

January 2014

Situational Duress and the Aberrance of Electronic Contracts

Nancy S. Kim

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Consumer Protection Law Commons](#), and the [Contracts Commons](#)

Recommended Citation

Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 Chi.-Kent L. Rev. 265 (2014).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol89/iss1/11>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

V. A Typical Consumer Agreements as Aberrant Contracts

SITUATIONAL DURESS AND THE ABERRANCE OF ELECTRONIC CONTRACTS

NANCY S. KIM*

INTRODUCTION

The theme of this symposium issue is aberrant contracts and this article considers a particularly virulent strain of aberrant contract—the mass consumer electronic contract. In the past decade, electronic contracts have spread dramatically and are now ubiquitous on the Internet and handheld devices. They have migrated offline so that paper contracts, notices and even invoices incorporate, by reference, electronic terms.¹ Electronic contracts are aberrant in a variety of ways, including their form, their medium, and their content. The intangibility and flexibility of electronic contracts make it easier for drafting companies to deploy them, but they also make it easier for consumers to ignore them. Companies exploit the form and excessively use electronic contracts. The excessive use of these contracts affects the consumer in several ways. First, it fosters confusion because the consumer receives contracts through a variety of channels and may be confused as to which terms or versions actually apply to a particular transaction. Frequent modifications to electronic terms exacerbate this problem.² In addition, excessive use of electronic contracts encourages consumer habituation. Companies intentionally minimize the disruptiveness of contract presentment in order to facilitate transactions and to create a smooth website experience for the consumer. All of this reduces the signaling effect of contracts and deters consumers from reading terms. Often, they fail to realize that by clicking “accept” they are entering into a legal commit-

* Professor, California Western School of Law. This article is part of the symposium on aberrant contracts, which resulted from the 2013 AALS Annual Meeting of the Commercial and Consumer Law Section. The author thanks Professor Sarah Howard Jenkins for organizing the symposium and for welcoming this contribution and Devon J. Steinmeyer and The Chicago-Kent Law Review for their diligent assistance.

1. See *Vernon v. Qwest Communications Int'l Inc.*, 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012) (where letter sent to Qwest customers incorporated by reference an online agreement); *Briceño v. Sprint Spectrum, L.P.*, 911 So. 2d 176 (Fla. Dist. Ct. App. 2005) (invoice sent to plaintiff incorporated by reference online terms). *But see Manasher v. NECC Telecom*, 2007 WL 2713845 (E.D. Mich. Sept. 8, 2007) (website terms of use incorporated in paper invoice were not incorporated by reference).

2. See Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 *BYU J. PUB. L.* 1, 23 (2011-2012) (noting that unilateral modifications are common provisions in online agreements).

ment. Companies take advantage of consumer failure to read and include ever more aggressive and oppressive terms. Meanwhile, courts apply doctrinal rules without considering the impact of the electronic form on the behavior of the parties.

This article explains how the aberrant nature of electronic contracts has unique effects. Companies take advantage of these unique effects and use electronic contracts in a coercive manner. This article proposes the new defense of “situational duress” to address the exploitative use of electronic contracts in certain situations. As with traditional duress, in order to avoid a contract on the grounds of situational duress, a consumer would have to prove that the drafting company made an improper threat that left the consumer with no reasonable alternative.³ Unlike traditional duress, a finding of situational duress would render a contract void and not merely voidable. The meaning and application of the rule would be tailored in a way that recognizes the coercive nature of introducing an electronic contract in certain situations.

Part I explains why electronic contracts are aberrant and explains how the developing law in this area deviates from traditional contract doctrine. This section also discusses how the electronic form affects consumer behavior and understanding of contract terms. Part II provides background to the traditional doctrine of duress and introduces the concept of situational duress. Part III explains how the defense of situational duress would operate and how it would respond to, and rectify problems associated with, electronic contracts. Part III also addresses anticipated objections to such a defense.

This article concludes that the aberrance of electronic contracts as a contracting form requires recognition in the definition and application of doctrinal rules. The digital form of electronic contracts obscures consumer perception and facilitates exploitation by companies. The proposed defense of situational duress enhances fairness in the contracting process by considering and responding to the effect of electronic contracts on the behavior of the parties in two specific situations: the “rolling contract” scenario and the “content hostage” scenario.⁴

3. See RESTATEMENT (SECOND) CONTRACTS, § 175(1) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

4. See *infra* Part III.A.

I. WHY ELECTRONIC CONTRACTS ARE ABERRANT CONTRACTS

Mass consumer electronic contracts, also known as clickwraps, browsewraps and tapwraps, differ from the archetype of a negotiated paper contract;⁵ however, they are not so different from other contracts of adhesion.⁶ Like their paper-based, real world counterparts, they contain one-sided provisions, companies offer them on a take-it-or-leave-it basis, and consumers fail to read their terms.⁷

Nonetheless, electronic contracts differ from their real world counterpart in two important ways. The first is the way that courts have applied the law to them. The second is their essence. This section addresses each aspect in turn.⁸

A. A Brief Overview of Electronic Contract Doctrine

In determining whether an electronic contract has been validly formed, courts must find that there was both “reasonable notice” of terms and “manifestation of assent” by the consumer.⁹ Manifestation of assent can be an affirmative act, such as clicking on an “I accept” icon with a computer mouse, but it may also be a failure to actively reject after receipt of notice, such as with browsewraps.¹⁰

5. See NANCY KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 4 (Oxford Univ. Press 2013). Clickwraps require that users click with a computer mouse on an “accept” icon, browsewraps are hyperlinks, which require clicking to view terms, and tapwraps require users to tap on an “accept” icon. *Id.*

6. Numerous scholars have written about the issues associated with contracts of adhesion. See, e.g., Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

7. For a discussion of the ways in which form contracts wrest important rights from consumers, see generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

8. For a complete discussion and analysis of the differences between digital and paper contracts, see KIM, *supra* note 5.

9. See, e.g., *Specht v. Netscape Communications Corp.*, 306 F. 3d 17, 28 (2002) (noting that both “conspicuous notice” of the existence of the contract and unambiguous “manifestation of assent” are essential to electronic bargains). *Id.* at 35. The courts seem to use the terms “assent” and “consent” interchangeably. See *id.* at 29 (noting that in California, a party’s intent to contract is judged by the party’s outward “manifestation of consent”).

10. By comparison, traditional contract law holds that silence does not constitute acceptance unless the offeree intends it. See ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS, ONE VOLUME EDITION* 119 (1952) (“It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so.”).

