Who Invited Them to the Party?: Using FTC UDAP Rulemaking Authority to Contain 'Infinite Privity' in Digital Consumer Contracts

KATERINA KAKKIS*

In 2023, a husband lost his wife to an avoidable allergic reaction at a Disney restaurant in Florida. When he sought accountability for his wife's death, Disney asked the court to toss the case because of a binding arbitration clause—a clause in a contract the husband entered into when he signed up for a free trial of Disney+ in 2019.

To participate in modern digital markets, consumers must enter these unbargained-for wrap contracts with businesses. Lurking in many such contracts is unassuming and obscure legalese that extends the enforceability of consequential contract clauses to a business' limitless affiliates, subsidiaries, related parties, parents, and related services. By agreeing to these terms, consumers give up legal leverage not only to the company on their screens, but also to that company's invisible corporate web. This Note calls this contractual sleight-of-hand the 'infinite privity' problem.

The 'infinite privity' problem deserves attention from the key stakeholder in the United States' consumer protection regime—the Federal Trade Commission. Under its well-established unfair practice rulemaking authority, the FTC should prohibit the enforcement of infinite privity when it unjustly strips consumers of their legal rights. The new rule would not

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* Winner, Best Note Competition Vol. 59. Executive Articles Editor, Colum. J.L. & Soc. Probs., 2025–2026. J.D. Candidate 2026, Columbia Law School. The author thanks Professor Katharina Pistor for her invaluable guidance and thought-provoking conversations that focused the Note. She thanks her peers, particularly Kushal Modi, for their support and active engagement throughout the writing process. The author also thanks her Note Editor, Michael Sosnick, and the staff of the *Columbia Journal of Law and Social Problems* for their help preparing this Note for publication. Finally, the author thanks Abe Kanter for sending her the article that inspired this Note and encouraging her to write about it.

seek to disrupt the freedom of contract between a business and its consumers, but rather reinforce the bounds of that relationship to the parties actually exchanging value with each other.

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INTRODUCTION

In October 2023, Jeffrey Piccolo lost his wife, Dr. Kanokporn Tangsuan, to an allergic reaction after the couple had dinner with Piccolo's mother at a Disney Springs restaurant in Florida.[1] Dr. Tangsuan had a severe nut and dairy allergy and chose the restaurant after careful research confirming that her meal could be prepared allergen-free.[2] Devastatingly, Tangsuan died from nut- and dairy-induced anaphylaxis after dining at the restaurant that she had so thoroughly researched.[3] Seeking accountability, Piccolo filed a wrongful death lawsuit against Walt Disney Parks and Resorts in Florida.[4]

Among Disney's legal arguments to have the case tossed was a disconcerting proposition: Mr. Piccolo should be bound to arbitrate his wrongful death suit against Walt Disney Parks and Resorts because he signed up for a free trial of Disney's streaming service, Disney+, in 2019.[5] When Mr. Piccolo created his account on the Disney+ website, he had to agree to its "Subscriber Agreement."[6]

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1. *See* Cora Lewis & Sean Murphy, *Wrongful Death Suit Against Disney Serves as a Warning to Consumers when Clicking 'I agree,'* ASSOC. PRESS: BUSINESS (Aug. 15, 2024, at 23:03 EST), https://apnews.com/article/disney-allergy-death-lawsuit-nyu-doctor-florida-8a6256b58311a01226d167fa80d37aad [https://perma.cc/RV48-8XE7].

2. *See id.* ("The suit alleges Tangsuan informed their server numerous times that she had a severe allergy to nuts and dairy products, and that the waiter 'guaranteed' the food was allergen-free."); Philip Marcelo, *Disney Argues Wrongful Death Suit Should Be Tossed Because Plaintiff Signed Up for a Disney+ Trial*, ASSOC. PRESS: U.S. NEWS (Aug. 14, 2024, at 23:16 EST), https://apnews.com/article/disney-allergy-death-lawsuit-nyu-doctor-florida-4bdaf74e2c889882b23b319ec720680a [https://perma.cc/KDE9-TQT7].

3. *See* Plaintiff's Response in Opposition to Defendant, Walt Disney Parks and Resorts U.S., Inc.'s Motion to Compel Arbitration and Stay Case at 2, Piccolo v. Walt Disney Parks and Resorts U.S., Inc., No. 2024-CA-001616-O (Fla. Orange County Ct. Aug. 2, 2024) [hereinafter Pl.'s Resp.] ("Ms. Tangsuan and her husband specifically questioned the waiter at Raglan Road on numerous occasions about the ability to receive allergen-free food and were assured that her order would be allergen free. However, shortly after consuming her dinner, Ms. Tangsuan suffered a severe acute allergic reaction . . . The medical examiner's investigation determined that her cause of death was anaphylaxis due to elevated levels of dairy and nut in her system.").

4. *See id.*, *supra* note 3, at 1–2.

5. *See generally* Defendant Walt Disney Parks and Resorts U.S., Inc.'s Motion to Compel Arbitration and Stay Case, Piccolo v. Walt Disney Parks and Resorts U.S., Inc.'s, No. 2024-CA-001616-O (Fla. Orange County Ct. May 31, 2024) [hereinafter Def.'s Mot. to Compel] (arguing to compel arbitration).

6. *See id.*, *supra* note 5, at 3–4 ("In November 2019, Piccolo initially created a Disney account through the Disney+ website. Piccolo completed the registration webform by providing personal information, including his email address, and created a password. Before registering the account, Piccolo had to select 'Agree & Continue'. Immediately above was a disclosure notifying Piccolo that '[b]y clicking Agree & Continue, you agree to our Subscriber Agreement.'").

Disney pointed to language in that agreement, arguing that Mr. Piccolo "agreed to arbitrate 'all disputes' against 'The Walt Disney Company or its affiliates' arising 'in contract, tort, warranty, statute, regulation, or other legal or equitable basis.'"[7] Disney was arguing, in effect, that "any person who signs up for a Disney+ account . . . will have forever waived the right to a jury enjoyed by them and any future Estate to which they are associated" and instead must "arbitrate any and all disputes against any and all Disney entities and affiliates, no matter how far removed from use of the Disney+ streaming service."[8] The Florida court did not have the opportunity to address the issue—as Disney withdrew its motion after public backlash, including from prominent consumer advocate organizations.[9]

Lacking regulatory constraints and wielding freedom of contract justifications, businesses have made take-it-or-leave-it contracts a prerequisite for any and every consumer interaction.[10] The Disney lawsuit highlights a less appreciated dimension of consumers' daily contracting with companies: which nonsignatory[11] corporate entities are legally entitled to assert privity of these contracts—and therefore enforce the clauses that limit consumers substantive legal rights—in disputes with consumer plaintiffs?[12] With absolute authority over the terms,

7. *See id.*, *supra* note 6, at 2, 4.

8. *See* Pl.'s Resp., *supra* note 3, at 4.

9. *See* Philip Marcelo, *Disney Drops Bid to Have Allergy-Death Lawsuit Tossed Because Plaintiff Signed Up for Disney+,* ASSOC. PRESS: U.S. NEWS (Aug. 20, 2024, at 4:56 PM EST), https://apnews.com/article/disney-allergy-death-lawsuit-b66cd07c6be2497bf5f6bce2d1f2e8d1 [https://perma.cc/YP8Q-TV4Z]; Christine Hines, *After Disney Wielded Its Terms of Use Against Customer, Groups Call on Congress to Pass FAIR Act*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES (Sept. 16, 2024), https://www.consumeradvocates.org/press-release/after-disney-wielded-its-terms-of-use-against-customer-groups-call-on-congress-to-pass-fair-act/ [https://perma.cc/52UA-2YYQ]. In a letter to Congress, the prominent consumer groups—like the National Association of Consumer Advocates and the National Consumer Law Center—noted that Disney's broad terms of use could "include its parks, streaming services, vacations services, merchandise, cable and broadcast networks, affecting tens of millions of customers," and urged Congress to act because "[i]t's not just Disney. For too long, big businesses have used one-sided, nonnegotiable terms and conditions to suppress their customers' legal protections." ALLIANCE 85 ET AL., *Letter to Congress, Re: Pass the FAIR Act* (Sept. 16, 2024) [hereinafter FAIR Act Letter to Congress], https://www.consumeradvocates.org/wp-content/uploads/2024/09/Grpletter_Disney_arb_FAIRAct092024.pdf [https://perma.cc/R5WB-A4MG].

