effects and implications of the technologization of insurance); Baker & Shortland, *Cyber Insurance for Ransomware*, *supra* note 22, at 295 (finding that cyber insurers only selectively engage in security initiatives).

requires a bit of a twist on the sociology of insurance's normal science. That research has focused on specific types of liability.[79] This makes sense because insurance firms organize themselves that way. There are specialty coverages for employment liability, medical malpractice, legal malpractice, etc. Even when selling general liability policies that cover whole business sectors and liabilities, insurance professionals often specialize in particular industries, like construction or healthcare systems.[80]

We've engaged in a distinct project. We looked trans-substantively—across different types of liability and industries—at how insurers view consumer contracts and whether they are encouraging their policyholders to use boilerplate. What we gain in breadth we lose in depth. The reach of both insurance and boilerplate is coterminous with the economy itself, but insurance does not influence all parts of the economy in the same ways. The effectiveness of insurance as a governor is dependent on insurance's role within particular industries, which we can only superficially explore.[81] Thus you should take our evidence as indicative, but not the last word, on what a more targeted industry-by-industry search would find.

In describing this broad phenomenon, we'll first need to say a bit about the structure of the insurance industry and the players who might conceivably motivate changes in boilerplate. That's Section A. Then in Section B, we offer a thick description of how insurance insiders seek to influence firms to change their liability profile using contracts.

Before we do, a few words on method. In line with earlier qualitative research into the insurance industry, we developed our dataset by interviewing insurance professionals involved in selling and pricing liability policies and professionals involved in claims management and loss prevention services who have experience with consumer boilerplate.[82] Overall, we spoke to more

79. *See supra* notes 71–78 and accompanying text.

80. *See* ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 31 (5th ed. 2012) (detailing the history of how the "business of insurance became compartmentalized according to the kind of risk insured").

81. *See* Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 558 (2016).

82. *See, e.g.*, Rappaport, *supra* note 18, at 1544 (conducting interviews with over thirty individuals to assess the market for municipal liability insurance among police agencies).

than two dozen insurance professionals on the record in informal conversations. We stopped asking for more interviews when we felt like we weren't learning anything new. Obviously, we are limited by who we talked to, and we might be capturing unrepresentative concepts or experiences.[83] The Article's third Part will consider the limits and extensions of our findings.

A. THE PROCESSES AND PEOPLE OF INSURING COMMERCIAL LIABILITY

We start with a brief tour of the commercial liability insurance industry—insurance that covers claims against firms. This insurance is *commercial*, rather than personal, in that it covers firms, not individuals. It is *liability*, rather than property, in that it covers harms a policyholder causes to others rather than harms to the policyholder's own stuff. Commercial liability insurers are called in when outsiders claim that a firm injured them in some way. Understanding the material that follows depends on learning some insurance-insider jargon[84]: We'll be as brief as possible.

Liability insurers promise to pay judgments or settlements of claims (called *covered losses*) and the legal costs of defending any plausibly covered claim.[85] But the liability insurance market

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83. Our interviews were semi-structured in that we began with an interview protocol but allowed the conversations to expand based on the experience and interests of the respondents. The interviews typically lasted approximately thirty minutes, and we occasionally followed up with additional questions via email. We spoke with approximately twenty-five respondents including five brokers, five underwriters, three claims attorneys, four coverage attorneys, three claims professionals, and other insurance professionals. Please note that all referenced quotes from our interviews have been lightly edited to remove natural conversational fillers (e.g., "uhm") to improve clarity, while still nonetheless preserving the original meaning. This segment of the insurance market is fragmented by the industry and risks covered. There are different silos for cyber insurance, construction, general liability, professional liability, employment, etc. But our respondents reported a surprising amount of uniformity about concerns with the litigation system and the corresponding importance of boilerplate.

84. Insurance terms introduced in this Article will be italicized upon their first use in the text.

85. An insurer's duty to defend is broader than its duty to indemnify. While there are variations to the rule, typically an insurer must provide defense when a complaint alleges plausibly covered violations. *See, e.g.*, Fitzpatrick v. Am. Honda Motor Co., 575 N.E.2d 90, 90 (N.Y. 1991) ("It is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence . . . ."). *See generally* TOM BAKER, KYLE

isn't simple; no one policy covers all the claims a firm might face.[86] And, even if a firm buys all the insurance it can, it still can't cover all of the claims that might be brought against it.

The basic liability policy (a *commercial general liability* (*CGL*) *policy*) protects firms against claims for bodily injury and property damage to others.[87] That promise covers lots of ground.[88] But CGL policies still exclude claims for a wide variety of consumer-generated liability, including environmental pollution, employment discrimination, professional negligence, and auto accidents.[89]

D. LOGUE & CHAIM SAIMAN, INSURANCE LAW AND POLICY 579–93 (5th ed. 2021) (describing an insurer's basic duty to defend).

86. In some cases, insurers carve liabilities out of coverage because covered, systemic losses unexpectedly emerge that drive an insurer's costs higher. For example, a combination of policy drafting and new federal liabilities for pollution led to a rise in pollution claims and then the absolute environmental exclusion. *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION 525 (6th ed. 2015) (describing the ways in which courts are divided on the scope of the absolute pollution exception); Kenneth S. Abraham, "*Incomplete" Insurance Coverage*, 26 CONN. INS. L.J. 115, 120–21 (2020) (describing the absolute environmental pollution exclusion); Am. Sts. Ins. Co. v. Koloms, 687 N.E.2d 72, 79–81 (Ill. 1997) (recounting the history of the absolute environmental pollution exclusion). Other times, insurers fragment risks among several types of policy and then exclude coverage offered in one type of policy from the others so as not to duplicate coverage. *See* Abraham, *supra* note 86, at 126–27. This is the case, for example, with auto and employment-related exclusions in commercial general liability policies. *See id.* at 127 (describing auto-related exclusions from homeowners insurance policies and bodily injury liability and property damage exclusions from employment liability insurance policies). Other omissions are justified by economic realities, like problems with adverse selection, moral hazard, correlated risks, and uncertainty. *See id.* at 121–26 (describing these types of exclusions); *see also* Jay M. Feinman, *Fragmented Risk: An Introduction*, 11 RUTGERS J.L. & PUB. POL'Y 1, 2–3 (2013) (introducing the long list of exclusions pursued by insurers).

87. *See, e.g.*, INS. SERVS. OFFICE, INC., CG 00 01 04 13, COMMERCIAL GENERAL LIABILITY COVERAGE FORM (2012) [hereinafter CGL POLICY]. It also protects against claims for "'personal and advertising injury,' only some of which has to do with advertising and is not personal in the sense of physical injury." Feinman, *supra* note 86, at 2. Rather, that section covers a host of intentional or business torts, including claims for false arrest, detention, imprisonment, malicious prosecution, wrongful eviction, slander and defamation, violation of rights of privacy, and infringing on trade dress in advertising. *See* CGL POLICY, *supra* note 87, at 15 (outlining these examples in a CGL policy).

88. *See* Abraham & Sharkey, *supra* note 12, at 2245, 2251–52, 2254 (describing the history of CGL policies in varying contexts).

89. Some of these liabilities are not covered because CGL policies define the injuries as personal injuries, property damage, or advertising injuries. Thus, for example, financial harms from professional negligence are not covered. Other liabilities are explicitly excluded from coverage like pollution. *See, e.g.*, CGL

Firms can buy cover for some of these omitted liabilities (in industry speak, they purchase additional *lines* of insurance which together make a *program* of insurance). To name a few: *Employment practices liability* insurance covers discrimination and employment claims; *errors and omissions* policies cover professionals from malpractice claims; and *workers' compensation* insurance covers workplace injuries to employees.[90]

But you can't insure against all of life's swings (or slings) of fortune. Insurers will not, and perhaps legally cannot, cover harms that were "expected or intended from the standpoint of the insured."[91] That means insurers (generally) don't cover damages arising from intentional torts: They limit their exposure to accidents.[92] Insurers justly fear that only those who plan to commit intentional torts will purchase coverage (this is the fear of *adverse selection*).[93] And courts worry that indemnifying intentional harms encourages bad actors (moral hazard again) and removes the punitive sting of tort liability.[94]

POLICY, *supra* note 87, at 2–6 (highlighting example CGL policy exclusions for these types of harms and others).

90. *See* Abraham & Sharkey, *supra* note 12, at 2181–83, 2185 n.57 (introducing programs of insurance and these types of policies).

91. CGL POLICY, *supra* note 87, at 2; *see* Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. L. REV. 721, 739–40 (2012) (explaining the reasons behind this coverage omission). CGL policies, in fact, do cover certain intentional torts, including intentional false imprisonment, malicious prosecution, defamation, invasion of privacy, copyright violations, and use of another's advertising ideas. *See* CGL POLICY, *supra* note 87, at 15 (defining "personal and advertising injury"). Those aren't quite the kinds of consumer claims we have in mind here, with the exception of the invasion of privacy tort.

92. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 493 (student ed. 1988) ("Losses which are intentionally caused by an insured generally are not covered by liability insurance, and this rule applies even when there is no clause in the applicable insurance policy that expressly excludes coverage for injuries intentionally inflicted by an insured . . . ."); *see* ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 382–83 (2d ed. 1996) ("The public policy underlying the fortuity requirement is so strong that if the insurance policy itself does not expressly require that the loss be accidental courts will imply such a requirement.").

93. *See* Peter Siegelman, Essay, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1225 (2004) (arguing that the influence of adverse selection on insurance markets is overblown).

94. *See* Swedloff, *supra* note 91, at 740; *see also* Lincoln Logan Mut. Ins. Co. v. Fornshell, 722 N.E.2d 239, 242 (Ill. App. Ct. 1999) ("An agreement to indemnify against intentional misconduct would, as a general rule, be contrary to public policy and unenforceable. Violent criminals should not be permitted to profit from their own intentional misconduct. Furthermore, exclusions for

For similar reasons, insurers are wary of covering breach of contract. From the insurers' perspective, breach is no accident. They are concerned about adverse selection and believe they can't adequately predict the risk that a policyholder will breach (economists and insurance scholars call this a problem of *uncertainty*).[95] Perhaps unsurprisingly, the basic CGL policy does not cover some breach claims that consumers might bring, but the scope of the exclusion is complicated.[96]

For example, in a recent case, festival goers who were prevented from attending South by Southwest (SXSW) because of the global pandemic sued for a full refund.[97] The festival paid more than $1 million to settle the suit and then turned to its insurer for indemnification.[98] The insurer argued that it had no duty to pay because SXSW's obligation to its ticket holders was contractual and thus excluded in the policy.[99] The court, rejecting this argument, held that the class plaintiffs' suit wasn't just a contract claim, but also an unjust enrichment and conversion claim, which are non-contractual causes of action in Texas.[100]

By contrast, the insurer came out smelling like roses in a dispute about perfume.[101] A policyholder sued its insurer for reimbursement after the policyholder settled a lawsuit accusing it

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intentional acts are necessary to help insurers set rates and supply coverage." (citing Dixon Distrib. Co. v. Hanover Ins. Co., 641 N.E.2d 395, 401 (1994))).