Notice can be actual or constructive.¹¹ Traditionally, courts have held that clauses printed on the reverse side of a document do not bind a person unless they were called to that person's attention.¹² Yet, in electronic contract cases, courts generally find notice where the consumer must click on an icon in order to complete the transaction, and the icon indicates that legal terms apply to the transaction. This is true even if the terms themselves were not immediately visible but were, instead, contained in a hyperlink near the "accept" icon or contained in a scrollable box.¹³ If the consumer is not required to click in order to proceed, a court will still find notice if the consumer receives a cease and desist letter or if the terms are visible on the website without scrolling down.¹⁴ In the case of a cease and desist letter, the language from court decisions seems to indicate that notice is effective at the time actual notice is received and not as of the time of the initial interaction.¹⁵

For example, in *Southwest Airlines v. BoardFirst, LLC*, BoardFirst accessed Southwest Airlines' website in order to check in passengers early, thereby obtaining a preferential boarding position.¹⁶ On Southwest Airlines' homepage, in "small black print at the bottom of the page," were words indicating that "[u]se of the Southwest websites . . . constitutes acceptance of our Terms and Conditions."¹⁷ The "Terms and Conditions" were hyperlinked to the actual terms and conditions page and limited the use of the website to "personal, non-commercial purposes."¹⁸ Southwest Airlines later added language that "third parties may not use the Southwest

11. *Southwest Airlines Co. v. BoardFirst, L.L.C.*, Civil Action No.3: 06-CV-0891-B, 2007 WL 4823761, at *5 (N.D. Tex. Sept. 12, 2007); *Cairo, Inc. v. CrossMedia Servs., Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *5 (N.D. Cal. Apr. 1, 2005).

12. *Birmingham Television Corp. v. Water Works*, 290 So. 2d 636, 642 (Ala. 1974); *In re Allstate Ins. Co. v. La Perta*, 42 A.D.2d 104, 108 (N.Y. 1973); *Cutler Corp. v. Latshaw*, 97 A.2d 234, 238 (Pa. 1953); see also John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 344 (1974).

13. See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007) (finding that as long as there was notice that terms were contained in a particular location, requiring users to scroll in order to view them was permissible).

14. See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004); *BoardFirst, L.L.C.*, 2007 WL 4823761, at *4.

15. See *BoardFirst, L.L.C.*, 2007 WL 4823761, at *5. The court found the notice requirements were met because the "evidence shows that BoardFirst has had knowledge of the Terms as early as" when it received Southwest's cease and desist letter in which it was informed of the violation. *Id.*; see also *Verio, Inc.*, 356 F.3d at 403; *Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957 JCH, 2011 WL 797505, at *5 (D. Conn. Feb. 24, 2011).

16. 2007 WL 4823761, at *1.

17. *Id.* at *2 (alterations in original).

18. *Id.*

web sites for the purpose of checking Customers in online or attempting to obtain for them a boarding pass in any certain boarding group.”¹⁹

The court found the notice requirements were met because BoardFirst “had knowledge of the Terms as early as” when it received Southwest’s cease and desist letter informing BoardFirst of the violation.²⁰ In other words, the court did not determine that BoardFirst had notice, actual or constructive, at the time it first visited Southwest’s website; rather, it found notice because BoardFirst continued to violate the Terms after having received actual notice by mail.

In the past, courts accommodated changes in contracting form by examining whether there was in fact an apparent manifestation of assent to the document.²¹ The document must be legible and the terms sufficiently called to the attention of the party signing it.²² Under the “reasonable communicativeness” test, courts focus both on the physical characteristics of the notice and extrinsic factors, such as the recipient’s ability to become meaningfully informed of the contractual terms.²³ For example, in *Wallis v. Princess Cruises, Inc.*,²⁴ the Ninth Circuit Court of Appeals analyzed whether the limitation of liability provision on the back of a passenger’s ticket was reasonably communicated to the passenger and concluded that it was not.²⁵ Although the courts found that the physical characteristics of the terms were “sufficiently conspicuous”²⁶ the relevant limitation of liability did not apply because it was difficult for the “average passenger with no legal background” to fully understand it the way that it was written.²⁷

By contrast, with electronic contracts, courts typically fail to acknowledge the difference that digital form has on both consumer perception and businesses’ drafting behavior.²⁸ Courts declare that electronic contracts are “just like” paper contracts and emphasize their similarities without also acknowledging their differences. For example, in *Register.com, Inc. v. Verio, Inc.*, the Second Circuit stated that while Internet

19. *Id.*

20. *Id.* at *4.

21. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 393 (5th ed. 2003).

22. *Id.* at 393-394.

23. Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1314 (2005) (Courts have “fashioned tests such as the ‘reasonable communicativeness’ test, under which the combination of reasonable notice of the contractual nature of offered terms and the opportunity to review those terms serves as a proxy for the offeree’s clear manifestation of assent.”).

24. 306 F.3d 827, 840 (9th Cir. 2002).

25. *Id.* at 830.

26. *Id.* at 836.

27. *Id.* 836-838.

28. Moringiello, *supra* note 23, at 1320 (noting that courts tend to view electronic contracts as “no different” from paper contracts).

commerce has “exposed courts to many new situations, it has not fundamentally changed the principles of contract.”²⁹ Another court stated that hyperlinks, “should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract.”³⁰ In another case, the court insisted that a person who “checks the box agreeing to the terms and conditions of a purchase on an internet site without scrolling down to read all of the terms and conditions is in the same position as a person who turns to the last page of a paper contract and signs it without reading the terms—namely the clause is still valid.”³¹ This view underestimates the impact of form on perception, and it also ignores the way existing law has been shaped by form.

B. The Essence of Electronic Contracts

The identifying characteristic—the essence—of clickwraps and browsewraps is that their terms are electronic. The nontangible, digital essence of electronic contracts has important consequences. Electronic terms are intangible and weightless, which affects consumer awareness. Contracts communicate with their words, but also through their form. A thick stack of documents signals something very different from a ticket stub with wording on one side. The length of a document, the quality of the paper, and its presentation all communicate something about the nature of the transaction. The heft of a document tends to correspond to the onerousness of the obligations agreed to by the consumer. Those signaling effects are often lost with electronic contracts.