10. For a longer discussion of the pervasiveness and nature of these contracts, see *infra* note 22.

11. This Note uses "nonsignatory" to refer to a corporate entity that is not named explicitly in the contract or that an average consumer would not reasonably expect to be bound by the contract or transaction.

12. For elaboration on the clauses of main concern in this Note, see *infra* Part I.A.

corporations pad their boilerplate contractual provisions with perfunctory language to expand privity of contract to their subsidiaries, affiliates, parent companies, services, as well as *future* subsidiaries, affiliates, parent companies, and services.[13] Professor David Horton identified this phenomenon as a category of "infinite language"[14] that companies leverage in what he deemed "infinite arbitration clauses."[15]

This Note builds off Horton's work[16] and refers to a specific category of infinite language—that which expands clauses "beyond the original contractual partners"[17]—as infinite privity. The increasingly complex webs of modern corporate structures[18] exacerbate the harm to consumers of letting corporations unilaterally erase the boundaries of reasonable privity in their consumer wrap contracts. This Note is specifically concerned with infinite privity as applied to contract provisions that limit or waive consumers' substantive legal rights.[19] This combination of contract language allows corporations to create a contractual

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13. *See, e.g.*, *Walmart.com Terms of Use*, WALMART, (Dec. 4, 2024), https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0 [https://perma.cc/GYW3-ST3C] ("When we say 'Walmart,' we mean Wal-Mart.com USA, LLC and Walmart Inc., and any subsidiaries of Wal-Mart Stores, Inc. (including any subsidiaries that Walmart Inc. may form or acquire in the future), and their affiliates, directors, officers, employees and agents"); *Conditions of Use*, AMAZON (Sept. 14, 2022), https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM [https://perma.cc/AVF7-WFX9] ("Amazon.com Services LLC and/or its affiliates ('Amazon') provide website features and other products and services to you when you visit or shop at Amazon.com, use Amazon products or services, use Amazon applications for mobile, or use software provided by Amazon in connection with any of the foregoing (collectively, 'Amazon Services'). By using the Amazon Services, you agree, on behalf of yourself and [all people] who use any Service under your account, to the following conditions.").

14. *See* David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 665 (2020).

15. In his article, Horton explains that "infinite arbitration clauses" can be expanded in multiple ways, such as extending arbitrations clauses coverage to "govern conduct that has nothing to with the original transaction, such as sexual harassment after the purchase of household goods." *See id.* at 639–40.

16. Horton identified a developing pattern in consumer and employment contracts that he referred to as "infinite arbitration clauses." *See id.* at 639. Horton tracked how drafters have become more aggressive in their contract language, expanding beyond the traditional nexus required between the dispute and valid contract enforcement. *See id.* at 639–40. One way drafters do this is by "declar[ing] that their arbitration provisions benefit and bind a range of nonsignatories [like] their litigation allies" who usually have "nothing to do with the container contract." *Id.* at 643.

17. *See id.* at 640. *See supra* note 14.

18. *See, e.g.*, Comcast Corp., Annual Report (Form 10-K) (Jan. 31, 2024) (listing over 35 pages of Comcast's significant subsidiaries).

19. For a discussion of those terms, see *infra* notes 39–45 and accompanying text.

backdoor for their corporate friends[20] to exploit in their unrelated disputes.

This Note proceeds in three parts. Part I outlines the consumer contracting landscape that allowed for the rise of the infinite privity problem and briefly overviews the role of the Federal Trade Commission (FTC) as a consumer protection body. Part II then surveys existing consumer protection tools and concludes that they cannot meaningfully protect consumers from the growing problem of infinite privity. Part III argues that the FTC's subject matter expertise and enforcement capabilities make it well-suited to address the infinite privity problem. This Note contends that the FTC should proscribe corporate defendants' use of infinite privity language to enforce rights-limiting clauses in consumer legal disputes where the defendant was not itself a signatory.

I. THE TERMS OF CONTRACTING AS A CONSUMER IN THE UNITED STATES

The high-profile Disney lawsuit is an alarming reminder of the legal consequences of consumers' daily interactions with digital platforms and services.[21] The digital marketplace allows consumers online access to any and every possible good or service through their smartphone, laptop, tablet, or other device.[22] But in the United States, companies charge a steep contractual price for such convenience. To purchase a good or service digitally, download an app, create an online account, or even just scroll, consumers must agree to "wrap contracts."[23] Like contracts of

20. Corporate friends include, for example, the "parent entity, subsidiaries, affiliates, officers, directors, shareholders, employees, agents, licensees, successors, and assigns." Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 68 (S.D.N.Y. 2012). But, also could include "any companies offering products or services through us, including Suppliers." Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204 (11th Cir. 2021).

21. *See* Lewis & Murphy, *supra* note 1.

22. This applies to transactions creating an ongoing relationship, such as a subscription service, and one-off transactions. *See* Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GA. L. REV. 657, 660 (2021) ("Consumer contracts are a pervasive legal tool that governs many of our daily activities"); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 429 (2002) ("People encounter standard forms in most of their contractual endeavors."); Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 82 (2021) (explaining that the COVID-19 pandemic increased the volume of digital contracts because "much of American life moved online").

23. Addressing readers, Nancy Kim writes: "If you are like me, you have agreed to the terms of a contract several times today. I entered into a contract with my bank when I went online to pay a bill. I entered into a contract with my e-mail service provider when I sent

adhesion more broadly, wrap contracts are nonnegotiable, unilaterally drafted by one party using standard terms, and often unread by the nondrafting party.[24] Wrap contracts do not, however, require a signature and instead rely on certain user behavior for assent, such as clicking an "I agree" box.[25] Wrap contracts are typical in consumer-driven industries with mass-produced goods and digital interactions where the nondrafting party has no obligation to pay money, such as signing up for an email account.[26] This Note is concerned only with wrap contracts resulting from digital transactions or interactions between individual consumers and businesses—like the contract between Piccolo and Disney+.[27]

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an e-mail to a friend. I entered into a contract when I purchased a song from a digital music retailer. I entered into all of these contracts without even uncapping a pen." NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 1 (2013) [hereinafter KIM, WRAP CONTRACTS]. The rise of digital platforms expanded the use of boilerplate contract terms to not only transactions, where there is some exchange of value, but also mere interactions, like visiting a webpage or making a log-in account. *See* Andrea J. Boyack, *The Shape of Consumer Contracts*, 101 DENV. L. REV. 1, 15, 29 (2023).

24. In wrap contracts, the party in the stronger position presents standardized terms to the other party who can "either take it as is or reject it in its entirety." *See* Hillman & Rachlinksi, *supra* note 22, at 467–68; *see also* Erin Canino, *The Electronic "Sign-In-Wrap" Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability*, 50 U.C. DAVIS L. REV. 535, 539 (2016) (explaining that wrap contracts are contracts of adhesion); Nancy S. Kim, *Digital Contracts*, 75 BUS. LAW. 1683, 1683 (2020) [hereinafter Kim, *Digital Contracts*] (referring to non-negotiated digital contracts as wrap contracts). Nancy Kim explains that wrap contracts share qualities with other contracts of adhesion, which are distinguished by the nature of the parties, specifically the unequal bargaining power between them. *See* KIM, WRAP CONTRACTS, *supra* note 23, at 55; *accord* RESTATEMENT OF CONSUMER CONTRACTS: INTRODUCTION (A.L.I. 2024) (discussing how consumer contracts operate within an asymmetric environment).

25. *See* KIM, WRAP CONTRACTS, *supra* note 23, at 54–55 (2013). Online or digital consumer contracts of adhesion take multiple forms, such as browsewrap, click-wrap, scrollwrap, and sign-in-wrap contracts. *See, e.g.*, Canino, *supra* 24, at 539–40 (overviewing different electronic contract forms). Sometimes consumers do not even realize they have entered a contract at all. *See* Boliek, *supra* note 22, at 84.