95. *See* Abraham, *supra* note 86, at 125 ("Risk refers to a quantifiable probability of an event occurring, whereas uncertainty obtains when that probability cannot be quantified." (citing FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 197–263 (1921))). Insurers tend not to cover uncertain risks. *See id.*

96. *See, e.g.*, CGL POLICY, *supra* note 87, at 2 (outlining a contractual liability-related CGL policy exclusion); *see also* JORDAN R. PLITT, STEVEN PLITT, DANIEL MALDONADO & JOSHUA D. ROGERS, COUCH ON INSURANCE § 103:19 (3d ed. 2025) (illustrating cases when courts navigated these complications).

97. *See* SXSW, L.L.C. v. Fed. Ins. Co., No. 22-50933, 2024 WL 1216560, at *1, *1 (5th Cir. filed Mar. 21, 2024) (detailing that festival goers sued for breach of contract, unjust enrichment, and conversion).

98. *Id.* at *3.

99. *See id.* at *4 (quoting the contract exclusion: "The Company shall not be liable for Loss on account of any Claim . . . based upon, arising from or in consequence of any liability in connection with any oral or written contract or agreement").

100. *See id.* at *5 ("The Contract Exclusion does not bar coverage for two of the claims in the [Plaintiffs'] Complaint: unjust enrichment and conversion.").

101. *See* Spa De Soleil, Inc. v. Gen. Star Indem. Co., 787 F. Supp.2d 1091, 1092 (C.D. Cal. 2011) (holding in part that the underlying claims against the insurer were contractual and excluded under the CGL policy). One co-author blames the other co-author for this terrible, no-good, joke.

of failing to deliver the promised quality or quantity of cosmetics. A California court held that the insurer had no duty to provide defense or indemnification even though the lawsuit against the policyholder included both tort (covered claims) and contract claims: "Breach of contract is not covered by a CGL policy unless the facts alleged in the underlying complaint could *also* give rise to coverage if brought under a different legal theory."[102]

Firms presented with a lawsuit for breach might look at these kinds of decisions and realize that they don't know whether the claim is covered or not. And claimants might preferentially therefore plead claims that sound more in tort than in contract as a means of accessing the deep pockets of insurers.[103] This creates considerable uncertainty on both sides about the value of the cover provided by the insurer.

This fragmented landscape is further complicated because some firms are rethinking traditional insurance even where it is offered. Tom Baker's recent work, for example, has shown that insurers are rarely involved in mass tort lawsuits because the firms with the largest mass tort exposure are forgoing outside coverage.[104] According to Baker, "most pharmaceutical companies and many medical device manufacturers have not purchased commercial liability insurance for their product liability risks for at least the last ten years."[105]

Instead, these firms work—either by self-insuring or by negotiating with their insurers—to keep control of their litigation processes.[106] This allows the firms to choose defense counsel, set

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102. *Id.* at 1097.

103. *See* Baker, *supra* note 18, at 4 (noting that plaintiff's lawyers shape claims to match collectible assets); *see also* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722 (1997) (describing a strategy of "under pleading" claims to avoid insurance exclusions).

104. *See* Tom Baker, *Where's the Insurance in Mass Tort Litigation?*, 101 TEX. L. REV. 1569, 1591 (2023) (finding that these firms spread mass tort losses through prices charged or profits foregone).

105. *Id.* at 1575.

106. *See id.* at 1583 ("[I]n recent years most large companies with significant mass tort exposure have instituted captive or fronting primary insurance arrangements that constitute a form of organized self-insurance and that give the companies control over their own defense."). Of course, most firms self-insure to some extent through their deductible or self-insured retention, *see infra* note 200 and accompanying text (describing instances of precautionary measures, or lack thereof, taken by firms that go without insurance), but Baker's article suggests a departure based on the scope of self-insurance.

the litigation strategy, and settle claims without the interference of an outsider—as would be the typical case if a liability insurer provided cover.[107]

That said, mass torts represent exceptionally large hazards: so large that many firms—even massive firms with capital structures beyond that of some insurers—don't want to keep all the risk to themselves. They sell it off. In a typical case, policyholders assemble a group of carriers who provide coverage in something called a *tower*, as so-called *excess* insurers take risks over a *primary* layer.[108] Baker reports that mass tort defendants are doing something similar, but in a way that allows them to retain control of litigation.[109]

Why does this matter? Insurers do not operate where there are gaps in the insurance market. Ken Abraham and Catherine Sharkey recently estimated that while insurance covers eighty to eighty-five percent of all tort claims,[110] it only reaches sixty percent or so of commercial tort costs.[111] That means that firms are paying almost half of tort liability themselves. Some of that self-payment appears to be in areas where one might expect boilerplate to be most prevalent: contract claims and low value torts. We will discuss the implications of this later.

Given the complexities of the market that we've sketched here, it is not surprising that policyholders look for help buying insurance from insurance intermediaries. These people are

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107. *See* Baker, *supra* note 104, at 1583 ("Mass tort defendants typically retain control over their own defense without losing their insurance rights . . . .").

108. This could be a direct tower of coverage where one excess insurer stacks on top of the next. For example, the first insurer might take $25 million of coverage, the next $50 million, etc. Or it could be quota share where a number of insurers share the risk at each layer: Five insurers might share the first $50 million of risk. And there could be excess layers over that. *See, e.g.*, Baker & Swedloff, *supra* note 18, at 24 (detailing an instance when a legal-professional liability policy issuer plugged a gap in a tower of insurance for fifteen large law firms during the insurance crisis in the 1980s and early 1990s).

109. *See* Baker, *supra* note 104, at 1583 ("If the companies do purchase true risk-transfer insurance for mass tort liabilities, that risk-transfer insurance typically comes in the form of reinsurance for their captive insurance companies or high-level excess insurance that attaches only after there are many millions of dollars in losses.").

110. Abraham & Sharkey, *supra* note 12, at 2184–85 (estimating that eighty to eighty-five percent of annual direct tort costs flow from insurers).

111. *See id.* at 2186 (reporting that as much as forty percent of commercial tort costs are self-insured).

called *agents* or *brokers*.[112] These intermediaries have different contractual relationships with insurers. Some sell only one insurer's policies, others sell those of multiple firms. (In the business, these intermediaries are called *captive* and *independent* agents).[113] Brokers can be salaried employees of an insurance company or independent contractors; some have the authority to bind an insurer to coverage at the point of sale, while others facilitate the bargain between insurer and consumer.[114] For our purposes, the important point is that these intermediaries, who we will generically refer to as brokers, help identify potential carriers and work with policyholders to place their risks.[115]

Insurers typically pay brokers commissions based on the amount of insurance that the broker sells or the profitability of her book of business (if the carrier pays less than expected for the risks it insures).[116] This is a key lever that insurers can pull to encourage brokers to gatekeep the policies they sell. As one of our respondents said: "The agents get these bonuses for how well they do with us. . . . [S]o that's why it's important for them to heed our recommendations, because it can make or break a year for them if they have a really bad claim."[117]

Insurers seek to reduce the risk they buy and avoid buying risk they don't understand.[118] That means they must evaluate who should be insured, at what price, and with what terms. This is the process called *underwriting*. *Underwriters* evaluate risk based on actuarial models (created by actuaries who are the quants in the insurance industry), which may lay out specific

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112. *See* Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT TRIAL & INS. PRAC. L.J. 1, 2 (2004). The lines between agent and broker in the insurance context are sometimes blurry. *See id.* at 7.

113. *Id.* at 3, 5.

114. *Id.* at 3.

115. *See id.* at 5 (describing the different ways retail and wholesale brokers provide these services).

116. *See* Daniel Schwarcz & Peter Siegelman, *Insurance Agents in the Twenty-First Century: The Problem of Biased Advice*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 36, 40 (Edward Elgar Publ'g 2015) (arguing that these compensation arrangements can cause conflicts of interest between the agents and policyholders).

117. Zoom Interview with Claims Professional 3 (Apr. 10, 2024) [hereinafter Claims Professional 3 Interview].

118. *See* SCOTT E. HARRINGTON & GREGORY R. NIEHAUS, RISK MANAGEMENT AND INSURANCE 141 (2d ed. 2004) ("[T]he overall process of assessing the expected claim costs for buyers, determining the applicable rate, and deciding whether to offer coverage is known as underwriting.").

criteria for thinking about pricing risk, and based on softer evaluations of the risk that any individual policyholder represents.[119]

Underwriters are salaried employees of insurance companies. Just as brokers were motivated to bring in "good" risks, underwriters are judged and compensated, in part, on the performance of the companies that they insure. Underwriting review occurs not only at the time of application, but often on an annualized basis when insurers are determining whether to continue to offer coverage and on what terms.[120]

The market is further roughly divided between complex and simple risks.[121] For complex, high-value accounts, underwriters take a deep look at the underlying risk that the applicant or policyholder represents and, in doing so, typically review consumer-facing contractual provisions. For example, if an insurer were ensuring a national hotel chain, it might review the age of the buildings, sprinkler systems, maintenance schedules, and, of course, its claims history as a way of evaluating the likelihood that the hotel would suffer a property loss or be sued for negligence. It might also review their guest agreements and even have sit-down conversations with the hotel's risk managers to discuss their policies and infrastructure.[122]

But when a policyholder presents a smaller risk—say a boutique hotel—the process is more streamlined. The application will ask the customers to warranty the features of the hotel as described above, but it is simply not cost effective for the insurer to perform the same kind of exacting review that it might do in a complex case. The premiums paid by the boutique hotel and the dollars at risk for the insurers simply do not justify the same kind of in-depth analysis.

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119. *See id.* (introducing the elaborate risk classification schemes developed by underwriters).

120. *Cf.* Baker & Swedloff, *supra* note 20, at 1420 (describing underwriting as a component of regulatory activities of liability insurers).

121. *Compare* Baker & Swedloff, *supra* note 18, at 3 (investigating risk management practices at large law firms), *with* Levin, *supra* note 81, at 567–69 (describing the underwriting process for solo and small law firms).

122. Leslie Levin described the difference in underwriting complex and simple markets as like the difference between buying a bespoke suit and one off-the-rack. *See* Levin, *supra* note 81, at 559. Complex risks get far more contact with insurers, and therefore, more formal and informal risk management advice. *See id.* at 558–63.

As one insider put it, the underwriters are "just so darn busy . . . going from one placement, one renewal, one client to another, one meeting to another. They're underwriting massive accounts potentially over multiple jurisdictions. And trying to understand exposures. And there's only so much that they can digest."[123] In this situation, a review of contractual language may look more like a "check-the-box" kind of review, where insurers simply ask the applicant whether they have boilerplate or not.[124]

Inevitably, policyholders get sued. When this happens, a different group of insurance insiders spring into action. *Claims handlers* evaluate the lawsuit and its expected consequences. After the risk has transformed into a claim, these handlers act as the primary contact between insurers and policyholders. Insurers bring in claims lawyers to work the suit, either directly or through a stable of counsel on standby. Sophisticated policyholders might bargain for the right to select their own counsel, but in most instances, insurers select defense lawyers to represent the insured. And while such lawyers owe fiduciary duties only to the named defendant, they consult the person writing the check—the insurer—on all major aspects of the claims process, including litigation strategy and settlement decisions.[125]

Brokers, underwriters, claims handlers, and defense lawyers all learn things about the risk facing policyholders in the normal course of their work. Good insurance firms find ways to pass information between and among the players on the insurance side and the policyholder as part of an "information sharing ecosystem."[126] Underwriters of complex risks talk to brokers and

123. Zoom Interview with Claims Professional 2 (Nov. 1, 2023) [hereinafter Claims Professional 2 Interview]. Claims Professional 2 introduced that subject with the quote: "Of course the insurers love [boilerplate]. The question is, how often do they engage to the point where they have input. And I think the answer is probably not as much as we'd all like . . . ." *Id.*

124. Zoom Interview with Claims Attorney 2 (Feb. 7, 2024) [hereinafter Claims Attorney 2 Interview] (explaining that whether they review contracts depends on the "nature of the program, where we play in the program, and the nature of the insured"); Zoom Interview with Broker 3 (Nov. 15, 2023) [hereinafter Broker 3 Interview] ("But they will ask questions, and I hate to make it sound like a check to box process, but on the application they will ask, do you have limitations of liability and your service agreements? Do you require your customers to send it to binding arbitration, etc.? And they will leave it at that.").