One might argue that even short documents can require consumers to relinquish significant rights. A one-page indemnification means that a consumer has agreed to a potentially alarming obligation. A waiver on the back of a claim check ticket means that a consumer has given up an important avenue of redress. Yet those examples only emphasize the essential difference between paper and electronic contracts. Electronic contracts are not physically constrained in the same way as paper contracts of adhesion. Both a one-page indemnification and a claim check ticket are limited by their physical space. The wording must be selected with care, and the rights claimed and the obligations sought are constrained by the four corners of the paper or the ticket stub. The space is further confined by the need to use

29. 356 F.3d 393, 403 (2d Cir. 2004); *see* *Cairo, Inc. v. Crossmedia Servs. Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *5 (N.D. Cal. Apr. 1, 2005).

30. *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 121 (Ill. App. Ct. 2005).

31. *Scherillo v. Dun & Bradstreet, Inc.*, 684 F. Supp. 2d 313, 322 (E.D.N.Y. 2010).

attention-catching bold font and capitalized letters in order to pass judicial scrutiny of conspicuousness. Consequently, consumers will likely notice capitalized terms on the back of a ticket stub, even if they are unable to change them. Furthermore, the tangibility of paper has a significant cost. Mass consumer paper contracts cost money to print and store. Changes in contract terms require additional paper, which may discourage companies from modifying their forms unnecessarily. Companies are hesitant to annoy customers by seeking a signature for every transaction so one-time transactions are often completed without a writing. Similarly, companies may dispense with having customers sign amended agreements for trivial changes.

The same limitations do not apply to electronic terms. Electronic terms are flexible and easily manipulated. They can be modified and connected across multiple pages with hyperlinks. The weightlessness and manipulability of electronic terms affect company behavior. An increase in the volume of electronic terms does not create a corresponding increase in cost. The intangible, digital essence of electronic contracts and the attenuated version of consent which is applied to them make it much easier for businesses to impose one-sided terms upon consumers, including terms that are rarely found in paper contracts of adhesion, such as provisions transferring or granting rights to creative works³² and extensive tracking and exploitation of user information. It also makes it easier for companies to continuously modify terms. Not surprisingly, electronic contracts commonly contain “modification at will” provisions.³³ For example, Twitter’s terms of services state:

We may revise these Terms from time to time, the most current version will always be at twitter.com/tos. If the revision, in our sole discretion, is material we will notify you via an @Twitter update or e-mail to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.³⁴

32. See Preston & McCann, *supra* note 2, at 19-20 (conducting survey of eight service providers and finding common onerous provisions, including mandatory arbitration clauses and rights to user creative works).

33. See *Google Terms of Service*, GOOGLE (Mar. 1, 2012), <http://www.google.com/intl/en/policies/terms/> (“We may modify these terms or any additional terms that apply to a Service to, for example, reflect changes to the law or changes to our Services.”); *Yahoo Terms of Service*, YAHOO! (Mar. 16, 2013), <http://info.yahoo.com/legal/us/yahoo/utos/terms/> (“Yahoo! provides the Yahoo! Services (defined below) to you subject to the following Terms of Service (‘TOS’), which may be updated by us from time to time without notice to you By accessing and using the Yahoo! Services, you accept and agree to be bound by the terms and provision of the TOS”); see also Preston & McCann, *supra* note 2, at 23.

34. *Terms of Service*, TWITTER (JUN. 25, 2012), <https://twitter.com/tos>.

While courts are split on whether these modification at will provisions are enforceable, some will enforce them if the user continues to use the site after notice of the modifications.³⁵ Because notice is constructive and includes posting changes to the site, the reality is that consumers often are unaware of the changes.

Companies take advantage of the flexibility of electronic contracts to minimize the risk of aborted transactions. Their placement is often strategically designed to provide constructive notice without actually making the terms easy to read or find. For example, a consumer is often not aware of a contract's terms until getting to the end of a sign-up process or, in the case of a retailer, having selected an item and filled out payment and personal information. The clickbox is often used to indicate a hyperlink, so there is a disruption (and possible loss of data) if the user actually clicks on the link to read the terms. The benefits of using electronic contracts for companies are obvious. They are cost effective, easy to duplicate, manipulate and modify, and only negligibly disruptive to the transacting process.

Electronic contracts may benefit the businesses that use them, but they excessively burden the consumer. Because they are weightless and often invisible to the consumer, electronic contracts are used in even unimportant or minor transactions which in the offline world would not require a contract. The weightlessness of electronic contracts means that the consumer often fails to notice them. Even when capitalized and in bold, terms can only be viewed behind a hyperlink if the hyperlink is clicked upon. The malleability of electronic contracts means that the burden is on the consumer to track down terms and reconcile conflicting provisions, a difficult task when every online transaction is governed by one or more electronic contracts and when a single contract often contains several hyperlinks to different web pages.

Users manifest assent to a browsewrap simply by continuing to use the website after the judicially constructed notice. Arguably, assent to click-wraps requires no more from the user and also escapes user detection. As several scholars have noted, even the affirmative act of clicking is typically reflexive rather than deliberate and may not be perceived the same way as signing a document with a pen.³⁶ Consumers in wrap contract cases often

35. See *Vernon v. Qwest Communications Int'l, Inc.*, 857 F. Supp. 2d 1135, 1153-56 (D. Colo. 2012) (upholding modification at will provision). *But see* *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396, 399 (N.D. Tex. 2009) (striking down modification at will provision at illusory); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1065 (D. Nev. 2012) (noting most federal courts find such clauses illusory if the party retains the "unilateral, unrestricted" right to terminate and there is "no obligation to receive consent from, or even notify" the other party).

36. See Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION

suffer from “click amnesia,”³⁷ and claim that they have no recollection of ever having seen a clickwrap, even though they would have been prevented from proceeding on a website if they had not clicked to accept the terms.³⁸

The testimony from consumers is not surprising to anyone but judges, who probably have clicked on such agreements themselves without much thought or awareness. One study found users tended to automatically click “accept” to clickwraps that resembled end user license agreements. The researchers believed that users have become so habituated to clickwraps that they have been trained to manifest consent without reading them.³⁹

Electronic contracts create a feedback loop, with customer consent becoming automatic as consumers become habituated to the ubiquity of electronic contracts. Because consumers fail to notice, companies modify and increase the number of terms further perpetuating consumer habituation. Consequently, electronic contracts are lengthier and their terms more aggressive than their paper counterparts.