26. *See Adhesion Contract: To Accept or Not Accept*, THOMAS REUTERS: L. BLOG (Mar. 25, 2024), https://legal.thomsonreuters.com/blog/contract-of-adhesion/ [https://perma.cc/PF8S-8MDS]; KIM, WRAP CONTRACTS, *supra* note 23, at 54–55 ("The adhering party's principal obligation in the wrap contract is typically not the payment of money."). For examples of some leading U.S. companies' online consumer agreements, see Michael L. Rustad, *Why A New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521 (2022).

27. For an in-depth discussion on the difference between electronic and paper form consumer contracts, see Hillman & Rachlinksi, *supra* note 22. This Note's focus is on issues arising from business-to-consumer digital transactions, as opposed to business-to-business. These two types of transactions may have similar characteristics, but contracting with consumers, particularly digitally, poses distinct fairness issues that require a different remedy.

Standard-form consumer contracts, including wrap contracts, do serve some benefit.[28] The format of these contracts eases consumer and business participation in modern markets that rely on the accessibility and relative affordability of mass-produced goods.[29] Consumer transactions at such scale realistically require a set of standard terms, benefitting consumers by creating a world of expected terms.[30] Freedom of contract principles, however, rely in part on parties deciding—and understanding—that they are exchanging value with each other.[31] While contract enforcement does serve economic goals,[32] the underlying justifications for enforcement are not plainly market-based, but also rooted in normative judgements about moral obligations to one another.[33]

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28. *See* 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 (2006) (arguing that "standard-form contracts in fact facilitate bargaining and are a crucial instrument in the establishment and maintenance of cooperative relationships between firms and their customers").

29. *See* RESTATEMENT OF CONSUMER CONTRACTS: INTRODUCTION (A.L.I. 2024) ("The efficiencies of mass production and mass distribution of products and services would be hindered if the terms of each transaction with each consumer had to be individually negotiated."); Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 3–4 (2002) ("Standard form contracts are necessary to the efficient functioning of the modern market and are not without their benefits for market participants.").

30. *See* RESTATEMENT OF CONSUMER CONTRACTS: INTRODUCTION (A.L.I. 2024) (discussing how standard-form contracting creates market efficiencies supporting mass production and distribution). Nonetheless, the ubiquitous and opaque nature of consumer wrap contracts has made it impossible for most consumers to keep up with complex contract terms. *See* Shmuel I. Becher & Uri Benoliel, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2258 (2019) ("Many share a strong intuition that consumer standard form contracts, which bombard us on a daily basis, are unreasonably lengthy and complicated.").

31. *See* Boyack, *supra* note 23, at 55 (explaining that freedom of contract principles are premised on party autonomy and that "voluntary exchanges of value" in theory promote "each party's rational self-interest, which creates net economic gains" or a "win-win" situation).

32. *See* Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 708 (2015) ("[C]ontracts are not sacred from the law and economics perspective; they are means to an ultimate goal, which is efficiency and the increase of wealth."); Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUM. L. REV. 629, 629 (1943) (explaining how contracts of adhesion developed to meet the needs of a developing "capitalist society").

33. *See* Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747 (2014) (discussing the "moral and social norms that bear on contracts of adhesion" and explaining that "[c]ontracts are understood to be serious moral obligations"); Friedrich Kessler, *supra* note 32, at 630 ("Thus freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle."); *see also* KIM, WRAP CONTRACTS, *supra* note 23, at 54 (describing how the nondrafting party, or

Traditional contract law developed to support mutually-beneficial, horizontal relationships free from government constraint and interference.[34] The rationale behind freedom of contract consequently assumes party autonomy and contractual input from both sides of a transaction.[35]

Legal scholars have long acknowledged the paradox between contract law's animating principles and the routine enforcement of standardized consumer contracts, which are characterized by a "hierarchical, vertical relationship" between the parties.[36] This Note seeks to illuminate how enforcement of infinite privity language constitutes a particularly egregious departure from the traditional goals and purpose of contract law.

A. INFINITE PRIVITY TO HINDER CORPORATE ACCOUNTABILITY

Infinite privity refers to contractual language that allows nonsignatory defendants to unreasonably benefit from rights-limiting clauses[37] in their corporate friends' contracts with

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consumer, is "conditioned to think of a legal undertaking as one requiring more ceremony and formality").

34. *See* Boyack, *supra* note 23, at 1, 8; Kessler, *supra* note 32, at 640 (explaining that freedom of contract "is closely tied up with the ethics of free enterprise capitalism and the ideals of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen").

35. *See* Hilary Smith, *The Federal Trade Commission and Online Consumer Contracts*, 2016 COLUM. BUS. L. REV. 512, 515 (2016) ("Current contract rules presume that contracts have been negotiated and give deference to contractual terms based upon a theory of autonomy."); Boyack, *supra* note 23, at 1.

36. *See* Boyack, *supra* note 23, at 1, 28 (internal quotation marks omitted); *accord* Kessler, *supra* note 32, at 640 ("Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract.").

37. Consumer contracts almost universally include clauses that "disclaim representations and warranties, limit consumer remedies, [and] qualify the rights of consumers to bring legal actions." RESTATEMENT OF CONSUMER CONTRACTS: INTRODUCTION (A.L.I. 2024). Contract and consumer law scholars have already documented the consumer harm flowing from clauses that limit or qualify consumer rights to legal redress. *See, e.g.*, William J. Woodward Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 22 (2006) (explaining that choice of law clauses can "disadvantage customers by substituting a weaker form of customer protection"); Zahra Takhshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 CARDOZO L. REV. 2183, 2185 (2021) (discussing consumer harm from exculpatory clauses); *see generally* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2 (2019) (explaining how cutting off a consumer's claims and defenses can subject the consumer to unjustifiable losses from a merchant's breach of contract).

consumers.[38] Prevalent clauses limiting consumers' legal rights[39] include those concerning forced arbitration,[40] class action waivers,[41] forum selection,[42] choice of law,[43] liability exculpation,[44] available damages or remedies,[45] and jury trial waivers.[46] Businesses can and do insert infinite privity language that, in its ordinary meaning, broadens the coverage of these types of clauses to a companies' "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users."[47]

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38. *See* Horton, *supra* note 14, at 640 ("[I]nfinite clauses extend beyond the original contractual partners.").

39. This list of contract clauses of concern is not exhaustive, and the remedy proposed by this Note suggests that enforcers remain adaptable to developments in online consumer contracting. Generally, the clauses of greatest concern in this Note are those that tend to overlap with private rights of action for consumers in the United States, often involving common law torts, statutory causes of action, class actions, and warranties. *See* Spencer Weber et al., *Consumer Protection in the United States: An Overview*, EUR. J. OF CONSUMER L., 24–26 (2011).

40. Forced arbitration clauses mandate that consumers resolve any dispute through arbitration, not before the courts. *See* Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1169 (2010). For a more robust conversation on the prevalence and problems associated with forced arbitration clauses, see Horton, *supra* note 14, at 633–34, 639 ("Not surprisingly, studies have found arbitration clauses in millions of consumer and employment contracts.").

41. Class action waiver clauses prohibit signatories from initiating a class action lawsuit against the other party. *See* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 922 (2021).

42. Forum selection clauses dictate "the geographic location for litigation between the parties." Becher & Benoliel, *supra* note 22, at 671–72.

43. Choice of law clauses dictate which state law applies to the contract dispute. While these seem innocuous, choice of law clauses are used to "disadvantage customers by substituting a weaker form of customer protection [law] for that which their own state offers." *See* Woodward, *supra* note 37, at 12, 22.

44. Exculpatory clauses waive a signatory's right to sue the other party for damages; they are also known as "contractual releases" or "contractual waivers of liability." *See* Takhshid, *supra* note 37, at 2188.

45. Liability limiting clauses restrict the amount or types of damages attributable to a party for a future breach. *See Limitation of Liability Clause (Annotated)*, BLOOMBERG LAW: PRACTICAL GUIDANCE (last visited Jan. 13, 2025), https://www.bloomberglaw.com/external/document/XFAHJRRO000000/commercial-clause-limitation-of-liability-clause-annotated [https://perma.cc/8SW9-DFWZ].