125. *See* Baker & Swedloff, *supra* note 20, at 1421 (discussing how insurers use contract provisions to influence the claims management process).

126. Zoom Interview with Underwriter 5 (May 31, 2024) [hereinafter Underwriter 5 Interview].

potential policyholders at the time of contracting or renewal about the specific risks they see in the account. What are the specific issues they see with the policyholder's current systems? How can the policyholders change their behaviors to meet the current state of the art? Are the contractual terms that the firm use being upheld or do they need to be tweaked to reduce exposure to liability?[127]

B. How Insurers Price and Influence Boilerplate

As we've just described, insurance insiders are motivated to reduce the number and size of claims against policyholders. Fewer and smaller claims mean less is spent on defense, settlement, and verdicts.[128] Insurers get to keep more of the premiums their policyholders pay. Insiders told us that boilerplate is a tool that policyholders can use to minimize claiming. In this Section, we'll lay out how they convince them to use it.

We start with insurers' ideological priors. As our interviews quickly surfaced, insiders are worried about juries. To be sure, insurance firms have been vocal supporters of tort reform for decades.[129] A concerted political effort on behalf of the defense bar and insurance industry yielded significant political gains on behalf of tort reform: limiting non-pecuniary damages, the collateral source rule, and punitive damage caps, thus curbing judgments and controlling litigation costs.[130] Despite these wins, insurers now view the current litigation environment with

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127. *See generally* HARRINGTON & NIEHAUS, *supra* note 118, at 141 (describing various risk management practices facilitated by underwriters).

128. *See* Baker & Swedloff, *supra* note 20, at 1439 (noting that insurers do not encourage risk management for altruistic reasons but rather to reduce payouts and increase profits); *see also* Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233, 234–35 (1996) (noting that insurers encourage precaution to avoid paying for the consequence of negligence).

129. The fight over tort reform has lasted decades. For example, seventy years ago, an insurer ran a national ad campaign decrying excessive and unjustified jury awards. *See* Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1227–28 (2004) (describing one ad in particular directed at jurors that read: "YOUR insurance premium is being determined now"); *see also* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 469–71 (2006) (detailing waves of "crises" in the '70s, '80s, and '90s).

130. *See generally* Hubbard, *supra* note 129, at 483–524 (describing the targets of the tort reform movement).

nearly existential concern.[131] As a leader in the insurance industry recently stated, litigation is "a tax on society broadly. It's about 2.5% of GDP now."[132]

Insurers have a phrase that captures their anxiety: "social inflation." That's the notion that litigation costs, and specifically jury awards, are increasing faster than economic inflation.[133] Industry participants believe that social inflation happens because jurors increasingly consist of populist firebrands willing to give cash to anyone with a plausible claim.[134] To this pressure for high verdicts, insurers raise concerns about an increasing supply of cases built on litigation funding and a voracious plaintiffs bar.[135] As one insider told us:

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131. *See* Susanne Sclafane, *Commercial Lines Not at Top of Cycle; 'Thieves' Fuel Social Inflation: CEOs*, INS. J. (July 9, 2024), https://www.insurancejournal.com/news/national/2024/07/09/782886.htm [https://perma.cc/NE9NANQT] (reporting that several insurance CEOs rank litigation finance and social inflation as serious threats to the industry).

132. Susanne Sclafane, *Social Inflation Fix: Insurers Can't Be Out Front, Chubb's Greenberg Says*, INS. J. (June 6, 2024), https://www.insurancejournal.com/news/national/2024/06/06/778369.htm [https://perma.cc/H42RSKBZ].

133. *See* Background to *Social Inflation*, NAT'L ASS'N INS. COMM'RS (last updated Aug. 23, 2023), https://content.naic.org/cipr-topics/social-inflation [https://perma.cc/SA2J-PYFP]; *see also* Deborah R. Hensler, *Jurors in the Material World: Putting Tort Verdicts in Their Social Context*, 13 ROGER WILLIAMS U. L. REV. 8, 31–38 (2008) (examining the role of "social inflation" in the growth in size of damage awards); Sangmin Oh, Social Inflation xiii (June 2024) (Ph.D. dissertation, University of Chicago) (ProQuest) ("[S]ocial inflation accounts for nearly two thirds of the annual price increase [in the auto insurance market] since 2018.").

134. *See* Claims Attorney 2 Interview, *supra* note 124; *see also* Zoom Interview with Underwriter 4 (May 20, 2024) [hereinafter Underwriter 4 Interview] ("So it's kind of a goes along with social inflation where juries [ ] and courts are more and more likely to want to punish what they could perceive as bad actors."); Bethan Moorcraft, *What is Social Inflation, and Why is it Hurting Insurance?*, INS. BUS. (Jan. 3, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-social-inflation-and-why-is-it-hurting-insurance-195626.aspx [https://perma.cc/JD73-JDPJ] ("'Probably one of the biggest drivers of social inflation is the general anti-corporate sentiment that exists, reaching back to the financial crisis,' said Mike Hudzik.").

135. *See* Zoom Interview with Underwriter 6 (Aug. 5, 2024) [hereinafter Underwriter 6 Interview] (explaining that social inflation is more of a problem today, in part, because "the litigation funding is so prevalent now" and that "it's a big, big business"); *see also* Zoom Interview with Underwriter 7 (Aug. 5, 2024) [hereinafter Underwriter 7 Interview] (claiming that social media influences "millennial" and "Gen Z" juries with "misinformation" that "creates fear [and] creates anger. So someone's got to pay, and someone's got to be put to blame for it").

> Some cases are good. For these cases, the plaintiffs' bar is willing to commit capital to see if they can "ring the bell." Some cases are in the middle. These cases they are willing to push, but they will settle. . . . Some are dogs. [T]he plaintiffs' bar used to take anything to get them to go away. But litigation funding changes this. The plaintiffs' bar is willing to take more cases deep into the process and hope for the best with a jury that has anti-corporation, populist leanings. These cases are now also getting pushed deeper into the litigation process in the hopes of ringing the bell.[136]

Whether social inflation or litigation funding have changed the game, it's not surprising that insurers espousing these views have pushed their insureds to mitigate their risks on multiple fronts, including the adoption of anti-liability boilerplate. As compared to the alternatives, boilerplate is a pretty cheap risk mitigation strategy, particularly if it works. New terms are relatively easy to create and deploy; changing policies and practices to avoid risks altogether can be expensive.[137]

First, insurers take account of boilerplate in underwriting decisions. In general, they view boilerplate as an important part of a good risk management portfolio. When reviewing accounts, from the simple to the complex, insurers make tradeoffs. It is not possible to visit every property a hotel chain might own or review every sprinkler certification to make sure it is up to date. Boilerplate signals that a policyholder takes risk management seriously. As one respondent stated: "It literally all comes back to risk management. If an insurance company sees that . . . you've implemented good risk management practice, with these contract provisions being certainly a component of that, that [ ] benefits the policyholder . . . in securing the best possible deal from their insurance company."[138] Policyholders with contractual clauses aimed to shift, limit, or mitigate liability are considered

136. Claims Attorney 2 Interview, *supra* note 124.

137. A question that some readers may ask is why, given that these terms are nearly zero costs, don't all insurers require them for all insured? We're not sure the answer, but presumably, the answer is that asking for changes in practices imposes at least opportunity costs and adds frictions to insurers' business development.

138. Claims Professional 2 Interview, *supra* note 123. One underwriter was skeptical of an insurer's ability to review even the largest policyholders' contract language, stating "it's unlikely that they're going to ask Hilton for their policy for the waiver that they get their guests to sign on bed bugs, and I don't know Pirelli on their tires" but thought it very likely that the insurer would "ask questions about it, and make sure the risk management is good." Underwriter 6 Interview, *supra* note 135. The underwriter explained that "underwriters don't have time to look that closely" at the contract language. *Id.*

good risks—those worth offering insurance. Those without are not worth gambling on.

This is especially true when the contractual provisions are part of an industry's best practices. If all trampoline parks have regular checks of the facility for appropriate spring tension, padding, sprinklers, and additionally all have a set of boilerplate waivers, insurers evaluating whether to offer cover to a new trampoline park will look to see whether the new client is keeping up with industry standards. "There's an interactive relationship between what those best practices are deemed to be for you to be . . . a risk that someone is willing to ensure. It also overlaps with the historical experience [of the industry]."[139] Best practices in the industry set the terms of what insurers view as an acceptable risk to undertake.

Just because a particular liability-limiting term is a "best practice" does not mean that underwriters, claims attorneys, and brokers think it is enforceable. As insiders acknowledge, boilerplate can mitigate risk outside of legal channels.

> Courts don't like boilerplate language. They feel as if you're trying to sneak something past the goalie, or you're trying to put in a provision that's so general that it would cover almost anything and everything which really falls under negligence. And the court doesn't like that.
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> Why do we still do it, as an industry? That's the bigger question . . . . Most people are not going to come to you or me for advice, or they're going to see that they had this boilerplate and think that they can't do anything. So it's basically a false stop sign for the unsophisticated to know what they have. If they have a cause of action, whether or not they can actually bring it.
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> Additionally for those attorneys, particularly plaintiffs' attorneys who are not well heeled, and what I mean by that is having the financial resources and rigor to go through a litigation with a big entity, a large national chain. All that this is [is] something that gives them pause in taking that case.[140]

Indeed, this very point crops up in advice insurers reduce to writing. Edward Cheng and his co-authors found a wild example—a firm called Sports Insurance wrote its policyholders (in public! where anyone could read it!): "[Despite unenforceability concerns], we recommend their use anyway as waiver/releases may have a psychological impact and actually deter some parents

139. Zoom Interview with Underwriter 1 (Oct. 31, 2023) [hereinafter Underwriter 1 Interview].

140. Zoom Interview with Claims Attorney 3 (Apr. 19, 2024) [hereinafter Claims Attorney 3 Interview].

from filing lawsuits. Also, they may have a psychological impact on some juries when it comes to deciding the amount of damages."[141]

As we'll explore below, insurers' general skepticism about enforceability is widespread, meaning that they haven't quite adopted the view prevalent in the contracts literature that these clauses shut off the spigots of liability.[142] Their appetite for encouraging their use is limited by their estimate of their effectiveness, in and out of court.