Paper contracts of adhesion typically served to limit a company’s risk by, for example, limiting its liability or disclaiming a warranty. Common clauses in electronic contracts, on the other hand, do more than limit risk. These clauses establish or expand the bargain itself. Thus, electronic contracts typically contain provisions obtaining rights to collect customer data, share customer information, and obtain control over customer creative works.⁴⁰ Given the constructed nature of consent with electronic contracts,

ECONOMY” 283 (Jane K. Winn 2006) (noting that that users may not assign the “same significance to a mouse click as a signature on a paper form”); Moringiello, *supra* note 23, at 1331 (stating that “the assumption that a click serves all of the same purposes that a signature does is . . . flawed It is not yet clear . . . that a click provides that signal, and courts do not seem to even address the possibility that it does not”); Elizabeth Macdonald, *Incorporation of Standard Terms in Website Contracting – Clicking ‘I Agree’*, 27 J. CONT. L. 198 (2011) (“Underlying questions of substance should determine whether clicking an ‘I agree’ button should be treated as equivalent to a signature. A ‘click button’ signature would lack the alerting function of a manuscript signature There are good reasons why the ‘click button’ action should not be adopted as a signature.”).

37. KIM, *supra* note 5, at 129.

38. See *Vernon*, 857 F. Supp. 2d at 1147-48 (class action plaintiffs testified that they did not recall clicking on agreement even though they would not have been permitted to proceed without doing so); *Scherillo v. Dun & Bradstreet, Inc.*, 684 F. Supp. 2d 313, 321-22 (E.D.N.Y. 2010) (Court rejected plaintiff argument as “not credible” that he had “no recollection of checking the box or reading the terms and conditions”).

39. See RAINER BÖHME & STEFAN KÖPSELL, 2010 ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYS., TRAINED TO ACCEPT? A FIELD EXPERIMENT ON CONSENT DIALOGS (2010).

40. See, e.g., *LinkedIn User Agreement* ¶2.2, LINKEDIN (Sept. 12, 2013), <http://www.linkedin.com/legal/user-agreement> (“[Y]ou grant LinkedIn a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty-free right to us to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information you provide, directly or indirectly to LinkedIn, including, but not limited to, any user generated content, ideas, concepts, techniques and/or data to the services, you submit to LinkedIn, without any further consent, notice and/or compensation to you or to any third parties.”).

obtaining these benefits differs from a traditional bargained-for exchange. Even with a paper contract of adhesion, consumers typically understand the nature of the bargain, even if they are unable to change the terms under which the bargain is made. Online, however, consumers are often ignorant that any bargain has taken place, believing, for example, that companies are acting as custodians of their content rather than as proprietors of it. The bargain itself is a moving target, thanks to “modification at will” provisions.

C. The Folly of a Duty to Read Electronic Contracts

Prior to the introduction of mass-market software and other electronic items, consumers generally signed contracts. Even if they were powerless to negotiate terms, consumers could hardly argue that they were unaware of what they were doing. In some situations, such as with receipt of a claim check ticket, consumers did not have to sign anything because the courts found an implied contract;⁴¹ however, these forms were binding as contracts only if the recipient received notice that there were terms on the back.⁴² In contract law, reasonable notice triggers a duty to read.⁴³ A reasonably prudent offeree should read the terms of a contract to which he or she is agreeing.

Courts also require reasonable notice with electronic contracts, but they have interpreted it to mean “visible to one looking for it,” unlike with claim check tickets where the wording must be conspicuous. Furthermore, the conspicuousness requirements applied to physical documents make little sense when applied to electronic documents. If the consumer fails to

41. Calamari, *supra* note 12, at 342 (noting that the duty to read applies even without a signature “if the acceptance of a document . . . implies assent to its terms”).

42. *Id.* (“[T]he acceptance of documents such as bills of lading, passenger tickets, insurance policies, bank books and warehouse receipts may give rise to contracts based upon the provisions contained therein.”). Calamari adds, however, “the cases are far from harmonious.” *Id.* at 342 n.9.

43. See *Russell v. Harman Int’l Indus. Inc.*, No. 07-2212, 2013 WL 2237793, at *4 (D.D.C. May 22, 2013) (noting that it is “well established that a person has a duty to read a contract before he signs it”); *Biesecker v. Biesecker*, 302 S.E.2d 826, 828-29 (N.C. Ct. App. 1983) (“A person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents.”); *Smith v. Price’s Creameries*, 650 P.2d 825, 829 (N.M. 1982) (noting that each party “has a duty to read and familiarize himself” with contents of contract before signing and thus, “a party who executes and enters into a written contract with another is presumed to know the terms of the agreement, and to have agreed to each of its provisions in the absence of fraud, misrepresentation or other wrongful act”); see also Calamari, *supra* note 12, at (“[A] party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents”). As Charles Knapp notes, the “the ‘duty to read,’ although regarded as a part of contract law, is not a ‘duty’ imposed by contract, but rather a statement about how parties should behave during the contract-making process.” Charles L. Knapp, *Is There a Duty to Read?*, in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL* 316 (Jean Braucher et al. eds., 2013).

click a hyperlink or scroll to the bottom of a contract, the consumer will not notice bold font and capitalization. Even if the consumer were to click, the sheer volume of the terms she would encounter would make reading all of them unduly burdensome and highly impracticable. But in this judicially constructed alternative universe—where a reasonable person is presumed to notice terms that are buried in hyperlinks—the courts apply the duty to read. The result is that consumers are being bound to contracts without having read them or, in many cases, even being aware of them at all.

Courts recognized electronic forms as contracts but they failed to recognize the effect that these electronic forms have on consumer perception and drafting company behavior. The development of an aberrant doctrine contributed to further aberrance in both the form and the content of electronic agreements. Clickwraps and browsewraps have given birth to multiwraps where users are made to “click” to manifest assent to the terms of a hyperlinked document,⁴⁴ which contains several more hyperlinked agreements, thereby luring users into “agreeing” to terms without even *seeing* them. Electronic contracts are no longer limited to computer screens; they have spread to handheld devices where the smaller screen size may further obscure their presentation.

Electronic contracts have also migrated offline. Paper contracts of adhesion often contain references to electronic contracts, which are incorporated by reference. Courts have enforced these agreements, even though consumers never received the actual terms, provided that they had constructive notice of their existence. In *Vernon v. Qwest Communications International, Inc.*, the court found that a welcome letter to Qwest customers provided notice of a Subscriber Agreement that could be found online.⁴⁵ In another case, *Briceno v. Sprint Spectrum, L.P.*,⁴⁶ a consumer was deemed to have notice of online terms via a mailed invoice.⁴⁷ By separating the notice in one medium and the actual terms in another, the drafter forces the consumer, who is engaged in the offline activity of opening mail, to interrupt that activity, find a computer, and go online in order to read the terms. Electronic contracts are truly aberrant—no other type of contract is

44. See *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp. 2d 913, 915-916, 919 (N.D. Ill. 2003) (plaintiff clicked box to indicate acceptance to terms visible only by clicking on hyperlink); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, at 907-908 (N.D. Cal. 2011) (plaintiff clicked to indicate agreement to terms contained behind hyperlink).