46. *See* Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 362 (2002).

47. Horton, *supra* note 14, at 640 (quoting *Wireless Customer Agreement,* AT&T, https://www.att.com/legal/terms.wirelessCustomerAgreement.html#disputeResolutionBy BindingArb [https://perma.cc/DY8T-XWKT] (last visited Jan. 2, 2020)). *Accord* Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 68 (S.D.N.Y. 2012) (where the contract at issue stated that "[t]he terms 'Company,' 'we,' 'us,' 'our,' or 'ours' as used only in this paragraph shall include our parent entity, subsidiaries, affiliates, officers, directors, shareholders, employees, agents, licensees, successors, and assigns"); Untershine v. Advanced Call Ctr. Techs., LLC, 2018 WL 3025074, at *9 (E.D. Wis. June 18, 2018) ("The arbitration provision

AT&T's Wireless Customer Agreement, for example, demonstrates the potential consequences of infinite privity. The agreement provides that "AT&T and [the consumer] agree to arbitrate all disputes and claims between us."[48] AT&T defines "us"—itself and the consumer—as including all "respective past, present, and future subsidiaries, affiliates, related entities, agents, employees, and all authorized or unauthorized users or beneficiaries of AT&T Services or products under past, present, or future Agreements between us."[49] Now, imagine you signed up for AT&T Mobility's cellphone service in 2010. A year later, you canceled that service and switched to a different cellphone provider. Then, in 2025, CNN reports an outrageous, false claim that you—a respected litigator in the region—were intoxicated during oral argument. You sue for defamation; CNN motions to compel arbitration based on the AT&T agreement you signed in 2010.[50] Although you never transacted with CNN, suddenly your defamation claim could be forced into corporate arbitration and out of the public legal system. How? In 2018, CNN's then-parent company, Time Warner, merged with AT&T Mobility's parent company, AT&T, Inc.[51] According to some courts—like the Fourth Circuit—CNN would succeed on their motion to compel arbitration because the plain language of the AT&T agreement covers "affiliates" or "subsidiaries" with no limitation.[52] With a few vague phrases squeezed into a contract clause, CNN could enforce this agreement's terms against an AT&T customer.

In practice, this means that a court could enforce contract terms, like a class action waiver or choice of forum clause, against

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contains the following language regarding the scope of disputes: 'If either you or we make a demand for arbitration, you and we must arbitrate any dispute or claim between you or any other user of your account, and us, our affiliates, agents and/or Wal-mart Stores, Inc. if it relates to your account, except as noted below.'").

48. AT&T WIRELESS CUSTOMER AGREEMENT, https://www.att.com/legal/terms.iframes.wirelessCustomerAgreement.html [https://perma.cc/F3N9-ZKRH] (last visited Oct. 4, 2025).

49. *See id.*

50. This hypothetical is heavily inspired by Judge Harris' dissent in *Mey*. *See* Mey v. DIRECTV, LLC, 971 F.3d at 303 (Harris, J. dissenting). For a longer discussion of the *Mey* decision, see *infra* Part I.B.

51. *See id.*

52. *See id.* at 290 (majority opinion). Significantly, the Fourth Circuit held that per the language of the AT&T agreement, the arbitration clause could be enforced by a future affiliate of AT&T. It did not matter that the nonsignatory DirecTV was not an affiliate of AT&T at the time the plaintiff signed the AT&T agreement. *Id.* at 303 (Harris, J., dissenting).

a consumer in a legal dispute with a nonsignatory defendant—whom the consumer never intended to contract with—over an incident unrelated to the original container contract the consumer signed. Companies already employ a variety of clauses dictating consumers' access to legal redress to force consumers wholly out of the public legal system or weaken their position as a plaintiff.[53] And other legal realities, including the high cost of litigation, already effectively immunize corporations from swathes of private consumer actions.[54] Infinite privity helps further insulate the contracting companies from suit and allows related corporations to seek this protection from alleged wrongdoing as well.[55] Modern companies' increasingly complex legal structures, particularly those of public corporations, further extend the potential mileage of infinite privity's corporate jargon.[56] Today, corporate links can span industries and borders, likely beyond many consumers' imaginations.[57] Infinite privity exacerbates the existing legal

53. *See* Rustad, *supra* note 26, at 555 (quoting Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1435 (2014)); Smith, *supra* note 35, at 516 (explaining that the drafting parties have "interests contrary to those of the consumer," and can insert terms that are "pro-seller"). For example, many people have the Uber application downloaded in their smartphone. When signing up for Uber, consumers agree to "waiv[e] your right to seek relief in a court of law and waiv[e] your right to have a jury trial on your claims." *U.S. Terms of Use*, UBER LEGAL (Aug. 19, 2024), https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en#_1t3h5sf [https://perma.cc/MGY4-VG7B] (emphasis omitted). Consumers also agree that the contract is a "legally binding agreement between you and Uber Technologies, Inc. and its subsidiaries, representatives, affiliates, officers and directors." *Id.*

54. *See* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers*, 83 Geo. Wash. L. Rev. 2157, 2170 (2015); *cf.* Smith, *supra* note 35, at 523 ("Consumers are unlikely to win suits and therefore less likely to bring them in the first place.").

55. *See supra* Part I.A.

56. *See* Gideon Parchomovsky & Asaf Eckstein, *Corporate Empires: Past, Present, and Future*, 109 IOWA L. REV. 1157, 1157–58 (2024) ("In December 2021, one hundred percent of the largest one hundred corporations on the S&P 500 were parent companies with tens, sometimes hundreds, of subsidiaries.").

57. For example, NBC and E! News are both subsidiaries of Comcast, but that not clear from their websites' sign-up pages. *See* Comcast Corp., Annual Report (Form 10-K, Exhibit 21) (Jan. 31, 2024); *see generally NBC Account Registration*, NBC (last visited Jan. 10, 2024), https://www.nbc.com/sign-up [https://perma.cc/R5Z5-BPF3] (lacking any mention of E! News as an entity related to NBC); *E! News*, E! NEWS (last visited Jan. 14, 2024), https://www.eonline.com/ [https://perma.cc/B5AR-3X9J] (lacking any mention of NBC as an entity related to E! News). Other examples of unexpectedly related businesses include Amazon and Metro-Goldwyn-Mayer; Uber and Drizzly; and Google and Waze. *See* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 52 (2019) ("Increasingly, however, the corporate form is used to partition assets of the same firm into select asset pools . . . with the result that a single firm may comprise dozens if not hundreds of legal shells."); *see also* Peter Brennan & Chris Hudgins, *Market-*

barriers that consumers face and widens the already-distant gap between consumers' expectations and their contractual reality.[58]

B. THE LEGAL TERRAIN BOLSTERING INFINITE PRIVITY

Courts' approaches to infinite privity language, and wrap contracts generally, reflect the "highly contradictory and confusing" common law of standardized contracts.[59] While courts have generally tried to protect consumers from unfair terms through various contract principles,[60] the results have been inconsistent.[61] Current jurisprudence on infinite privity is no exception, with courts willing to enforce these clauses against consumers despite fairness concerns.[62] This section charts the current legal analyses and doctrines that courts typically use to

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leading US Companies Consolidate Power in Era of 'Superstar' Firms, S&P GLOBAL (Jan. 17, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/market-leading-us-companies-consolidate-power-in-era-of-superstar-firms-73773141 [https://perma.cc/5J9Q-2SB6] ("The largest companies are increasing their dominance of industry market share as the U.S. economy becomes more consolidated.").

58. *See* William C. Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5*, 10 GONZ. L. REV. 333, 345 (1975); Woodward, *supra* note 37, at 64; Becher & Benoliel, *supra* note 22, at 661.

59. *See* Kessler, *supra* note 32, at 633 (explaining how courts have tried to protect "the elementary rules" of contract law while also protecting the weaker contracting parties in an evolving market).

60. *See* Smith, *supra* note 35, at 524.

61. *See infra* Part II; Kessler, *supra* note 32, at 633 (arguing that courts attempt to protect weaker parties to contracts through traditional contract rules created confusing, inconsistent common law of standardized contracts).