Insurers work to convince their insureds to adopt particular species of boilerplate. The process starts in underwriting. When underwriters review a complex risk and think they will be on the hook for claims, they look at contractual language. Where insurers don't have significant exposure, they won't. As one respondent explained in the context of evaluating hotel risk:

> If we take on [a Hotel Chain] in the "burn layers," [the lower levels of the tower where we are responsible for defense and a finding of liability would require us to contribute or pay a settlement], then we will definitely look at the contracts. They will be part of the broker submission. But, if we are high excess [providing cover that will pay only if the lower layers of the tower are exhausted] or small limits [offering very little coverage], we won't.[143]

Where institutions do not include the necessary language, insurers may refuse to offer coverage at all. As one respondent commented:

> As part of the underwriting process over the years, insurance companies have built into their guidelines that they won't insure someone that doesn't follow, quote unquote best practices. So if the best practice of a bowling alley is to have a series of waivers and or conditions around you bowling in their bowling alley, and [they] don't do that, well, [an] insurance company would probably not even insure you, let alone charge you more.[144]

Another was more circumspect: "On the straight consumer level, I don't think it impacts underwriting for prices, but it might impact whether they offer coverage." He added that "in certain situations, insurers might charge higher deductibles or

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141. Cheng et al., *supra* note 12, at 589 (alteration in original); *see id.* at n.104 (listing an additional example).

142. *See infra* Part III.

143. Claims Attorney 2 Interview, *supra* note 124; *cf.* Zoom Interview with Broker 4 (Feb. 28, 2024) [hereinafter Broker 4 Interview] ("Sometimes carriers will ask for contracts, depending on the complexity of the risk.").

144. Underwriter 1 Interview, *supra* note 139.

different rates if certain contractual agreements (like hold harmless agreements) are not in place."[145]

Boilerplate-conscious underwriting can be part of the initial insurance application or can play a role at renewal.[146] An attorney surmised that:

> Contract provisions that mitigate exposure to litigation dynamics make the insured a better risk, potentially affecting how risks are priced and underwritten. This implies that the presence of specific clauses could influence underwriting decisions and pricing strategies, especially in complex markets and high-limit policies.[147]

Moreover, significant insured losses can be shocks that drive change in boilerplate terms. One claims manager explained that after an insured suffers a loss, it's easier to make underwriting decisions depend on tighter consumer contracts.

> I think if I didn't tell [underwriting about the unsuccessful boilerplate language], my guess is, they would just not renew the account. . . . We'll never make our money back. But sometimes, if claims [personnel] are talking to underwrit[ers], they may renew that account, knowing that [the insured has] done something, they're taking into account future risk and trying to lessen that risk for future claims by tightening up contracts. Now, that being said, I still see underwriting make the decision that we're not renewing this account.[148]

Such non-renewal may hurt organizations more than an initial denial, as other insurers would perceive the switch as a signal of an organization with bad risk management overall.

Second, insurers can encourage boilerplate by pricing it, but don't always do so. Theory teaches that insurers ought to offer prices reflecting the risk of loss of the individual policyholder.[149] Insurers that offer cover are taking a bet on whether a particular insured will suffer a loss during the term of the policy. The riskier the bet, the higher the probability that the insured will suffer a loss. Insurers must charge an additional premium to those riskier bets so that they can cover the cost of paying for indemnity and defense.

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145. Broker 4 Interview, *supra* note 143; *see* Underwriter 5 Interview, *supra* note 126 ("There weren't a lot of insurers in my seat that were saying, 'you guys don't have arbitration provisions, or this or that, and we're not going to [insure you] anymore.' But it would dictate to some degree your appetite, and the pricing, and the deductibles, and the limits you would put up.").

146. Cheng et al., *supra* note 12, at 590–92 (providing examples of applications requiring liability waivers).

147. Claims Attorney 2 Interview, *supra* note 124.

148. Claims Professional 3 Interview, *supra* note 117.

149. *See* BAKER ET AL., *supra* note 85, at 8–9.

But insurance pricing is complicated. Like all prices, insurance premiums are subject to inflation. As the cost of inputs go up, the good's price also rises. The inputs for liability insurers are the cost of claims. Legal fees are rising, and insurers believe that judgments are too, even more than inflation should allow.[150]

But this is only part of the story. Insurance premium prices are subject to other, somewhat mysterious, forces. At times, insurance markets are *soft*, meaning that insurers charge less than the expected cost of losses and insurers are willing to insure more risky policyholders.[151] Other times, the market is *hard*, meaning insurers charge more than the expected cost of losses.[152] In a hard market, insurers are less willing to take on risk and tighten their underwriting standards. Hard and soft markets bear some relationship to the macro-business cycle, but you'd have to be much more interested in insurance than we suspect you are to know exactly how.[153]

Our respondents reported that some lines of insurance today are experiencing a hard market; prices are up and supply is down.[154] In hard markets, consumers might not see a price decrease for better contract language or better risk management generally, because prices are rising overall. But they might have access to coverage they would not otherwise have and better rates than they would have without the boilerplate.

Nonetheless, respondents reported that insurers sometimes send pricing and contract signals to policyholders to encourage the use of boilerplate. For example, one broker told us:

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150. *See supra* notes 133–37 discussing "social inflation."

151. Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 396 (2005) (detailing that a "soft market" is a period during which insurance is priced below cost, resulting in plentiful coverage and nonprice terms being favorable to policyholders).

152. *See id.* (noting that when insurance is sold above cost in a "hard market," coverage is restricted and nonprice terms are unfavorable to policyholders); *see also* Sean M. Fitzpatrick, *Fear is the Key: A Behavioral Guide to Underwriting Cycles,* 10 CONN. INS. L.J. 255, 261 (2004); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 400 (1987) (discussing the implications of a hard market).

153. *See generally* BAKER ET AL., *supra* note 85, at 702–04 (explaining the underwriting cycle).

154. Zoom Interview with Broker 1 (Oct. 23, 2023) [hereinafter Broker 1 Interview] ("It's a hard market; the rates are going up. Again. It's really getting people's attention to try to try to, mitigate or limit their exposures when it comes to dealing with consumers.").

> At renewal for one client, the pricing went up significantly. And the carrier has been harping on: "[O]kay, you need to implement this language again, hold harmless indemnification language in your contracts with the third parties." And the client said "[y]eah, we will do it." But then from the losses that we see, clearly they haven't done it. So they had a significant increase in premium. And our feedback to our client was unless we sit down with you, go through your contracts, make sure you're actually implementing these, you're going to see these increases. And it doesn't matter what carrier you go to, they're all going to respond the same way.[155]

Another broker reported that strong contractual language might be a pricing factor as a part of a review of general risk management. As he put it, underwriters will ask about "good practices regarding liquidated damages" and "strong indemnity languages" and "strong limitations of liability. [They'll then] look at that information [and . . .] probably reduce rates a little bit. They'll say: That's terrific. We [were] gonna charge you a 50 cent rate [and instead] will charge you a 40 cent, right? Because we know you've got a good in-house team in risk management."[156]

That is, at least some of the time, it's normal to *explicitly* link price and boilerplate in the review process.[157] But this claim shouldn't be overstated. Often, the price effects for contractual protections are small compared to other factors.

Consider cyber insurance. There, underwriters and brokers, seeking to manage and price risk, focus first on the *technological defenses* their insureds have in place against wrongdoers—like multi-factor authentication and the like.[158] Only after they've evaluated these aspects of the firms' approach will they focus on

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155. *Id.*

156. Zoom Interview with Broker 2 (Nov. 8, 2023) [hereinafter Broker 2 Interview]. We aren't sure if this respondent meant to describe a rate per hundred thousand or million dollars of coverage, or just a bit of insurance jargon indicating premium size.

157. We asked an underwriter if they would send proposals back to the broker and say, "Hey, look! We can underwrite this, but you know we could maybe do a little better on price?" They responded stating: "Exactly right. We will send this back to the broker. Ask them to present it to their client. And then ask the client to then take it to their [own] attorney to review and consider." Zoom Interview with Underwriter 2 (May 2, 2024) [hereinafter Underwriter 2 Interview].

158. Underwriter 4 Interview, *supra* note 134 ("So multi-factor authentication really helps with that. Also, having backup data that's protected from ransomware events is really important to us. VDR is an endpoint detection and response system. It identifies malware on the system.").

the contract, but it quite clearly plays a second-order role in pricing:

> We look for things like a limitation of liability, waiver of warranties, you know, implied warranties. And all your kind of basics there, but we don't really make a big practice of telling people what to do. Or even offering a lot of suggestions. When we see clauses that we like, we tend to price more favorably. When we see those clauses missing, we tend to be a little bit more conservative on our pricing. But I also wouldn't say it's a big underwriting factor for cyber.[159]

Thus, while multiple insiders reported using price breaks to reward insureds who adopted more consumer-unfriendly contracts, the magnitude of these savings, at least in the cyber insurance market, is likely relatively small.

In sum, boilerplate is a part of an overall pricing strategy, but the pricing effect is limited by a number of factors including fears about its enforceability, its impact on the size and prevalence of claims, and other general market factors. As one respondent explained:

> [W]hile sophisticated clients might already have the clauses, smaller clients may not, and insurers may not place significant credence in the clauses due to doubts about their enforceability. This indicates a nuanced approach where the presence of clauses may not directly lead to price changes but is part of the overall risk assessment.[160]

Third, insurance firms also encourage the use of boilerplate by educating policyholders about its virtues. Insurers are better positioned to know boilerplate's value than policyholders because they see a huge number of claims in a year. They can thus collect more data about the causes and correlates of loss and best practices for risk management.[161] One respondent explained that his policyholders "see ten or twenty claims a year. We see thousands. We can offer them concrete things they can do."[162]

Claims managers, lawyers, and the brokers or agents who handle the whole process for their clients each have pieces of information about how to help insureds avoid loss. That experience leads them to hold some views that might be surprising. Of particular interest was the insiders' view of the utility of arbitration to reduce their insureds' expected liability costs. Arbitration, after all, is generally seen as a revolutionary legal technology, which has cut back on the right of consumers and employees to

159. *Id.*
160. Telephone Interview with Broker 5 (Mar. 29, 2024).
161. Baker & Swedloff, *supra* note 20, at 1421.
162. Claims Attorney 2 Interview, *supra* note 124.

vindicate their rights and significantly reduced firms' expected liability for losses.[163] But while insurers agree that arbitration clauses are increasingly common,[164] they were generally ambivalent about their value.

Some of our respondents lauded arbitration. One said:

> Insurers care about the arbitration clauses. . . . If you can settle the claim through mediation or arbitration you should do that, and you'll get a financial benefit in your policy. They'll pay more for or they'll pay for that with more benefits and coverage extensions then, if you go to full blown litigation and avoid mediation or arbitration.[165]

Subjects suggested that arbitration clauses, like choice of forum clauses, were important to avoid plaintiff-friendly jurisdictions, explaining that a good underwriter would certainly ask if the policyholder had taken "steps to mitigate a jury trial in a bad jurisdiction, by . . . having arbitration as [its] resolution mechanism, and [it had] taken steps to enforce those arbitration provisions . . . ."[166] But on the whole, the best case insurers made about arbitration was that it sometimes was faster than litigation. Speedy resolution means quicker claim closure, and more certainty on insurer balance sheets.[167]

In contrast, one subject explicitly told us that "[f]or the most part I'd prefer [arbitration clauses] weren't there."[168] Doubters

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163. *See, e.g.*, Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 145 (2022) ("Adhesive contracts containing forced arbitration clauses stifle constitutional rights to speech and to a jury trial."); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 442 (2011) ("[T]he [Federal Arbitration Act] as interpreted by the Court does not just allow private parties to engage in law*making*—it allows them to engage in law *revision*, abrogating Congress's procedural rulemaking duties and eroding substantive statutory and common law rights.").