45. See 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012) (“Qwest customers were made aware of the Subscriber Agreement through multiple communications. The December 2005 letter sent to existing Qwest customers explained that high speed internet services would henceforth be governed by a Subscriber Agreement that could be found at www.qwest.com/legal.”).

46. 911 So. 2d 176 (Fla. Dist. Ct. App. 2005).

47. *Id.* at 178-79.

considered binding upon an offeree who has not received the actual terms. Indeed, courts have permitted the use of electronic contracts to burden consumers who are forced to hunt for terms through a disruptive process of toggling from one page to another via hyperlinks, or from one medium to another via paper notices that incorporate, by reference, electronic agreements. The aberrant doctrine of electronic contract law imposes a duty to read yet ignores both the disruptive process required to find the terms and the sheer volume of terms applicable to a transaction.⁴⁸

As they have done in the past with the advent of new contracting methods, courts have taken liberties with traditional contract law notions of offer, acceptance, and mutual assent in order to enforce electronic contracts.⁴⁹ In doing so, courts were adapting contract law to modern business needs—something that should be applauded. Unlike in the past, however, they refused to recognize how these forms burden consumers while benefiting businesses.

Courts repackaged assent, swapping it out for notice. In doing so, they made it much more difficult for consumers to decline agreements and much easier to be deemed to have accepted them. Companies exploited electronic agreements and they quickly became the norm in the online environment. Today, a consumer is practically unable to engage in any online activity without being forced to accept the terms of an electronic contract.⁵⁰

II. DURESS AS A CONTRACT DEFENSE

Duress is defined as any wrongful act or threat, which overcomes the free will of a party.⁵¹ The legitimacy of contract law itself is based upon free will.⁵² Physical force provides a basis for duress, but the law of duress

48. James Gibson notes the high information costs associated with adhesive contracts especially when considering all the multiple layers of contracts encountered for a single transaction. See James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 163-64 (2013). Furthermore, the “average computer purchase binds the consumer to twenty-five contracts, comprising 74,897 words of boilerplate.” *Id.* at 190.

49. Moringiello, *supra* note 23, at 1309 (noting that contract law has been modified over the years to “accommodate diverse methods of communicating those terms”).

50. Elsewhere, I have argued that the ubiquity of digital contracts online creates a coercive contracting environment, which should be considered in evaluating a claim of unconscionability. See KIM, *supra* note 5, at 4, 207.

51. PERILLO, *supra* note 21, at 316 (“Today the general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress.”); see also *Rissman v. Rissman*, 213 F.3d 381, 386 (7th Cir. 2000) (Illinois defines duress as “a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will.”); *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 535 (N.Y. 1971).

52. *Oswald v. City of El Centro*, L.A., 292 P. 1073, 1076 (Cal. 1930) (The “exercise of freedom of will . . . is always essential to a valid contract.”).

has evolved to include economic duress as well.⁵³ Duress in the form of physical compulsion renders a contract void for lack of assent,⁵⁴ but economic duress renders it voidable.⁵⁵ Courts typically evaluate duress claims by focusing on whether the party was the victim of a wrongful act or threat that deprived her of her free will.⁵⁶ Alternatively, courts determine whether the following three elements exist: (1) the victim involuntarily accepted the terms of contract; (2) under circumstances that permitted no reasonable alternative; and (3) the other party's improper actions created the circumstances.⁵⁷

Thus, in evaluating whether duress compels a victim to enter into a contract, courts consider surrounding circumstances, including the background and relationship of the parties and the emotional state of the victim.⁵⁸ The victim, however, needs to show more than hard bargaining or tough financial circumstances; she must show that the other party coerced, threatened or otherwise created the difficult circumstances, which caused her to enter into the contract.⁵⁹ The doctrine of economic duress evolved

53. See RESTATEMENT (SECOND) OF CONTRACTS § 175-176 (1981) (An improper threat is one where “the resulting exchange is not on fair terms” and “would not significantly benefit the party making the threat”); see also *Blodgett v. Blodgett*, 551 N.E.2d 1249, 1251-1252 (Ohio 1990).

54. RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) (“If conduct . . . is physically compelled by duress, the conduct is not effective as a manifestation of assent.”) Furthermore, comment a notes that the result is “there is no contract at all, or a ‘void contract’ as distinguished from a voidable one.” *Id.* at cmt. a.

55. *Id.* at § 175.

56. See *Vasapolli v. Rostoff*, 39 F.3d 27, 34 (1st Cir. 1994); see also RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

57. See, e.g., *Quebodeaux v. Quebodeaux*, 657 N.E.2d 539, 541 (Ohio Ct. App. 1995) (describing “three elements” necessary to establish duress: “first, one side involuntarily accepted the terms of another; second, that circumstances permitted no other alternative; and third, that the opposite party’s coercive acts caused those circumstances”); *Vasapolli*, 39 F.3d at 34.

58. “A party’s manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent. . . . The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of the duress. Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves. . . . However . . . circumstantial evidence may be useful in determining whether a threat did in fact induce assent.” RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c (1981); see also *Sudan v. Sudan*, 145 S.W.3d 280, 287 (Tex. Ct. App. 2004) (noting that the test for causation is subjective and considers “all surrounding circumstances” including the “background and relationship of the parties and the emotional condition of the party claiming duress”).

59. 17 C.J.S. *Contracts* § 239 (1963) (“A charge of economic duress or business compulsion must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim, or on his fear of what a third person might do.”); see also *Strickland Tower Maint., Inc. v. AT&T Communications*, 128 F.3d 1422, 1426 (10th Cir. 1997) (In Oklahoma, “a party seeking to prove economic duress must prove that the defendant committed a wrongful act. More importantly, however, the plaintiff must also show a causal relationship between the bad act and the contract at issue.”); *Blodgett v. Blodgett*, 441 N.E.2d 1249, 1251-52 (Ohio 1990) (“To avoid a contract on the basis of

from cases that voided contracts that were the result of physical compulsion or coercion.⁶⁰ One court noted that the “rationale underlying the principle of economic duress is the imposition of certain minimal standards of business ethics in the market place.”⁶¹ It further noted that these “minimum standards” include “equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value which, in turn, undermine the freedom of contract and the proper functioning of the system.”⁶²

This article proposes an expansion of the definition of duress to recognize the unique way in which electronic contracts can be used to force terms upon consumers who have no choice but to accept them. This new defense of situational duress would render a transaction void, and not merely voidable. As the Restatement (Second) of Contracts notes, “The distinction between a ‘void contract’ and a voidable contract has important consequences. For example, a victim of duress may be held to have ratified the contract if it is voidable, but not if it is ‘void.’”⁶³ Economic duress is a voidable transaction rather than a void one; thus, in asserting a claim of economic duress, plaintiffs must act promptly or forfeit their claim.⁶⁴ This distinction has particular relevance for electronic contracts because consumers often do not realize they have constructively agreed to the terms of the contract.