62. For a detailed discussion of courts' treatment of these terms, see *infra* Part II. "The vast majority of terms no one reads are enforceable." Wilkinson-Ryan, *supra* note 33, at 1753. *See also, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (noting that "courts must 'rigorously enforce' arbitration agreements according to their terms" (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985))); Stelluti v. Casapenn Enters., 1 A.3d 678, 695 (N.J. 2010) (holding that contract exculpating a party's ordinary negligence in the context of recreational activities is enforceable). Takhshid explains that "*Stelluti* is not an isolated case." Takhshid, *supra* note 37, at 2185–86. Courts' analyses of exculpatory clauses often lead to "pro-defendant outcomes" even if they are described as "disfavored." *Id.* at 2186; *accord* A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT'L L. 1219, 1280–81 (2001) ("[V]ehemently pro-FAA case law from the Supreme Court, when coupled with judicial interpretations of state contract law regarding fundamental fairness and consent that often disfavor the consumer, has resulted in a strong—if not in some courts nearly irrebuttable—presumption that favors enforcement of arbitration clauses in consumer contracts."); Lobel, *supra* note 41, at 922 ("The Supreme Court has acknowledged the decline of incentives to litigate when class waivers are enforced and yet has upheld these clauses as enforceable.").

determine if a nonsignatory defendant can enforce a contract provision against a consumer plaintiff.[63]

1. *Wrap Contract Jurisprudence*

To understand courts' treatment of infinite privity, it is critical to understand the jurisprudence developed in response to the introduction of wrap contracts.[64] Rather than build a new doctrine, courts chose to adapt traditional contract law to wrap contracts,[65] including how to handle disputes over terms limiting consumers' legal rights.[66] In doing so, courts warped traditional contract doctrines, like "meeting of the minds" and "consent," to justify

63. While this Note is concerned with all clauses that limit consumers' substantive legal rights, much of the existing doctrine is centered around whether a nonsignatory defendant can enforce an arbitration clause.

64. The Restatement of Consumer Contracts explains that consumer contract jurisprudence—including jurisprudence relating to of wrap contracts—consists of common law contract principles and both federal and state consumer protection statutes and regulations. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024). Part I of this Note focuses primarily on the common law contract rules that generally apply to wrap contracts across various industries and states.

65. *See id.* ("The challenges posed by consumer contracts have heightened over the past generation as courts have adapted traditional contract-law rules to consumer contracts."); *see also, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) (enforcing a forum selection clause in a consumer adhesion contract and noting that the lack of negotiation did not render the contract unenforceable or unfair). There is significant consensus among scholars, however, that adhesion contracts, such as wrap contracts, should be analyzed differently from traditional contracts because of their unique form. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177, 1175 (1983); Lobel, *supra* note 41, at 887. Nancy Kim emphasizes that it was not a foregone conclusion that the "imposition of terms in nontraditional formats [would] be called contracts." KIM, WRAP CONTRACTS, *supra* note 23, at 56. Rather, businesses proposed this position, and courts endorsed it "by enforcing these formats as valid contracting forms." *Id.* ("Wrap contracts are only contracts because courts recognize them as such."); *see also id.* at 69 (noting that "courts claim that wrap contracts are no different from other contracts"); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 383 (E.D.N.Y. 2015) ("A substantial number of court opinions in recent years assume the validity of provisions contained in online contracts of adhesion.").

66. *See, e.g.*, Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630–32 (2009) (holding that courts should neutrally apply state law to determine if arbitration clauses cover nonparties); AtriCure, Inc. v. Meng, 12 F.4th 516, 522 (6th Cir. 2021) ("The Court starts with a presumption that an arbitration agreement is governed by the contract law of the state whose laws otherwise apply to it" (citing *Arthur Andersen LLP*, 556 U.S. at 630); *see also* Woodward, *supra* note 37, at 16 ("Whether they appear in negotiated contracts or adhesive forms, choice of law clauses are not binding unless we first conclude that they are enforceable as a matter of contract law."). Some courts and scholars, however, believe that clauses limiting consumers' substantive legal rights should be analyzed differently than other, more straightforward terms like price or delivery date. *See, e.g.*, *Berkson*, 97 F. Supp. 3d at 404 ("Unlike the basic internet contract for a sale and payment, arbitration and forum selection clauses materially alter the substantive default rights of a consumer. They are not enforceable against ordinary consumers who are unlikely to be aware of them.").

enforcing take-it-or-leave-it consumer contracts against nondrafting parties that never read the terms.[67]

Courts will find assent to online consumer contracts, and their specific terms, where there was reasonable notice and manifestation of assent.[68] For assessing reasonable notice, courts review the totality of the circumstances to determine if the terms are presented in a way that would alert a reasonably prudent consumer.[69] This inquiry, for example, can involve the placement of terms on the platform, the size and style of the font signaling there are terms, or the accessibility of the full set of terms.[70] Manifestation of assent to wrap contracts usually takes the form of clicking-to-sign, tapping-to-sign, or the consumer's continued use of the platform with notice of controlling terms.[71] Mere notice and an opportunity to read have become sufficient to bind

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67. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024); KIM, WRAP CONTRACTS, *supra* note 23, at 63 ("Wrap contract doctrine replaces deliberate acts of contracting with manifestations of consent and awareness of terms with reasonable notice."); *see also* Smith, *supra* note 35, at 514 ("Consumer and commercial contracts are apples and oranges. Consumer contracts, in fact, are not even properly categorized as contracts."). Take-it-or-leave-it contracts are broadly referred to as contracts of adhesion. This Note treats digital wrap contracts as a variety of adhesion contracts.

68. *See* Kim, *Online Contracting*, *infra* note 73, at 243. The Restatement notes that state and federal courts have united on the minimum requirements to enforce standard contract terms. *See* RESTATEMENT OF CONSUMER CONTS. § 2 (A.L.I. 2024) ("State and federal court decisions have converged on these minimum requirements, with almost no exception.").

69. *See* Specht v. Netscape Commc'ns. Corp., 306 F.3d 17, 33 (2d Cir. 2002) (reviewing cases where notice for Internet contracts was sufficient); *Berkson*, 97 F. Supp. 3d at 389–93 ("Terms in contracts of adhesion are subject to a reasonableness standard."). Assent to online adhesion contracts—including wrap contracts—is passive, *see id.* at 388, so validity inquiries often depend on whether there was actual or inquiry notice of the terms of the contract. *See Specht*, 306 F.3d at 30 n.14 ("Inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry" (internal quotation marks omitted)); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014) ("But where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.").

70. *See* Kim, *Online Contracting*, *infra* note 73, at 243, 252. Courts have also found notice through actions, such as "intimate[ ] involve[ment] in the formation and execution of the contracts." Pestmaster Franchise Network, Inc. v. Mata, 2017 WL 1956927, at *5 (N.D. Cal. May 11, 2017).

71. *See* Kim, *Online Contracting*, *infra* note 73, at 243; *see also* KIM, WRAP CONTRACTS, *supra* note 23, at 59 ("Clickwraps, browsewraps, and now tapwraps are as commonplace as computer screens and mobile devices."); Wilkinson-Ryan, *supra* note 33, at 1754 ("What *is* required is that parties have some notice of the terms—an 'opportunity to read.' If a contract term is 'hidden,' a court may refuse to enforce it on the grounds that the parties did not manifest their assent." (citation omitted)).

consumers to digital wrap contracts across varying platforms and contract presentation.[72]

And businesses generally only need to show that a consumer was aware they entered into a transaction with legally binding terms, not that a consumer was aware of the specific terms within the contract.[73] So while courts know that consumers—including even law professors and the Chief Justice of the United States Supreme Court—do not read the content of these contracts, they still "bind[ ] consumers to terms of which they should have been aware."[74] The effect is that "the principle undergirding the validity of contracts of adhesion—knowledge by parties of terms," is "[o]ften overlooked in our electronic age."[75]

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72. The Restatement of Consumer Contracts notes that courts apply the "same test" no matter the form of the transaction—clickwrap, browsewrap, or other. *See* RESTATEMENT OF CONSUMER CONTS. § 2 (A.L.I. 2024). Accordingly, a court is unlikely to invalidate an infinite privity clause based solely on the untraditional presentation or form of said contract, provided there was sufficient notice and opportunity to read.