164. Zoom Interview with Claims Professional 1 (Oct. 24, 2023) ("Arbitration is becoming more common, especially in place of class actions. This trend is seen in employment and insurance arbitrations. Non-admitted policies, such as those from the London market, often include arbitration clauses because it is challenging to have arbitration clauses in standard forms due to regulatory challenge.").

165. Broker 2 Interview, *supra* note 156.

166. Claims Professional 2 Interview, *supra* note 123. It is not always clear to us if the insurers' preferred choice of forum clauses in consumer contracts would be enforceable (though we think the modern trend is to defer strongly to the text).

167. Broker 2 Interview, *supra* note 156 ("Q: They view arbitration clauses as positive, not necessarily because they're cost limiting, but because they create cost certainty? A: Yeah. And they want certainty on their books.").

168. Underwriter 2 Interview, *supra* note 157.

had come to the view that arbitral forums don't deliver liability savings:

> From my perspective in the claims world, I don't like arbitrations. I feel like they're more expensive . . . than a typical civil litigation. . . . When [claims] go to arbitration, I feel like the arbitrator or arbitration panel will pick the number in between the two sides or give it all to the plaintiff. . . . I sometimes feel like a defendant has a better chance with a jury on those cases than arbitration.[169]

Several expressed concern over the rising tide of mass arbitrations:

> We're in the midst of addressing the emergence of "mass arbitration" claims. . . . Long story short, when we have an applicant that we believe is exposed to a "mass arbitration" claim and we see a mandatory arbitration clause in the contract (or Terms of Service), we recommend that they review the mandatory arbitration provision with legal counsel.[170]

One underwriter shared a mailer his firm used to alert constituents about mass arbitration, described as "a tactic being employed by the plaintiffs' bar that leverages the high cost of arbitration hearings to force quick/large settlements."[171] They explicitly advised reviewing contracts and terms of service to "mitigate the risk" of mass arbitration.[172] Another underwriter said that while he had seen the rise of mass arbitrations, it "will be three to four years before we really know if the arbitration provisions are helpful or not."[173]

The ambivalence is hard to reconcile and might be attributed to evolving arbitration norms and outcomes. Alternatively, anti-arbitration preferences might simply be about opportunity costs: "[T]here is little pressure on policyholders to include arbitration clauses in their contracts, as underwriters are not typically concerned with these clauses. Instead, the focus is more on how to prevent claims and manage existing risk."[174]

By contrast, several insiders gushed about the value of forum selection clauses. This underwriter's view is typical:

> The forum/venue is quite important, particularly [in a notably plaintiff-friendly jurisdiction]. Every case that I have, plaintiffs are trying to put

169. Claims Professional 3 Interview, *supra* note 117.

170. Email from Underwriter 4, to authors (May 15, 2024) (on file with authors).

171. *Id.*

172. *Id.*

173. Underwriter 5 Interview, *supra* note 126.

174. Broker 1 Interview, *supra* note 154.

> it in [the plaintiff-friendly jurisdiction], and they'll find any way under the sun, I mean everything that you learned in Civ Pro about putting a case in a certain venue happens on a daily basis in my office.[175]

That said, others told us that at underwriting, they "really don't see very much about choice of forum,"[176] except "once in a great while, [but] not very often at all."[177]

A claims professional told us he saw value in choice of law clauses, but not enough to raise the issue: "Sometimes I see a contract . . . and I wish the contract said choice of law was Illinois versus Missouri, you know. But we probably don't [go back and try to push people to change] and I'm guessing underwriters may not do that [either]."[178]

When asked why underwriters don't push for the clauses, he stated, "[t]hat's probably more legal advice, which the insured should be seeking from their own business counsel."[179] But as we found with other boilerplate, when the missing clause is systemically meaningful, insurers find ways to tell policyholders to make changes.

By contrast, we heard relatively little about class action waivers. This may speak more to the scope of insurance than the value of the clause. There is somewhat of a mismatch between the causes of action that give rise to class actions, when boilerplate operates, and where insurers govern. For example, while insurers offer specialty coverage for securities and corporate claims (directors and officers insurance), insurers don't push for boilerplate for two reasons: (1) Consumer boilerplate does not limit securities claims; and (2) Baker and Griffith have shown that insurers do not meddle to that degree in corporate loss prevention.[180]

With that sense of what insiders sought to do, we turned to how they did it. Insiders employ different strategies to educate the marketplace about boilerplate. For instance, in response to a question about how information about contractual loss prevention got transmitted to an insured, one underwriter explained

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175. Claims Attorney 3 Interview, *supra* note 140.

176. Zoom Interview with Underwriter 3 (May 2, 2024).

177. Underwriter 2 Interview, *supra* note 157.

178. Claims Professional 3 Interview, *supra* note 117.

179. *Id.*

180. *See* BAKER & GRIFFITH, *supra* note 18, at 109–13; *see also infra* notes 222–25 and accompanying text.

that they do it through "thought leadership" and "information sharing with brokers."[181]

They regularly put on road shows to provide advice to brokers with the hope that the advice will trickle down to policyholders:

> I, another claims guy, and two underwriters travel around the country a few times a year, putting on these workshops for our agents. These workshops typically talk about risk transfer. And we talk about the contracts, and we point out to them, "[h]ere's a bad contract when it comes to risk transfer. Here's a good contract. And here's why you need this in here." And from a claims perspective, we give them the horror stories of what happens when you don't have a good contract and how much money we have to end up paying.[182]

There are multiple reasons why the brokers might care about this information. Some larger insurance brokerages have "risk management arms" and are "trying to get dollars, not only through the insurance transactional process, but also through risk management, advice and consulting."[183] They believe (or at least hope) that it is also a value-added service that might deepen their client relationships.[184] In other situations, brokers might be willing to engage in the information flow because they are paid, in part, based on whether their clients (the policyholders) are good bets for the insurer.[185] Thus, risk management ideas can affect the agents' financial fortunes.

Advice about boilerplate is also passed directly from underwriters to brokers about specific issues related to the client, rather than broad brush risk management ideas.[186] As one explained:

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181. Underwriter 5 Interview, *supra* note 126.

182. Claims Professional 3 Interview, *supra* note 117; *see also* Underwriter 2 Interview, *supra* note 157 ("[We] are both facilitators/presenters at contract reliability workshops that we put on across the country for our agencies. To help educate them so that they can work better with their clients.").

183. Underwriter 5 Interview, *supra* note 126.

184. *See* Abraham & Schwarcz, *supra* note 71, at 234 ("[I]nsurers have strong reasons to contend that they provide significant risk mitigation services to policyholders irrespective of the accuracy of this claim.").

185. *See supra* notes 116–17 and accompanying text (discussing how insurers usually pay brokers' commissions).

186. *See* Underwriter 4 Interview, *supra* note 134 ("We play a little bit of game of telephone where we work through brokers, and sometimes there's a retail broker, and then a wholesale broker, and then they get to us. And it's really hard to move information up and down the ladder in an efficient manner.").

> Insurance companies started making recommendations [to use boilerplate]. Insurance companies call it risk control services or loss control services. But they will volunteer to look at a policyholder contract[ ] and give them what they call "value added service." They'll say, "[h]ey, we've got in-house counsel here at our insurance company. Let us look at your contracts, and we can redline them and make some recommendations that you might want to use. It'll help you limit your liability and lower the risk of a claim with us. So let's all be on the same page and do it together."[187]

Some of the professionals we spoke with reported that, while they give risk management advice, they were hesitant as nonlawyers to give direct advice about contract terms.[188] This was not particularly surprising, as insurers are cautious about their own liability exposure.[189] But they were willing to suggest that their policyholders talk to their own lawyers about writing tighter or better language.[190]

At the back end of the relationship, claims managers and claims attorneys are also important parts of the information-sharing ecosystem. As one claims manager explained:

> When the claim comes in, and I know that the waiver is not good enough, I'll just talk to underwriting and I'll say, "[h]ey, you may want to work with our insured and their agent . . . ." I'll tell underwriters, "[h]ey, this waiver did not work, if you want to get one that works for

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187. Broker 2 Interview, *supra* note 156.

188. *See, e.g.*, Underwriter 2 Interview, *supra* note 157 ("We do not give them advice because we're not attorneys. We emphasize that with education. Look, we're gonna give you guidance from an insurance ex perspective. . . . Please don't construe this as legal advice."); Claims Professional 3 Interview, *supra* note 117 ("I think our risk transfer guys get involved in a little bit of looking at contracts, though I think the typical message is, they're not attorneys. They make suggestions, but ultimately we don't want to be give them legal advice how their contract should read. But we do give them tips on, maybe what it should include to help.").

189. Kyle D. Logue, *Encouraging Insurers to Regulate: The Role (If Any) for Tort Law*, 5 U.C. IRVINE L. REV. 1355, 1380–82 (2015) (detailing liability of insurers for negligent supervision when insurers provided specific advice to policyholders about precaution); *see also* Underwriter 6 Interview, *supra* note 135 ("As underwriters, we are not licensed to give advice, nor are we insured to give advice, so we are not allowed to.").

190. *See* Broker 2 Interview, *supra* note 156. One underwriter explained that though they couldn't give advice, they could encourage the brokers to do so. *See* Underwriter 6 Interview, *supra* note 135 ("But, you know a broker will definitely advise their client that if they drop certain coverage points or conditions . . . , they're more likely to get a cheaper price."); *see also id.* ("I mean, we don't [offer direct advice] for the U.S. But we do have risk engineers that can review either via desktop or go out to see someone and provide information. They have their insurance, and they're good to go.").

> future claims . . . get the insured to get with the agent and . . . their personal counsel to tighten that up."[191]

Another said his insurance company works directly with clients to draft boilerplate:

> Our clients will often have us review their contracts that they have with their own customer base with a special focus on indemnity. . . . And are they consistent with our insurance placements . . . ? The answer is, yes, we get involved in helping our clients wordsmith those provisions, because our folks are so, you know, experienced in doing that.[192]

And a third reported a "hard conversation" about risks that an insured had mistakenly not disclaimed.[193]

In short, insurers are keen to use boilerplate as a means of identifying firms that take precaution seriously and for minimizing claims that materialize. They think contractual terms can, in some instances, discourage unsophisticated claimants, limit the scope of claims, and shift claims away from a litigation system that they view as out of control. And they use the tools at their disposal—underwriting, pricing, and education—to encourage adoption of contractual terms.

But there are limits to that claim, to which we now turn.

III. LIMITS, LESSONS, AND RESEARCH DIRECTIONS

We have identified a new actor in the production of litigation defeating boilerplate: insurers. A new actor, but not the whole cast. We are not claiming that insurers invented liability-limiting boilerplate, nor would we blame or credit them exclusively for its hypothesized explosive spread. Our claim is more modest.[194] Insurers encourage, and sometimes require, the use of contractual language limiting liability.

We can't say something grander, largely because the commercial liability market is fragmented and incomplete. As we described above, different policies and different insurers cover different types of risks and different types of entities. Boilerplate is deployed ubiquitously, including in financial transactions, sales

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191. Claims Professional 3 Interview, *supra* note 117.