III. SITUATIONAL DURESS

The recognition of a situational duress defense would be limited to situations where consumers are uniquely vulnerable because of the nature of their interest in the relevant product or service. In other words, situational duress does not encompass all electronic contracting scenarios. Elsewhere, I have argued that the ubiquity of electronic contracts has created a coercive contracting environment; however, that environment alone is not

duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party.”).

60. See PERILLO, *supra* note 21, at 315-316; see also *Strickland Tower Maint.*, 128 F.3d at 1426 (“[The] doctrine of economic duress grew from a narrow band of cases that provided relief from contracts secured through actual imprisonment or threats to the reluctant contracting party’s life or limb.”).

61. *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 413 (Okla. 1986).

62. *Id.* at 414. The court continued that the doctrine of economic duress “comes into play *only* when conventional alternatives and remedies are unavailable to correct aberrational abuse of these norms.” *Id.*

63. RESTATEMENT (SECOND) OF CONTRACTS, § 174, cmt. a (1981).

64. See *Acquaire v. Can. Dry Bottling*, 906 F. Supp. 819, 828 (E.D.N.Y. 1995) (noting that a party asserting duress must do so “promptly”).

the trigger for this proposed novel defense of situational duress.⁶⁵ Rather, the defense should be used in the electronic contracting context if (1) a drafting company uses an electronic contract to block consumer access to a product or service; (2) the consumer has a “vested interest” in that product or service; and (3) the consumer accepts the terms because she was blocked from the product or service after attempting to reject or decline them. In these situations, the consumer’s action should not be effective as a manifestation of assent and the contract should be void.⁶⁶

A. “Vested interest”

A consumer may have a vested interest in two different scenarios. The first is the classic “rolling contract” scenario where the terms of a contract arrive after the acts constituting the transaction have been completed.⁶⁷ The company’s introduction of an electronic contract, which prevents access to a purchased product, is excessively burdensome. The consumer has a justifiable belief that she can use a product because she has already paid for it (or in the case of credit transactions, incurred a binding legal obligation to pay for it). She is then made to accept the terms of an electronic contract or else reject them by physically returning the item in order to get her money back (or her account credited). This task is made more difficult if the retailer has a restrictive return policy. A consumer may, for example, purchase a computer with software preinstalled. When she gets home, she may discover that before she can use the computer she must accept the terms of an electronic contract or she must repackage the computer and drive back to the store to ask for a refund.

The second scenario involves “content hostage” and occurs when the consumer uses a service that, either with or without a fee, permits consumers to store content on the company’s servers. Many online companies not only permit but actively encourage consumers to use their services as virtual warehouses. Email providers and social media or “sharing” sites, such as Facebook, Twitter, and Instagram fall into this category. In exchange for consumers using their services for storage, companies are able to access

65. I have argued that a coercive contracting environment provides justification for a reconceptualization of unconscionability see KIM, *supra* note 5, at 203-210. The focus of duress, however, is on the improper conduct of one party, unlike unconscionability, which emphasizes the substantive nature of the terms. Furthermore, situational duress would render a contract void, as opposed to voidable.

66. RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) (“If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.”).

67. See Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) (“In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods.”).

and use customer information for marketing purposes. Frequent user activity on a website benefits a company. It can gather more customer data and sell more advertising at higher prices.

A user typically registers and agrees to the terms of an electronic contract prior to being permitted to upload content. *After* registration and when the user has already stored content on the website, these companies may update their terms and require their users to accept before being allowed to continue using the service. Sometimes, these amended terms may be clarifications or innocuous adjustments to the service offering. More often, however, they reflect changes that tax the user in a more oppressive or harmful fashion. For example, Facebook has made several changes to its privacy policy that have gradually diminished its users' privacy.⁶⁸ In 2005, Facebook's privacy policy stated, "No personal information that you submit to Thefacebook will be available to any user of the Web Site who does not belong to at least one of the groups specified by you in your privacy settings."⁶⁹

Its latest proposed change (which is being reviewed by the Federal Trade Commission⁷⁰) states,

You give us permission to use your name, profile, picture, content and information in connection with commercial, sponsored or related content This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you."⁷¹

Google, which has as its unofficial corporate motto "Don't be evil," recently announced that it, too, would change its terms of use to allow it to

68. The Electronic Frontier Foundation ("EFF"), which has documented these changes, states: Facebook has undergone a remarkable transformation. When it started, it was a private space for communication with a group of your choice. Soon, it transformed into a platform where much of your information is public by default. Today, it has become a platform where you have no choice but to make certain information public, and this public information may be shared by Facebook with its partner websites and used to target ads.

See Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUNDATION (April 28, 2010), <https://www.eff.org/deeplinks/2010/04/facebook-timeline> (constructing a timeline of Facebook's privacy policies that show how Facebook has gained more control "of its user's information, while limiting the users' options to control their own information.").

69. *Id.*

70. Vinu Goel & Edward Wyatt, *Facebook Privacy Change is Subject of F.T.C. Inquiry*, N.Y. TIMES (Sept. 11, 2013), http://www.nytimes.com/2013/09/12/technology/personaltech/ftc-looking-into-facebook-privacy-policy.html?_r=0.