73. *See* RESTATEMENT OF CONSUMER CONTS. § 2 (A.L.I. 2024); Boyack, *supra* note 23, at 15–16 (discussing how courts conflate consent to the transaction with consent to specific terms of a transaction). *Contra* Nancy S. Kim, *Online Contracting: New Developments*, 72 BUS. LAW. 243, 244 (2016) [hereinafter Kim, *Online Contracting*] ("[S]everal courts seem to be acknowledging the folly of blanket assent to online terms and rejecting the view that notice that contract terms apply to the transaction means notice of (and assent to) all of the terms."). The manifestation of assent to a contractual relationship is a separate legal concept from manifestation of assent to a contract's terms. This distinction, however, is blurred in the context of consumer contracts of adhesion. *See, e.g.*, Rustad, *supra* note 26, at 523 ("Microsoft's Service Agreement asserts that consumers are bound to their onerous terms by simply creating an account or 'by continuing to use the Services after being notified of a change to these Terms'" (quoting *Microsoft Services Agreement*, MICROSOFT (June 15, 2022), https://www.microsoft.com/enus/servicesagreement [https://perma.cc/ZE6G-5LH5])). Though an in-depth review of this issue is beyond the scope of this Note, Nancy Kim has reviewed cases involving wrap contracts, particularly focusing on the variance across courts about whether proper notice "refers to the terms of service generally or whether the offeree must have notice of, and assent to, *specific* terms." Kim, *Digital Contracts*, *supra* note 24, at 1683.

74. *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 549, 605 (2014). Under the duty to read doctrine, "parties are taken to agree to terms that they had the opportunity to read before signing. . . . A buyer who could have read but did not assumes the risk of being bound by any unfavorable terms." *Id.* at 548–49. *See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 388 (E.D.N.Y. 2015) ("Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract") (quoting Fteja v. Facebook, Inc., 841 Fed. Supp. 2 829, 839 (S.D.N.Y. 2012)); Becher & Benoliel, *The Duty to Read*, *supra* note 30, at 2282 ("Under the duty to read doctrine, consumers are legally expected to read consumer contracts before agreeing to their terms.").

75. *Berkson*, 97 F. Supp. 3d at 389; *see* Bates, *supra* note 29, at 5 (noting that core characteristics of consumer contracts do not align with contract law's "ideal transaction-type," so "the law has constructed a fictitious image of the typical consumer contract that comports with the ideal transaction-type."); Becher & Benoliel, *Sneak In Contracts*, *supra*

2. *Infinite Privity in the Courts Thus Far*

Dictated by this consumer contract legal regime, infinity privity disputes raise identifiable recurring legal questions: (1) whether the plaintiff and nonsignatory formed a contract between themselves, (2) whether the plaintiff's claims are within the scope of the agreement or clause at-issue, (3) whether the nonsignatory can enforce the clause under other contract doctrines, and (4) whether the contract is unenforceable based on affirmative defenses.[76] How a court addresses these questions varies depending on the jurisdiction, judge, case facts, and party arguments in a specific case.[77]

To determine whether the parties formed a contract, courts will typically begin by testing whether there was notice and manifestation of assent.[78] If there was sufficient notice, courts will next address whether a nonsignatory defendant can enforce a contract provision against a consumer.[79] This involves an inquiry into the objective intent of the parties, which often turns on the

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note 22, at 705 ("Contract law assumes, for good reasons, that parties need to be sufficiently informed to make contractual decisions.").

76. *See generally, e.g.*, AtriCure, Inc. v. Meng, 12 F.4th 516, 522 (6th Cir. 2021) (explaining that courts must inquire into whether the nonsignatory defendant and plaintiff entered into an enforceable contract); Mey v. DIRECTV, LLC, 971 F.3d 284, 292–95 (4th Cir. 2020) (discussing whether the contract language should be interpreted to encompass the plaintiff's claims); Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (discussing common law contract doctrines that permit nonparties to enforce contract provisions); Becher & Benoliel, *Sneak In Contracts*, *supra* note 22, at 716 (discussing common law affirmative defenses that can void contracts).

77. *See* Kim, *Digital Contracts*, *supra* note 24 at 1693 ("The standards of 'notice' and 'manifestation of assent' remain the same, but how those standards are applied varies depending upon the facts of the case and the jurisdiction."); *see also* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630–31 (2009) (noting that state law "is applicable to determine which contracts are binding . . . and enforceable" (citing Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987))); *AtriCure*, 12 F.4th at 524 ("[C]ircuit courts have recognized that they now must look to the relevant state's common law to decide when nonparties may enforce (or be bound by) an arbitration agreement.").

78. *See, e.g.*, Frazier v. W. Union Co., 377 F. Supp. 3d 1248, 1257 (D. Colo. 2019) ("In determining whether a valid arbitration agreement exists, the Tenth Circuit relies on state law principles of contract formation to determine whether parties have agreed to arbitrate an issue or claim."); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 388 (E.D.N.Y. 2015) ("A 'transaction,' even if created online, 'in order to be a contract, requires a manifestation of agreement between the parties' as to its terms" (quoting Specht v. Netscape Commc'ns. Corp., 306 F.3d 17, 29 (2d Cir. 2002))).

79. *See, e.g.*, *AtriCure*, 12 F.4th at 522 (explaining that when determining the enforceability of an arbitration agreement over nonsignatory defendants, its state contract law prompts the court to ask: "Did the parties enter into a binding contract? How should a court interpret its language? Do any contract-law defenses (like fraud or duress) render the contract unenforceable?").

ordinary meaning of the plain contract language.[80] In addition to asking whether the parties intended enforcement by nonsignatories, courts apply a similar intent analysis to determine if the nature of the plaintiff's legal claims are covered by the language of the terms.[81] Businesses are not only unilaterally controlling of the contract language that directs courts' analysis of *who* is covered, but also of the bounds of *when* an entity is covered.[82]

Aware of this, businesses draft boilerplate with courts as the intended audience, not consumers.[83] Over time, courts' recurring endorsement of these standard terms sets new standards for acceptable boilerplate.[84] But, while some courts seem ready to accept and enforce infinite privity language, but others have expressed hesitancy.[85] The Fourth and Ninth Circuits, for example, disagreed over the enforceability of an identical

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80. *See, e.g.*, Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 428, 432 (Tex. 2017) ("In determining these matters, common principles of contract and agency law and the parties' chosen language are the fulcrum of our inquiry because forum-selection clauses are creatures of contract and we must give effect to the parties' intent expressed in the four corners of the document."); Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co., 118 F. Supp. 2d 1002, 1008 (C.D. Cal. 2000) ("In California, a party's intent to contract is judged objectively, by the party's outward manifestation of consent.").

81. In *Mey*, for example, after deciding that the agreement covered future affiliates, the court relied on the broad language of the arbitration provision to determine that the plaintiff's claim against DirecTV was within the scope of the AT&T Customer Agreement's arbitration provision. *See* Mey v. DIRECTV, LLC, 971 F.3d 284, 292–95 (4th Cir. 2020).

82. For example, in *Calderon v. Sixt Rent a Car, LLC*, the Eleventh Circuit determined that the nonsignatory, a rental-car service, was a "travel supplier[ ]" covered by the arbitration provision in Orbitz' Terms of Use. 5 F.4th 1204, 1207 (11th Cir. 2021). The court refused to grant the nonsignatory's motion to compel arbitration, however, because the plaintiff's claims did not fall under any of the "Claims" defined by the provision. *See id.* at 1208, 1212. It is important to note that Orbitz could theoretically respond to this decision by simply changing the language of its consumer contracts. *See* Becher & Benoliel, *Sneak In Contracts*, *supra* note 22, at 668 ("[S]elf-interested firms may employ sneak in contracts that give the firms wide discretion and maximum flexibility with minimal transparency requirements. In this way, sneak in contracts might allow a business to modify a contract at its sole discretion and at any time.").

83. *See* Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105–06 (2006) ("The trick is a private conversation between drafters and courts . . . With the consumer out of the room, edits and additions to boilerplate are targeted to courts alone . . . Drafters value boilerplate because courts know what it means.").