192. Claims Professional 2 Interview, *supra* note 123.

193. *See* Claims Attorney 3 Interview, *supra* note 140 ("I have a case right now that I'm going to have to have a hard conversation [with a policyholder] and tell them that their lease contract is horrible, that they have with everybody, because they've now taken on obligations that nobody else does.").

194. Consistent with the needs of High Law Review Style.

of goods, employment relationships, and provision of services. It aims to draw the sting of all kinds of liability, including breach of contract, products, premises, cyber and ordinary tort. Insurance covers such disparate liabilities with a welter of different policies, issued by distinct firms, and sometimes not at all. This means it is difficult to say what "insurance firms" think about "boilerplate"; both phenomena are too large and too diffuse to easily capture.

Considering those limits, Section A lays out what we can't say in bringing together and advancing the ideas from above. Section B offers a more affirmative case, suggesting a research agenda that would extract more information using this new actor. Section C then looks forward to what this means for consumer contract regulation.

A. THE LIMITS OF INSURANCE GOVERNANCE

There are structural limits to any insurance-as-governance story, and we're subject to them. Though scholars have shown that insurers affect the practices of their policyholders,[195] the effect's magnitude depends on the relationship between features of the underlying industry and its insurance market.

First, insurance does not influence where it does not cover.[196] As we discussed above, there are gaps in the insurance market. Insurers refuse to cover some kinds of claims altogether, including intentionally caused harms and certain kinds of breach of contract.[197]

In other areas, insurers require policyholders to share the risk of harm through deductibles or coverage limits.[198] This means insurers do not provide cover for low- or high-level losses, leaving only the Goldilocks middle within the insurers' range.

And, of course, there are some areas where insureds are choosing to go with incomplete cover. This includes mass torts, where Tom Baker has argued that pharmaceutical companies

195. *See supra* notes 22, 72–78.

196. *See* Abraham & Schwarcz, *supra* note 71, at 247 (showing that there is no moral hazard where insurers do not provide indemnification).

197. *See supra* notes 91–96 and accompanying text.

198. *See* James A. Ligon & Paul D. Thistle, *Adverse Selection with Frequency and Severity Risk: Alternative Risk-Sharing Provisions*, 75 J. RISK & INS. 825, 825–26 (2008) (demonstrating risk-sharing by insurers using deductibles and coverage limits in the health care context).

and medical-device companies are foregoing insurance to keep insurers out of litigation.[199]

Where there is truly no insurance (in the business, going *bare*) insurers have no reason to encourage boilerplate, or, for that matter, any precaution taking at all. If it isn't providing cover, an insurer has no stake; all losses are borne by the policyholder. There is no moral hazard to control. Consumer firms' own estimate of their exposure provides incentives to take precautions.

If there is co-insurance, insurers similarly may abstain from nudging.[200] If deductibles are high enough—if the policyholder covers all losses up to a certain amount—an insurer's obligations may never kick in. Consider again the trampoline park. The park will pay relatively modest sums that come from broken arms, sprained wrists, or dislocated shoulders and may not trigger coverage. The insurer in that case would be indifferent about controlling those claims through boilerplate. It is only worried about harms that create losses above the deductible limits. If claims are likely to reach above the deductible, as perhaps with serious spinal injuries, insurers have a reason to encourage boilerplate.

There are also contested grounds. Insurers may believe that they have very little exposure to breach of contract claims. As we discussed above, plaintiffs may try to shape claims to implicate insurance. But even so, insurers may feel that they do not have to encourage boilerplate for contractual relationships because they have no risk of paying out. Insurers encourage precaution taking when it is good for them.[201]

To be sure, just because a risk isn't covered or is incompletely insured doesn't mean that insurance firms can't *influence* boilerplate's adoption. If an insurer covers other parts of the consumer-facing firms' operations, it's likely that liability-defeating clauses suggested for tort liabilities would spread within the policyholder's operations. Producing terms is costly, and

199. *See supra* notes 104–09 and accompanying text.

200. *See* Abraham & Schwarcz, *supra* note 71, at 247 ("Partial insurance can limit moral hazard by requiring the policyholder to bear some of the risk of loss, and thus partially removing the underlying source of moral hazard. In that sense, partial insurance does not 'combat' moral hazard at all but simply limits its creation in the first place.").

201. *See* Baker & Swedloff, *supra* note 20, at 1439 ("[I]nsurers encourage changes in behavior to serve the insurer's own interests, which at this point we take to be reducing payouts and maximizing profits.").

policyholders have incentives to spread those costs by deploying good and liability-defeating terms as widely as possible. That is, even if insurance won't pay for a specific risk, it could for a cognate one, and contract language that's good enough to kill the (tort) goose will also cook the (contracts) gander.

Second, the signals insurers send about precaution taking can be blunted and messy.

Insurers want to minimize the cost of claims. The best way to do so is by having no accidents. That would require reducing the risk of fire or the incidence of bedbugs or the number of trampoline accidents. Contract clauses may well be legal/technological marvels but they can't accomplish those goals. As such, they operate at the wrong end of the funnel; insurers might choose to devote their marginal hour to making sure that risks don't eventuate at all.[202]

Consider again the cyber liability world, where one respondent told us that when underwriting a risk, the vast majority of what they look at is the tech that companies employ to avoid harm:

> Maybe 60, 75[% of underwriting the risk] is all about computer security controls. After that we start looking at their loss history and how well we feel they're managed. And as part of the management evaluation, we do look at contracts with terms of service. Better terms of service tend to indicate better management, and we'd like to see those clauses that protect us.[203]

Another pointed out that much of their concern was about ransomware, with liability to third parties only part of what they cover.[204] And, consistent with the quote above, this respondent told us that most of their underwriting is around technological fixes to prevent loss. So, contractual fixes become a second-best solution to a second-order problem.[205]

That implies that unless the boilerplate is going to make a significant difference in the policyholder's exposure, insurers will hesitate to use prices to tempt or discipline policyholders to change their boilerplate, and when they do, it's on the

202. *See generally* Underwriter 4 Interview, *supra* note 134 (detailing technological fixes over contract fixes); Underwriter 5 Interview, *supra* note 126 (detailing the same).

203. Underwriter 4 Interview, *supra* note 134.

204. Underwriter 5 Interview, *supra* note 126.

205. *Id.*

margins.[206] If boilerplate is a small part of a risk management strategy, the prices linked to encouraging boilerplate are likely to be correspondingly small. That then suggests that the total cost savings from adopting boilerplate are unlikely to materially benefit firms on the front end. Since the back-end savings from boilerplate are unknown, it's overall unlikely that policyholders will appreciate boilerplate's financial effects—they won't intentionally change product prices or invest in savings because they've mitigated the risks of claims.[207]

And, even where insurers are focused on contract language as a mechanism to controlling losses, there are significant barriers to changing policyholder behavior. For example, the information ecosystem that our respondents described to us is complex. It creates opportunities for underwriters, brokers, and claims professionals to share and encourage best practices. But it also creates opportunities for the messages to get lost. Brokers may not push as hard as underwriters about contract language. And—given that insurance professionals repeatedly were generally not comfortable making direct suggestions about contract language[208]—specific language suggested by claims professionals may be ignored or modified by the lawyers who represent the policyholders.

Lastly, the message is further blunted because not all insurers in a market view boilerplate the same way. One underwriter explained his failed attempts to require that insureds use modern forms of arbitration waivers that would stand up to plaintiffs filing mass claims as a market failure: "I've got a lot of competitors that don't feel like this is a big issue right now, or haven't identified it as an issue yet, and they'll offer to match the price and not bother them about [mass arbitration waivers]."[209] Price sensitive consumers, or consumers who want to avoid advice, can ignore the signals from insurers who do care.[210]

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206. Abraham & Schwarcz, *supra* note 71, at 237–41 (suggesting the limits of pricing based on the features of the insured).

207. The back-end savings might be predictable but our respondents, even underwriters, denied having those assessments available.

208. *See supra* note 188 and accompanying text.

209. Underwriter 4 Interview, *supra* note 134.

210. This contrasts with well-coordinated insurance markets, where insurers can speak with a more unanimous voice about the importance of certain features. For example, there are relatively few insurers offering significant coverage to large law firms for legal professional liability. Those firms often work together on providing the full tower of coverage that the largest firms demand.

In short, insurers only have so much time with their clients, and their clients only have so much capacity for change. Insurers must be thoughtful about what they push and when. Our respondents told us that boilerplate is important, but they sometimes will pick their battles in the war against losses.[211]

Third, insurance insiders seem to value some pieces of boilerplate less than contracts scholars think they should. Although one lawyer thought specific waivers were a viable risk management tactic,[212] we heard general skepticism about their enforceability. One said, "I don't care what you write down. . . . [Y]ou can add any contract language you want. If there's gross negligence, no judge is going to enforce the contract."[213] Another wryly commented, "[i]f there's a clever plaintiff's lawyer who can come up with an argument—the waiver was unconscionable, the print was too small, it wasn't conspicuous. . . . There're always arguments from contract law that work around waivers and disclosures."[214] Another wanted proof that the clauses "had been tested in the courts," before taking any the language "into consideration."[215] And yet another threw up his hands at the complexity of the law:

> Is it advantageous for the business to have a mandatory arbitration clause, or an anti-class action [clause], or some other limitations of

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See generally Baker & Swedloff, *supra* note 18 (detailing the coordination of the market). In that kind of market, the insurers have more information about each of the actors, and more agreement about the keys to managing risks. In that kind of market, the messages that insurers send to policyholders about risk management are more significant than in markets with many players, each of whom might value different parts of risk management differently. *See id.* at 1–3.

211. *See generally* Abraham & Schwarcz, *supra* note 71, at 255–57 (explaining the cost tradeoffs of risk management by insurers).

212. *See* Claims Attorney 3 Interview, *supra* note 140 ("[Boilerplate] has to be very, very specific for the court to take that provision or waiver assessment seriously . . . . The more specific, the better it is for enforceability . . . . For example, you go to a hotel, and they say you waive all rights to any you know any personal injury claim, or you limit your ability to make a claim. You have to first go to arbitration. Or it has to be in this state before you can do it. The more general it is, the less likely it'll be enforced. Insurers want you to ensure and spell out things to be very specific, because you can't waive negligence. But the more specific instances you can put in the more an underwriter sees that you are a good risk for them to offer a policy to, and maybe offer a policy to for less than another carrier.").

213. Underwriter 1 Interview, *supra* note 139.

214. Broker 2 Interview, *supra* note 156. On the complexity of the enforceability of waivers generally, see Cheng et al., *supra* note 12, at 580–82.

215. Underwriter 7 Interview, *supra* note 135.

> liability? Absolutely. And as an underwriter . . . I'd be happy to see that they were doing all those things to limit their exposure. . . . It's the unconscionability issue where you get into a problem.[216]

If the clauses aren't enforceable, they aren't worth very much as a risk management device except as an extra-judicial deterrent. As one broker mused: "Are these clauses enforceable? Like if Funzone includes those liability or damage waivers, I thought those were unenforceable. I understand that they might deter potential claims, but are they enforceable?"[217] That means that the insurance firms still have to look at the non-contractual risk management as a way to price the risk; "[t]he underwriters know no waiver is bulletproof, and they still have to underwrite the real risks."[218]

This may further explain the difficulty of pricing boilerplate. While brokers and underwriters are happy to push the language forward, they are not sure the language will save them a significant amount of money. They fear that the clauses are only eliminating unsophisticated claimants and minor claims (which may fall in the policyholders' risk retention and thus not actually affect the insurer's bottom line), and that clever plaintiffs' attorneys will defeat the clauses.