71. Proposed Statement of Rights and Responsibilities Tracked Changes, *Proposed Updates to Our Governing Documents*, FACEBOOK, <https://www.facebook.com/notes/facebook-site-governance/proposed-updates-to-our-governing-documents/10153167395945301> (PDF may be accessed at https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/851575_209563965879553_209116475_n.pdf) (last visited Nov. 13, 2013).

use the names and likenesses of users in paid advertisements across its network without seeking their express consent.⁷²

When companies change their terms of use after the user already has content stored on the website, it becomes more difficult for users to object to revised terms. They may have established large social networks and may have invested time and energy cultivating their online presence on the website. Refusal to accept the terms of the electronic agreement means that the user will not be able to access her content and would lose the network that she has painstakingly developed. Because companies may not give their users advance notice of contract changes, the user may have no time to save a copy of the stored content or reestablish her network elsewhere, or it may be impossible, difficult or impracticable to do so. Even with notice, the user already has sunk costs which may make it difficult to find a new service, transfer content and contact information, and notify his or her network of the change.⁷³

B. The Improper Threat Posed by Electronic Contracts

An “improper” or “wrongful” act includes illegal acts, but is not limited to them. Courts emphasize the coercive effect that an act may have on the victim’s manifestation of assent. For example, the Supreme Court of Oklahoma stated, “‘Unlawful’ and/or ‘wrongful’ are not synonymous with ‘illegal.’”⁷⁴ The key is that the threatened action presents an unreasonable alternative to the weaker party within the confines of a bargaining situation. Economic duress may be found if the act is done under circumstances which are considered wrongful even if there was a legal right to perform the threatened act. The wrongfulness of the coercer’s conduct derives from the fact that the threatened party was forced to accept the contract, not from any inherent wrongfulness of the act threatened. Thus, a coercer’s threats may be wrongful, even though the threatened action would have been legal, if the threatened action is an unreasonable alternative to an injurious con-

72. See *Terms of Service*, GOOGLE (Nov. 11, 2013), <https://www.google.com/intl/en/policies/terms/> (“By using our Services, you are agreeing to these terms.”). Google does, however, provide a comparison of its previous terms of service. *Summary of Changes*, GOOGLE, <https://www.google.com/intl/en/policies/terms/changes/> (last visited Nov. 13, 2013); see also Claire Cain Miller & Vinu Goel, *Google to Sell Users’ Endorsements*, N.Y. TIMES (October 11, 2013), <http://www.nytimes.com/2013/10/12/technology/google-sets-plan-to-sell-users-endorsements.html?src=xps>; Ian Bogost, *What is ‘Evil’ to Google?*, THEATLANTIC (Oct. 15, 2013, 2:12 PM), <http://www.theatlantic.com/technology/archive/2013/10/what-is-evil-to-google/280573/> (“If anything, Google’s motto seems to have largely succeeded at reframing “evil” to exclude all actions performed by Google.”).

73. William Barnes et al., *Old Habits Die Hard: Path Dependency and Behavioral Lock-in*, 38 J. ECON. ISSUES 371, 373 (2004).

74. *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 419 (Okla. 1986).

tractual demand in a bargaining situation. The wrongfulness of the coercer's conduct is related to the unreasonableness of the alternatives the coercer presents to the weaker party rather than to its legality. As one court noted, "'Unlawful,' when applied to promises, agreements, contracts, and considerations, means that the agreements are legally ineffective because they were obtained by bad faith, coercion or compulsion, even though the acts may not be illegal *per se*."⁷⁵ The Restatement (Second) of Contracts includes in its definition of improper threats, a threat, which "is a breach of the duty of good faith and fair dealing under a contract with the recipient."⁷⁶

In both the rolling contract and content hostage scenarios, the company acts improperly or wrongfully by creating a situation that results in an unfair choice: contract acceptance or forfeiture. In the "rolling contract" situation, the consumer has already purchased the product and the payment of money creates an expectation and ownership interest. The company's act of imposing additional terms after purchase is even more unreasonable and wrongful when one considers the sheer volume of subsequent terms. A study conducted by Professor James Gibson found that buying a computer required "agreeing" to an average of 25 binding contracts totaling 74,897 contractual terms, the majority of which were available only after purchase:

Of the 74,897 total words, only 7,699 (10.3%) were presented to me by the time I had to decide whether to order (and pay for) the computer. I had to wait until the computer arrived before the rest were made available. Of the remaining 67,198 words, 25,912 (34.6%) were presented when the computer arrived and was first started up, and the other 41,287 (55.1%) when individual programs were opened.⁷⁷

In the "content hostage" situation, the consumer does not pay money to the website, but has allowed the site owner to gather data, engaging in an implicit or constructive bargain whereby the consumer exchanges information for services. The modification after consumer data has been extracted materially changes the terms of the bargain.

By blocking the consumer's access in each of these two scenarios, the company is threatening the consumer with the loss of something in which she has a vested property or proprietorship interest. The company's threat is improper in the rolling contract scenario because it asks for terms to govern the transaction even though the transaction has been completed. It withholds something from the consumer that already belongs to the consumer. In the content hostage scenario, the company has encouraged the

75. *Id.*

76. RESTATEMENT (SECOND) CONTRACTS § 176.

77. Gibson, *supra* note 48, at 192-93.

consumer's reliance upon the company's services and has already received the benefits in the form of access to the consumer's contacts and personal information. It then places the user in the situation where she has no choice but to accept the new or additional terms or forfeit her content and contacts. In both scenarios, the electronic contract acts like a lock, keeping the consumer away from something she has already paid for, either in dollars or information. The introduction of an electronic contract at this point creates an improper threat in the sense that the company forces the consumer to accept or risk forfeiture of valuable goods or services.

C. No Reasonable Alternative

Courts have ruled that a rolling contract is an enforceable contracting method if the consumer is provided an opportunity to reject terms.⁷⁸ A consumer can reject a rolling contract by packing up and returning the product. This rejection option is impractical especially where electronic contracts are involved. The consumer does not encounter electronic contracts until after she or he has unpackaged the product and tried to use it. The introduction of terms at this late stage of the package unbundling process means that a retailer is far less likely to accept return of the goods. Best Buy, for example, a large retailer of electronic goods, does not provide refunds for returns of "opened computer software," but permits only exchanges.⁷⁹ Staples, a large retailer of office supplies, has a similar policy that allows refunds only for returns of "unopened boxed software" but "opened software can only be exchanged for the same title version" and "(d)ownloadable software is not returnable or refundable."⁸⁰ Furthermore, electronic contracts often appear on devices after the consumer has had the product for a period of time. This makes it much more difficult for the user to return the device, both because the consumer has grown dependent upon it and because the manufacturer is unlikely to provide a refund for the product's return.⁸¹

In order to avail herself of a situational duress defense, the consumer must testify that she attempted to decline or reject terms but was forced to

78. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (finding that ProCD "holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product").

79. See *Return & Exchange Policy*, BEST BUY (Oct. 20, 2013), <http://www.bestbuy.com/site/Help-Topics/Returning-Online-Purchases/pcmcat260800050014.c?id=pcmcat260800050014>.

80. *Help Center, Shipping & Delivery*, STAPLES, http://www.staples.com/sbd/cre/programs/customerservice/shipping_and_returns.html#returns_exchanges (last visited Nov. 14, 2013).