84. *See id.* ("Boilerplate, used widely, repeatedly, applied uniformly to all, is like a broad statute, or the First Amendment. . . . Drafters value boilerplate because *courts* know what it means." (footnotes omitted)).

85. *See, e.g.*, Revitch v. DIRECTV, LLC, 977 F.3d 713, 719–20 (9th Cir. 2020) (refusing to enforce an arbitration clause in a consumer dispute with a nonsignatory defendant).

arbitration clause[86] in an AT&T customer agreement by a nonsignatory defendant (DirecTV) in lawsuits unrelated to AT&T's provision of cellular services.[87] In the arbitration clause at issue, AT&T leveraged infinite privity language and defined "'AT&T' and 'us' broadly to include AT&T Mobility's 'respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors and assigns.'"[88] The plaintiffs in each case had signed their customer agreements years *before* AT&T, Inc. acquired DirecTV.[89]

Analyzing the same terms in almost identical contexts, the two circuits diverged on their understanding of the objective intent expressed by the contract. Both courts considered whether the parties' intent was to arbitrate "any and all" disputes that "might ever arise" between the plaintiff and "yet-unknown affiliates," "no matter how unrelated" to the AT&T service the plaintiff in each case received.[90] In *Mey v. DIRECTV*, the Fourth Circuit decided that "Mey formed an agreement to arbitrate with DirecTV."[91] The court reasoned that the plain meaning of "affiliates" as read in the context of the contract did not limit the term to entities related to AT&T's telecommunication services nor to affiliates at the time of

86. This Note attempts to isolate the infinite privity dimension of disputes over arbitration provisions for the sake of illustration. There are, however, complex legal developments specific to arbitration clauses. For example, in the context of enforcing arbitration clauses against nonsignatory defendants, there is a divide emanating from courts' framing of the issue as either "a threshold question of contract formation" versus a question of "scope." *See Mey*, 971 F.3d at 304 (Harris, J., dissenting); *see, e.g.*, Adams v. AT&T Mobility, LLC, 524 F. App'x 322, 324 (9th Cir. 2013) (resolving whether a nonsignatory defendant was covered by an arbitration clause as a matter of scope without addressing contract formation); *see also Mey*, 971 F.3d at 289 n.1 (discussing *Adams*, 524 Fed. App'x at 324).

87. *See* Revitch v. DIRECTV, LLC, 977 F.3d 713, 719–20 (9th Cir. 2020) ("We are aware that the Fourth Circuit, considering a recent case presenting facts and issues substantially similar to those presented here (including, most pertinently, an arbitration clause identical to that signed by Revitch), has arrived at the opposite conclusion." (referencing *Mey*, 971 F.3d at 284)). In both cases, the plaintiffs both brought putative class action lawsuits against DirecTV for its automated advertisement calls, alleging violations of the Telephone Consumer Protection Act. *See Revitch*, 977 F.3d at 715; *Mey*, 971 F.3d at 289–90.

88. Revitch v. DIRECTV, LLC, 2018 WL 4030550, at *10 (N.D. Cal. Aug. 23, 2018), *aff'd*, 977 F.3d 713 (9th Cir. 2020.

89. *See Mey*, 971 F.3d at 286; *Revitch*, 977 F.3d at 715.

90. *Revitch*, 977 F.3d at 720 ("[W]e employ hypotheticals to discern whether the mutual intent of the parties could have been to form an agreement to arbitrate any and all disputes that might ever arise between Revitch and yet-unknown affiliates such as DIRECTV, no matter how unrelated to AT&T Mobility's provision of cellular phone service, including but not limited to the TCPA claim presented here"); *accord Mey*, 971 F.3d at 299–300.

91. *See* Mey v. DIRECTV, LLC, 971 F.3d 284, 291 (4th Cir. 2020).

the plaintiff's contract.[92] The Ninth Circuit reached the opposite conclusion in *Revitch v. DIRECTV*.[93] There, the court employed hypotheticals to discern what the parties' mutual intent "could have been" and to define the bounds of the parties' reasonable expectations.[94] The court, for example, asked whether the parties intended to agree to arbitrate tort claims that could arise if the plaintiff was hit by a DirecTV delivery truck.[95] The Ninth Circuit reasoned that "the parties' intention—based on their reasonable expectations at the time of contract—was not to form an arbitration agreement of the kind that DIRECTV would now have [the court] read into the contract."[96]

Beyond contract interpretation, certain state law principles permit nonparties to enforce a contract: "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and [equitable] estoppel.'"[97] The standards for these nonsignatory exceptions vary across states, representing another avenue for business' choice of law or forum-selection clauses to favor enforcement of infinite privity.[98] In Ohio, for example, a third-party beneficiary theory can succeed if the nonsignatory was "an intended (not just an incidental)" beneficiary of the contract.[99] West Virginia's definition of a third-party beneficiary requires that the "covenant or promise be made for the *sole* benefit of a person with whom [the covenant or promise] is not made."[100] States also have distinct equitable estoppel

92. *See Mey*, 971 F.3d at 290–91 (agreeing with DIRECTV that the nature of the Customer Agreement was "forward-looking" and included future affiliates).

93. *See generally* Revitch v. DIRECTV, LLC, 977 F.3d 713, 719–20 (9th Cir. 2020) (holding that the nonsignatory defendant could not enforce an arbitration clause against the plaintiff).

94. *See id.* at 720; *cf. Mey*, 971 F.3d at 303 (Harris, J., dissenting) (using hypotheticals to evaluate the parties' intent and coming to an opposite conclusion).

95. *See Revitch*, 977 F.3d at 720.

96. *Id.* at 721.

97. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (quoting SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57.19 (4th ed. 1993)); *accord* Horton, *supra* note 14, at 674 n.38 (listing the various contract theories nonsignatories may invoke to bind themselves to an agreement); Untershine v. Advanced Call Ctr. Techs., LLC, 2018 WL 3025074, at *3 (E.D. Wis. June 18, 2018) ("'[U]nder certain circumstances, a nonsignatory to an arbitration agreement can enforce or be bound by an agreement between other parties.' Those circumstances fall into five groups: '(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter-ego; and (5) estoppel'" (quoting Ellsworth v. Am. Arb. Ass'n, 148 P.3d 983, 989 n.11 (Utah 2006)).).

98. *See infra* Part II.A (explaining how companies use choice of law or forum-selection clauses to avoid consumer-friendly jurisdictions).

99. AtriCure, Inc. v. Meng, 12 F.4th 516, 526 (6th Cir. 2021).

100. Blevins v. Flagstar Bank, F.S.B., 2013 WL 3365252, at *16 (N.D.W.V. July 3, 2013).

jurisprudence—another doctrine nonsignatories can use to bind themselves to consumer agreements.[101] Broadly, equitable estoppel inquiries test for a close enough nexus between the claim against the nonsignatory defendant and the contract,[102] or between the nonsignatory defendant and the dispute.[103] Like infinite privity language, these doctrines represent paths into contracts for nonsignatories. However, unlike infinite privity, these doctrines call for the court to assess the connection between the nonsignatory defendant and the dispute, contract, or consumer involved.

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101. *See* Aubrey L. Thomas, Symposium Comment, *Nonsignatories in Arbitration: A Good Faith Analysis*, 14 LEWIS & CLARK L. REV. 953, 961 (2010) (noting that the "most controversial mechanism to bind a nonsignatory to an arbitration clause is equitable estoppel"). For cases involving infinite privity and equitable estoppel, see, e.g., Al Rushaid v. Nat'l Oilwell Varco, Inc., 814 F.3d 300, 302–03 (5th Cir. 2016) ("With respect to the NOV Norway arbitration clause, all defendants (including NOV LP) argued an entitlement to arbitration based on principles of equitable estoppel."); Cohen v. CBR Sys., Inc., 625 F. Supp. 3d 997, 1005 (N.D. Cal. 2022) ("Defendant GI Partners is not a signatory to the contracts, but it argues that equitable estoppel requires the claims against it to be arbitrated as well.").