These limits are real, but not fatal to our finding. They are consistent with other insurance-as-governance findings where scholars show that insurers attempt to influence their policyholders' behaviors, but often with mixed results. John Rappaport, for example, found that insurers regulated police behavior by contributing to departmental policies, education and training, and influencing personnel decisions.[219] He also showed that insurers were able to encourage modest changes through underwriting, contract design, and pricing.[220] But, because many departments self-insure, insurers' reach was limited.[221]

Tom Baker and Sean Griffith found decidedly mixed results on insurers' ability to influence corporate boards.[222] While insurers tried to price based on the riskiness of the policyholder, they

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216. Broker 3 Interview, *supra* note 124.
217. Broker 4 Interview, *supra* note 143.
218. Broker 2 Interview, *supra* note 156.
219. Rappaport, *supra* note 18, at 1573–86.
220. *See id.* at 1587–91.
221. *See id.* at 1595–97.
222. *See* BAKER & GRIFFITH, *supra* note 18, at 10–12, 97–104.

were not confident in their ability to do so.[223] They also found that insurers do not provide price breaks for specific loss prevention activities[224] and do not provide loss prevention advice.[225] Nonetheless, insurers try to mitigate the moral hazard that insurance creates with high deductibles and low limits.

The insurance-as-governance literature is contested and (as we've described) contains findings that are mixed. We find evidence that insurers seek to have their policyholders use boilerplate to mitigate costs. Insurers like to transfer risk but aren't fully convinced that waivers are enforceable. If (where) they are, insurers and policyholders can offload their losses more completely. Thus, even where procedural boilerplate is effective at reducing the cost of litigation, it's less bang for the buck.

One way to square these findings with the more skeptical voices in the insurance literature is to note that boilerplate is in some ways the cheapest possible risk-mitigation strategy. Insurers can say that you don't have to repair your sprinkler system, update your technological controls, or install a new laundry system to eliminate bedbugs. Rather, you simply have to insert a clause into contracts that you were already having your consumers sign. It's a small ask, and an easy give, in an insurance relationship that could have many other sticking points. It's no wonder that insurers find it such a low-hanging fruit. And yet they don't always pick it.

B. RESEARCH DIRECTIONS

We've offered some evidence that insurance firms are playing a role in the creation of liability-depreciating terms in consumer contracts. *Some* is the key word in that sentence: Our interviews take a step toward proving the existence of this kind of insurance as governance, but not a big one in determining its scope. What our qualitative evidence does best is raise questions and provocations for further research. In this Section, we'll try to put some more scaffolding on the questions that remain.

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223. *See id.* at 78 ("[A]lthough D&O insurers do seek to price on the basis of risk, their efforts are unlikely to be sufficient to reinvigorate the deterrence function of shareholder litigation.").

224. *See id.* at 111–12.

225. *See id.* at 110–13.

The literature on consumer boilerplate has a hole at its center: how to objectively value unread and unpriced terms.[226] This is a wickedly hard problem, and scholars have made essentially no progress on solving it in the last hundred years. Looking at the changes of price of goods and services that accompany mutable contracts is fruitless; product characteristics typically swamp the marginal term effects.[227] Some have sought to identify the value of privacy protections in terms of using complex models.[228] But scholars have not tried to extend those techniques to price obscure, litigation-defeating clauses.[229]

In other markets where scholars seek to identify the effect of discrete pieces of disclosed information on firm value, they often turn to excess stock market returns on the date when information about those terms became salient.[230] Those studies identify whether a firm's Securities Exchange Commission disclosure was material by asking if that firm's stock went up (or down) more than a comparable basket of stocks. The difference between the target firm's return and the comparable stocks represents an estimate of the effect of the disclosure on the firm's value.[231]

Scholars have tried to use stock market returns to estimate the effects of contract clauses. Their empirical approach looks for shocks in the enforceability of particular pieces of contract language—a legislative enactment that makes it unenforceable, or

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226. *See supra* text accompanying notes 41–67.

227. *See* Ben-Shahar, *supra* note 39, at 895 ("[T]he 'price effect' means that one cannot evaluate whether boilerplate deletion of legal rights is good or bad for consumers without also looking at the price people are asked to pay for the 'product + boilerplate' package."); *cf. Arbitration Study*, *supra* note 62, § 1, at 18 (finding no "statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses and thus increased their exposure to class action litigation risk").

228. *See, e.g.*, Alessandro Acquisti, Leslie K. John & George Loewenstein, *What is Privacy Worth?*, 42 J. LEGAL STUD. 249, 249 (2013).

229. *See* Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, PLOS ONE, Feb. 23, 2024, at 1, 1 (showing lack of consumer understanding of arbitration clauses); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 75 (2015) (detailing the same).

230. *See* Lucian A. Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549, 1586 (2010) (describing the event study approach).

231. There is a large literature on the effect of commercial terms on value. *See, e.g.*, Andrew K. Jennings, *Firm Value and Intracorporate Arbitration*, 38 REV. LITIG. 1 (2018).

a Supreme Court decision approving it—and then asks if that shock caused an effect on firm value.[232] This market-reaction strategy is common in the world of commercial boilerplate, which provides some evidence that markets do value contract language.[233] But in consumer contracts, there are (at most) a handful of examples, and the most salient one—from the world of noncompete agreements—offers a null result.[234]

One possible explanation for the literature's deficit is that an absence of evidence is hard to get published.[235] That is, perhaps scholars have looked in vain for evidence that firms' financially benefit when arbitration becomes more enforceable. Or the literature has failed to provide statistically valid evidence that firms led by certain men (for example) became less valuable when the non-disclosure agreements that cover their

232. For example, scholars have looked at the effect of judicial decisions on debt enforceability. *See* Colleen Honigsberg, Robert J. Jackson, Jr. & Richard Squire, *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 J.L. & ECON. 673, 675 (2017).

233. *See, e.g.*, Stephen J. Choi, Mitu Gulati, Ugo Panizza, Robert E. Scott & Mark C. Weidemaier, *Obscure Contract Terms: An Inadvertent Pricing Experiment*, 19 CAP. MKTS. L.J. 230, 233–39 (2024) (finding price effects from disclosure of bond terms on a podcast); Vincent S. J. Buccola & Greg Nini, *The Loan Market Response to Dropdown and Uptier Transactions*, 53 J. LEGAL STUD. 489, 489 (2024) (providing evidence of bond price reactions to salient and innovative transactions).

234. Hiraiwa et al., *supra* note 51, at 31 (finding no measurable stock market reactions to changes of the enforceability of noncompetes for firms that used them). We are aware of two working papers finding effects, suggesting that changes in the enforceability of NDAs and NCAs on firm value is an active research subject. *See* Tural Karimli, The Costs of Hidden Workplace Harassment 1 (Oct. 31, 2023) (unpublished manuscript) (on file with the *Minnesota Law Review*), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618312 (finding that changes in enforcement of NDAs caused changes in likelihood of harassment and firm innovation); Lauren E. Aydinliyim & Petra Christmann, Public Policy-Induced Changes in Human Capital Factor Market Imperfections: How Non-Compete Policy Affects Firm Performance 1 (June 10, 2022) (unpublished manuscript) (on file with the *Minnesota Law Review*) (finding positive effects on firm value for a California judicial decision making out-of-state noncompetes unenforceable).

235. *Cf.* Robert Rosenthal, *The "File Drawer Problem" and Tolerance for Null Results*, 86 PSYCH. BULL. 638, 638 (1979) ("[T]he 'file drawer problem,' is that the journals are filled with the 5% of studies that show Type 1 errors, while the file drawers back at the lab are filled with the 95% of the studies that show nonsignificant . . . results.").

harassment suddenly can't be used anymore.[236] We generally wouldn't know about these failed attempts.

Our research suggests that looking under different lampposts might be of use. That is, when consumer boilerplate faces enforceability shocks, its drafters' insurance companies will be financially affected. Perhaps if you wanted to evaluate the value of arbitration clauses, and had in mind a few decisions that increased those clauses' enforceability and some others that decreased it,[237] event studies centered on liability insurers would be potentially revelatory.[238] They'd offer a way to measure the economic consequences of boilerplate (and, conversely, consumer litigation) across the economy.

A second line of research would interact what we've learned about insurance firms with the existing literature on how terms are diffused throughout markets. Again, starting with markets where we know a great deal, the literature from commercial contracts suggests law firms (and individual lawyers) diffuse terms across markets within networks.[239] More closely connected

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236. *But cf.* Jason Sockin, Aaron Sojourner & Evan Starr, *Non-Disclosure Agreements and Externalities from Silence* 30 (Upjohn Inst., Working Paper No. 22-360, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900285 (examining labor market response to legislation in California, Illinois, and New Jersey prohibiting use of NDAs to conceal unlawful wrongdoing and finding a greater impact on the reputation of "low-road" employers). For a detailed accounting of the landscape of state legislation prohibiting or limiting NDAs related to sexual misconduct or sex-based harassment, see Eve Litvak, Comment, *Survivors' Choice: Nullifying NDA's in New Jersey's Employment and Family Practices*, 47 SETON HALL LEGIS. J. 206 (2023).

237. *See, e.g.*, David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323 (2019); Michael A. Rosenhouse, Annotation, *Construction and Application of Federal Arbitration Act–Supreme Court Cases*, 28 A.L.R. Fed. 2d (2008).

238. There is a literature finding insurance firms' market value responds to shocks like natural disasters. *See, e.g.*, Atsushi Takao, Takuya Yoshizawa, Shuofen Hsu & Takashi Yamasaki, *The Effect of the Great East Japan Earthquake on the Stock Prices of Non-Life Insurance Companies*, 38 GENEVA PAPERS 449, 463–64 (2013) (finding negative abnormal returns for non-life insurance firms).

239. *See, e.g.*, GULATI & SCOTT, *supra* note 60 at 33–44; Nyarko *supra* note 66 (examining choice-of-forum provisions); Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 17–24, 43–44 (2017); Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 64–65, 80 (2017); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. Rev. 1, 15 (2013); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 143–46 (2012); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and*

lawyers (i.e., those within the same firm, or across deals) borrow terms from each other, leading to the evolution of contracts over time in lawyer and firm lineages.[240]

Might insurance firms be nodes for the dissemination of consumer contract terms within these information sharing networks, just as Skadden or Wachtell's corporate departments are nodes for M&A contracts?[241] To learn more, scholars could look to see if widely disparate firms with the same insurance carrier adopt similar arbitration, class action waiver, or choice of law clauses.[242] Finding such network effects would provide more information about how insurance spurs innovation in consumer terms.[243] It would also provide information that would advance debates about how to interpret and regulate boilerplate.