81. For example, the author periodically receives clickwraps that appear on her iPad even now, two years after her initial purchase of the device.

accept them. A user attempts to reject an electronic contract by clicking on a “decline” icon. If she is then prevented from proceeding, her subsequent acceptance was coerced.

A “reject first” requirement serves two purposes. The first purpose is to raise consumer awareness and to reduce consumer habituation of online terms. Consumers have grown accustomed to clicking “agree” automatically because they know it makes no difference if they read the terms—they must accept them if they wish to proceed on the website. Their assent is preordained by the coercive contracting environment so they proceed through the contracting process as quickly as they can. If consumers realize that they may be saved from a contract by clicking “decline” first, even if they have to then click “accept” in order to proceed, they may overcome their learned helplessness in the face of adhesive contracts. Clicking “decline” enables consumers to declare their choice, even if they are unable to exercise it.

The second reason for a “reject first” requirement is that it provides a powerful incentive for companies to offer better ways to reject terms. In order to rebut a plaintiff’s testimony that she tried to reject terms, a company must prove that she did *not* attempt to decline terms.⁸² Currently, companies neither track nor maintain records of which users accept or decline terms. Providing them with an incentive to do so may motivate companies to seek assent or rejection in ways that both facilitate recordkeeping and heighten user awareness of the contract, such as email consent. Furthermore, increasing the burden on companies to record which users decline modified terms may discourage companies from making changes too frequently or unnecessarily.

D. The Limited Applicability of Situational Duress

There are several traditional reasons for limiting duress claims. One is that parties to an arm’s length negotiation should be able to bargain in their own interests. Courts have generally rejected claims of duress where the party seeking to escape the contract entered into the transaction with a profit motive, but had then been subjected to hard bargaining.⁸³ Consistent with

82. Browsewraps typically are not used to block access to a website but if they were used in this way, the user would be presumed to have bypassed the hyperlink without clicking unless the company can prove otherwise.

83. *See* *Pleasants v. Home Fed. Sav. & Loan Ass’n*, 569 P.2d 261, 263 (Ariz. Ct. App. 1977) (“If the payment or exchange is made with the hope of obtaining a gain, there is not duress; it must be made solely for the purpose of protecting the victim’s business or property interests.”); *Acquire v. Can. Dry Bottling*, 906 F. Supp. 819, 827-28 (E.D.N.Y. 1995) (noting that contract made for personal gain undercut duress claim).

that line of cases, situational duress would only be applicable if the consumer was not motivated by profit or gain to enter into the contract. To the contrary, the consumer in the two specified scenarios does not want to enter into any contract at all. Rather, the company is forcing the consumer into the contract and the consumer acquiesces in order to avoid forfeiture of a vested interest.

Another objection is that allowing parties to escape contracts too easily would undermine the security of transactions. In the rolling contract scenario, the company unilaterally imposes terms after the acts constituting the transaction have been completed. In the content hostage scenario, the drafter unilaterally changes the terms of the initial registration agreement. The blame for any destabilizing effect in both scenarios can be assigned to the company seeking to add or modify terms to either a completed transaction or an existing contract. In other words, the company is engaging in conduct analogous to a “bait and switch.” The company lures the consumer into purchasing a product or relying upon the company’s service, and then unilaterally imposes additional or different terms *after* the consumer has grown dependent upon it.⁸⁴ The company is essentially playing a “hold-up” game where it uses electronic contracts to block access to a product or service until the user acquiesces to the terms.⁸⁵

A successful claim of situational duress does not mean that *no* terms govern the relationship between the parties. In the content hostage situation, the terms of the original contract govern. In the rolling contract situation, the company can insert limitations of liability and warranty disclaimers into packaging under the Uniform Commercial Code provided they meet certain conspicuousness requirements.⁸⁶ The possibility of a successful situational duress claim may discourage the deceptive business practice of a company luring a customer with a product or service and then changing the terms so the “bargain” is materially different from what was originally promised. Instead of the unrestrained power to unilaterally impose terms, businesses will have to think of more appropriate ways to entice consumers to accept modified terms. For example, a company might offer support services or bonus add-ons if a product has already been pur-

84. *See supra* Part III.A.

85. In a famous case, after reaching a remote location, the crew of a fishing vessel refused to work unless the owner of the vessel agreed to pay double agreed wages. *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99, 1010 (9th Cir. 1902). The court held that the owner’s promise to pay double wages was obtained under duress and therefore unenforceable. *Id.* at 102-03.

86. *See* U.C.C. § 2-316(2) (2012). In order to exclude or modify the implied warranty of merchantability, the “language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.” *Id.*

chased. In the content hostage scenario, the company can offer “new and improved” services to those who accept new terms while continuing to offer existing services to those who decline terms.

In the alternative, to defend against a situational duress claim and still implement new terms, a company could offer a rescission remedy. This “reasonable alternative” to accepting the terms of the modified agreement would allow the parties to rescind the initial contract between the parties and, to the extent possible, undo the transaction. In the rolling contract scenario, the company would have to pick up and pay for shipping and handling of the product, and provide a full refund. In the content hostage scenario, the company must provide a convenient way for users to easily export all of their personal information and data during a reasonable “phase out” period. In addition, the company must cease using any user information for marketing purposes, expunge any information received from the user (including information about the user’s contacts), and terminate any licenses that have been granted by the user. It must also notify any third parties, including marketing companies, and terminate any licenses granted to them involving the information.

CONCLUSION

Electronic contracts differ from paper contracts and courts recognized them in order to facilitate commercial transactions and encourage marketplace innovations, such as mass-market digital products. Courts have emphasized the similarities between these electronic forms and their physical counterparts, but have often ignored their differences. Companies take advantage of the flexible form and low cost of electronic contracts and modify them liberally. Electronic contracts can be used as a barrier to a transaction or interaction, preventing a consumer from continuing to use a product, proceeding on a website or progressing with an installation. This leaves a consumer particularly vulnerable because that consumer already has a vested right or interest in the use of that product or service. A consumer who has posted years of content on a particular website may be locked out without warning by an electronic agreement that requires acceptance. Fear of losing her content may compel her to agree to the terms.

Contract law must address the adverse impact of electronic contracts on consumer perceptions, choice, expectations and intent. This article recognizes situational factors unique to the electronic contracting environment and proposes an expanded definition of duress as one way to respond to the aberrance of electronic contracts. Expanding the definition of duress to

include situational duress is only one way in which contract law might respond to the aberrant nature of electronic contracts.