C. INSURANCE FIRMS AS BOILERPLATE'S (REAL?) BENEFICIARIES

We now consider some broader implications of the research—and research agenda—we've described above. To start, consider the implications if insurance firms gain value when boilerplate they've pushed becomes more enforceable, but their consumer-facing policyholders do not. The gains would appear in insurers' coffers because the policyholders and companies made a trade: Insurers took on the risk of liability in return for a stream of payments. When that liability risk went down, insurance firms benefited. Insurance firms would be acting not just as boilerplate's secret regulators but also as its residual claimants.[244]

Cognitive Biases, 74 WASH. U. L.Q. 347, 348 (1996); Kahan & Klausner, *supra* note 52, at 713; Robert Anderson, The Evolution of the Poison Pill 5–8 (Oct. 16, 2025) (unpublished manuscript) (on file with the *Minnesota Law Review*), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5583071.

240. Matthew Jennejohn, *Do Networks Govern Contracts*? 47 J. CORP. L. 333, 359 (2022) (illustrating networked contracting practices).

241. *See, e.g.*, Stephen J. Choi, Mitu Gulati, Matthew Jennejohn & Robert E. Scott, *Contract Production in M&A Markets*, 171 U. PA. L. REV. 1881, 1912–13 (2023).

242. *See, e.g.*, Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J. CORP. L. 393, 393 (2015) (discussing the value elite law firms bring to clients based on their aggregated information regarding "market" deal terms).

243. *See, e.g.*, Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1076–77 (2006).

244. For a nice history of this term in the corporate context, see Sung Eun (Summer) Kim, *Tracing the Diverse History of Corporate Residual Claimants*, 95 S. CAL. L. REV. POSTSCRIPT 43 (2021).

Imagining insurance looming in the background of consumer contracting has implications for boilerplate policy. For generations, scholars have sought to cabin boilerplate with a variety of techniques, ranging from ex ante regulatory prohibitions to ex post liability sanctions, and all stops in between.[245] Some have focused on fiduciaries—lawyers—as regulatory objects, suggesting that they be punished for drafting aversive terms.[246] Others have suggested that there would be utility in encouraging certain nonprofits to produce better boilerplate.[247]

So, one obvious possibility is that regulators and other policymakers could start by learning from insurance firms. They could ask or require them to disclose information about boilerplate—both its use and its effects. At the moment, consumer-facing firms adopting new kinds of boilerplate rarely, if ever, have an obligation to disclose it.[248] But, as Tom Baker has observed, liability insurers are better positioned than any other actor to understand the judicial system in its totality.[249] Using liability insurers as windows into the obscure world of boilerplate could shed important light and give regulators a firm place to stand.

Alternatively, regulators could require insurers to constrain their insureds' use of boilerplate. Today's contract literature has increasingly asked how to slow or reverse the widespread adoption of unenforceable terms.[250] Insurers could be deployed to help in this project. For example, regulators could ask firms what they did, in their contractual review, to remove unenforceable clauses like noncompetes from California employment

245. *See generally* Hoffman, *supra* note 1, at 1388–92 (summarizing reform proposals).

246. *See* Wilf-Townsend, *supra* note 43, at 999–1002 (summarizing proposals and astutely noting problems with them).

247. Hoffman & Strezhnev, *supra* note 32, at 128 (suggesting the utility of "pressure campaigns" against form providers).

248. *See* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 11 ("Ordinarily, companies [a]re not obligated to disclose their arbitration agreements systematically in a form usable by researchers.").

249. *See* Tom Baker, *Transparency Through Insurance: Mandates Dominate Discretion, in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 184, 191–92 (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012) (suggesting problems with permitting insurance firms to keep this knowledge private).

250. *See* Wilf-Townsend, *supra* note 43, at 977–1002 (describing techniques to deter unenforceable terms).

contracts,[251] or disclaimers of the implied warranty of habitability from leases in jurisdictions that don't permit that practice.[252] Insurers' role as generators of consumer boilerplate thus could give policymakers not just a window into its function, but a place to put down their feet.

But regulators should step slowly. As many have long argued, there are complicated economic tradeoffs in enforcing contractual limitations on liability against consumers. On the one hand, they might save firms money, and in so doing improve products over the long term. On the other, they might have negative effects on general deterrence, leaving consumers unable to seek recourse through private law, in a world where market sanctions might fail to deter certain kinds of corporate wrongdoing. As we've discussed above, the empirics of that debate haven't meaningfully advanced in the last hundred years.[253]

One advantage that studying insurance firms' views about boilerplate might provide is that those firms, because they take on risks from many different types of companies, as well as holding the risks from some individuals, may be better positioned to measure the net social effects of less litigation of certain kinds. Parts of insurance firms benefit from deterred lawsuits. But other parts (those that cover personal liabilities) don't.

The point can be easily overstated—insurance companies are almost as balkanized and badly governed as universities—but at least some of the time, insurers cover the field. They can thus be motivated to invest in precautions that increase net welfare. That insurers have incentives to do so at least some of the time is conventional in other parts of the insurance literature.[254] Because they do so, they can end up taking on some of the functions of governments in balancing risks, as the residual holder of both sides of the *v*'s liabilities. But, as some scholars have cautioned, simply because insurers are hedged doesn't mean they

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251. *See* Sarath Sanga, *Incomplete Contracts: An Empirical Approach*, 34 J.L. ECON. & ORG. 650, 650 (2018) (showing that California employers pay employees to comply with unenforceable noncompetes which remain in their contracts).

252. Hoffman & Strezhnev, *supra* note 32, at 99 (finding that disclaimers of the implied warranty appeared in around sixty percent of unsubsidized private leases).

253. *See supra* text accompanying notes 39–67.

254. Tom Baker & Charles Silver, *How Liability Insurers Protect Patients and Improve Safety*, 68 DEPAUL L. REV. 209, 210 (2019) (discussing such incentives in the context of medical liability insurance).

prefer a low-risk society. Insurers are motivated to pump risk for all comers, while shifting losses away from themselves. This is the "dark side" of insurance.[255]

Resolving whether insurer risk-reduction practices move consumer litigation toward positive social equilibria, or shift risk away from insurers and put it on the backs of uncovered victims and firms, is well beyond the scope of this Article. Merely framing that debate, however, would offer fresh—and perhaps tractable—empirical inputs into the socially critical question of whether boilerplate is in fact bad for consumers.

Finally, thinking about insurance boilerplate producers has implications for judicial interpretation of such clauses. As Abraham and Sharkey recently illustrated, the availability of insurance has had profound consequences on the development of tort doctrine, giving judges implicit license to expand the scope of liability where it is present and retarding liability's spread when it is not.[256] But insurance's role in boilerplate's production has not had *any* effect on interpretation of the contracts that increasingly control those suits' disposition.

To be sure, we lack a well-accepted, or even clear, theory articulating how to interpret consumer contracts.[257] Most of the law and commentary on these contracts turns on questions of notice (to trigger application of arbitration clauses) or unconscionability and public policy (to avoid particular outcomes).[258] And, as such, there really are very few consumer contract interpretation cases. That's in part due to the diversion of such cases into the secrecy of arbitration and the settlement practices of

255. Ronen Avraham & Ariel Porat, *The Dark Side of Insurance*, 19 REV. L. & ECON. 13, 13 (2023) (detailing the "dark side" of insurance where insurers "employ various tactics to shift losses to their insureds or to their victims in order to minimize their own costs instead of reducing their insureds' losses").

256. Abraham & Sharkey, *supra* note 12, at 2193–215.

257. *See generally* Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753 (2017) (noting problems in existing methods and proposing using surveys to interpret certain mass contracts); Gregory Klass, *Boilerplate and Party Intent*, 82 LAW & CONTEMP. PROBS. 105, 108–130 (2019) (showing how boilerplate in consumer contracts has special interpretative rules); David A. Hoffman, *Consumers' Unreasonable Textual Expectations*, 15 HARV. BUS. L. REV. 43 (2025) (offering methodology based on the Restatement of Consumer Contracts).

258. *See* RESTATEMENT OF THE LAW: CONSUMER CONTRACTS § 2 cmt. 8, § 6 (AM. L. INST. 2022).

class-wide adjudication,[259] but given the contracting mass, it's increasingly important to come up with ways to interpret terms no one reads and that third parties apparently draft.

In other places where contracts incorporate the views of third-party drafters—think, for example, of a contract that contains a term required by the government[260]—courts often standardize interpretative techniques across boilerplate, notwithstanding their drafters' intent.[261] Gregory Klass recently identified one controversial example: Courts treating as uniform consumer contract language for the purposes of class certification, though individual adherents may have varied experiences with it.[262] Perhaps the tension Klass identifies would be mitigated if the parties adopted terms at the behest of insurers who sought to create standardization across the market. That is, excavating insurers' hidden role in influencing terms provides a new and unexpected source of information about those terms' meaning, and a set of new policy arguments on how to incorporate that evidence into judicial construction.

There are unsettled questions about how far to take this line of argument. For example, if an insurance firm believes a waiver is unenforceable but requires its policyholders to use it as a condition of getting insurance, should that belief be imported to the "drafter" when the waiver is challenged, through the doctrines of estoppel or bad faith? Conversely, if insurers push a choice of forum thinking that the law is more settled and clearer, rather than to avoid liability by depressing the likelihood of suits, should that exculpatory fact matter to the terms' enforceability? Insurers' beliefs, knowledge, sophistication, and incentives differ from those of policyholders; incorporating their views into consumer contract doctrine is no easy task.[263] The evidence we've

259. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 607–08, 610 (2020) (arguing that the rise of class actions, arbitration, and other federalizing boilerplate has decimated the common law of contracts).

260. Klass, *supra* note 257, at 117 (noting that when government mandates terms, it is the government's meaning that controls, not the parties).

261. For a general application beyond the mandatory context, see *id.* at 119–23.

262. *Id.* at 134–36.

263. *See* Shaanan Cohney & David A. Hoffman, *Transactional Scripts in Contract Stacks*, 105 MINN. L. REV. 319, 371 (2020) (discussing the problem of code written by different programmers at different times incorporated into a single "transactional script"); *cf.* Cathy Hwang & Matthew Jennejohn, *Deal*

offered in this Article suggests that it's time to take third-party drafting more seriously.

CONCLUSION

Our contribution is simply stated: Insurers play a role in the propagation of litigation-limiting boilerplate in consumer contracts. Through interviews with industry participants, we illustrated that insurers not only refine and promote such contract terms but also enforce their adoption by policyholders. Insurers' practices of educating policyholders, evaluating contract language during underwriting, and denying coverage when certain liability-limiting clauses are absent, underscore their influence.

Unearthing a new actor in the diffusion of consumer boilerplate provides some short-term insights and offers long-term promise for a research agenda. While insurers push for the inclusion of certain boilerplate clauses, they are skeptical about the efficacy of popular terms like arbitration and class waiver clauses, focusing more on forum selection and choice of law clauses. This skepticism stems from a belief that many clauses, despite being legally sound, often fail to materially reduce liability or deter sophisticated plaintiffs. That finding might provoke scholars of procedure to approach the problem of private control over procedure from a different angle.

By emphasizing insurers' role, this Article also challenges traditional views that solely attribute the rise of boilerplate to intentional and internal corporate legal strategies. It proposes that insurers, driven by a need to mitigate risk and manage claims, influence the form of consumer contracts. This insight prompts a reconsideration of the broader economic and regulatory implications of boilerplate, suggesting that further research into insurers' role could enhance our understanding of consumer contract dynamics and inform regulatory strategies.

Structure, 113 NW. U. L. REV. 279, 279 (2018) (proposing a theory of mixed contextual and textual moves to account for the modular design of certain commercial contracts).