102. *See, e.g.*, *Untershine*, 2018 WL 3025074, at *10 (holding that the nonsignatory defendant could not use equitable estoppel to compel plaintiff to arbitrate because plaintiff did not sue them on the contract); *id*. at *9 (For equitable "estoppel to apply, it must be that a signatory plaintiff sues a nonsignatory defendant on the contract but seeks to avoid the contract's arbitration provision by relying on the fact the defendant is a nonsignatory." (citing Ellsworth v. Am. Arb. Ass'n, 148 P.3d 983, 989 n.12 (Utah 2006))); Carson v. Home Depot, Inc., 2022 WL 2954327, at *4 (N.D. Ga. July 26, 2022) ("Consequently, the *sine qua non* of equitable estoppel is whether the plaintiff actually depends on the underlying contract to make out his claim against the nonsignatory defendant. If not, then the nonsignatory cannot use the contract to force the case into arbitration." (citation omitted)); Hunter v. NHcash.com, LLC, 2017 WL 4052386, at *5 (E.D. Va. Sep. 12, 2017) (explaining that, in circumstances where equitable estoppel is warranted, "[t]he first such circumstance arises 'when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory'" (quoting Brantley v. Rep. Mortgage Ins. Co., 424 F.3d 392, 395–96 (4th Cir. 2005))).

103. *See, e.g.*, *Hunter*, 2017 WL 4052386, at *5 ("The second circumstance where equitable estoppel is warranted arises 'when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" (quoting *Brantley*, 424 F.3d at 395–96)); Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 347 (W. Va. 2009) ("In order for a non-signatory to benefit from or be subject to a forum selection clause, the non-signatory must be closely related to the dispute such that it becomes foreseeable that the non-signatory may benefit from or be subject to the forum selection clause."); *Carson*, 2022 WL 2954327, at *3 (explaining that Georgia's doctrine of equitable estoppel allows "nonsignatories to invoke an arbitration clause against a signatory" when the signatory, or plaintiff, "raises allegations of *substantially interdependent and concerted misconduct* by both the nonsignatory [i.e., Home Depot] and one or more of the signatories to the contract [i.e., Red Beacon]" (alterations and emphasis in original) (quoting Autonation Fin. Servs. Corp. v. Avrain, 592 S.E.2d 96, 100 (Ga. Ct. App. 2003))).

On the other side, some courts have allowed consumer plaintiffs to void contracts or clauses containing infinite privity terms through various affirmative defenses.[104] Traditional contract doctrines—primarily unconscionability[105]—developed to "offer a degree of consumer protection" police fundamentally unfair or exceedingly one-sided terms.[106] State contract law typically dictates the requirements of affirmative defenses.[107] Part II discusses why affirmative defense doctrines on their own are insufficient to protect consumers from enforcement of infinite privity.[108]

C. CONSUMER PROTECTION IN THE UNITED STATES

Traditional contract law operates in both tandem and in tension with the United States' consumer protection legal regime.[109] This regime, which is a mash-up of judge-made law, private law, and state and federal law,[110] coalesces around the principle that—for

104. *See* Becher & Benoliel, *Sneak In Contracts*, *supra* note 22, at 716 (discussing how courts can utilize doctrinal tools to examine standard form contracts, like "unfair surprise, reasonable expectations, reasonable communication, good faith, and unconscionability").

105. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024); Becher & Benoliel, *Sneak In Contracts*, *supra* note 22, at 716–17 ("Perhaps the most important and relevant tool is the doctrine of unconscionability, which plays a key role in judicial analysis of consumer contracts."); Wayne R. Barnes, *Online Disinhibited Contracts*, 51 PEPP. L. REV. 267, 278 (2024) ("[W]hen consumers sign the form, they are generally bound by it, period (absent potentially applicable formation defenses such as fraud, duress, or unconscionability).").

106. Smith, *supra* note 35, at 524. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024); *id.* § 6.

107. *See* RESTATEMENT OF CONSUMER CONTS. § 6 (A.L.I. 2024) (explaining that different courts have different requirements to show unconscionability); *see, e.g.*, Cohen v. CBR Sys., Inc., 625 F. Supp. 3d 997, 1003 (N.D. Cal. 2022) (discussing the factors that California courts weigh when determining if a term or contract is unconscionable).

108. *See infra* Part II.A.1.

109. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 156 (2009) ("Federal and state consumer law is still being actively interpreted by the courts and [sic] common law doctrines of fraud, deceit, misrepresentation and warranty continue to undergo substantial change."). *See also* Becher & Benoliel, *Sneak In Contracts*, *supra* note 22, at 728 n.281 (explaining that the Consumer Review Fairness Act of 2016 was enacted "[t]o prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services . . . that were the subject of the contract" (alterations in original) (quoting Pub. L. No. 114-258, 130 Stat. 1355, 1355 (2016))); Budnitz, *supra* note 40, at 1169 ("Despite the many state and federal statutes that have been enacted in the last forty years to regulate consumer transactions, the underlying contract between the company and the consumer remains crucial in determining the rights and liabilities of the parties.").

110. *See* Overby, *supra* note 62, at 1235–36 ("The bodies responsible for enforcing U.S. consumer law change depending on the law being enforced."); Alderman, *supra* note 109, at

various reasons—the law should mitigate certain unfair trade practices that harm consumers.[111] This core tenet is reflected in the mission and organic statute of the Federal Trade Commission.[112]

The FTC lies at the center of the United States' consumer protection regime.[113] In 1938, Congress amended Section 5(a) of the FTC Act, granting the FTC broad authority to advance consumer protection by proscribing unfair or deceptive acts or practices (UDAPs).[114] The UDAP provision firmly established the

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152 (explaining that judicial reform and state and federal laws deal with consumer protection issues, like product safety and liability issues); Smith, *supra* note 35, at 524 ("Within this standard framework, courts have attempted to offer a degree of consumer protection through a variety of different principles, including unconscionability and unfair surprise."); Spencer Weber Waller et al., *Consumer Protection in the United States: An Overview*, EUR. J. CONSUMER L., 803, 827–28 (2011) (overviewing private rights of actions for consumers). *See also, e.g.*, Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, *invalidated in part by*, Barr v. Am. Ass'n of Pol. Consultants, 591 U.S. 610 (2020); Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641; OHIO REV. CODE ANN. § 1345.03 (governing "unconscionable acts or practices"); California Consumers Legal Remedies Act (CLRA), CAL. CIV. CODE §§ 1750–1784 (West 1970).

111. Theoretical rationales for consumer protection legislation can typically be categorized as either "(1) policing for market failures or, in a related vein, creating efficient markets for consumer goods and services; (2) advancing ethical goals; or (3) paternalist protection of the consumer." Overby, *supra* note 62, at 1227.

112. *See infra* note 113–115 and accompanying text.

113. *See* ERIC N. HOLMES, CONG. RSCH. SERV., IF12244, UNFAIR OR DECEPTIVE ACTS OR PRACTICES (UDAP) ENFORCEMENT AUTHORITY UNDER THE FEDERAL TRADE COMMISSION ACT 1 (2022) [hereinafter HOLMES, UDAP REPORT] ("The Federal Trade Commission (FTC) is the principal agency responsible for enforcing federal consumer protection laws."); Teresa M. Schwartz, *Regulating Unfair Practices under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1, 1 (1977) ("The Federal Trade Commission . . . has become one of the most powerful consumer protection agencies in the federal government."); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 608–09 (2014) (discussing the FTC's "consumer protection" authority); Beales & Muris, *supra* note 58, at 2160 (2015) ("When market forces are insufficient and common law is ineffective, a public agency, such as the FTC, may supplement these other institutions to preserve competition and protect consumers."); Symposium, *More Than Law Enforcement: The FTC's Many Tools—A Conversation With Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 780 (2005) ("Consumer protection and competition naturally complement each other: both serve to improve consumer welfare. The FTC's experience illustrates the benefits of combining the two missions in one public institution.").

114. *See* HOLMES, UDAP REPORT, *supra* note 113, at 1; Joshua A. T. Fairfield, *"Do-Not-Track" as Contract*, 14 VAND. J. TECH. & L. 545, 589 n.248 (2012) (quoting Fed. Trade Comm'n v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1311 (D.C. Cir. 1968)) ("By the Wheeler-Lea amendment, Congress, in 1938, broadened Section 5 of the Act and extended the authority of the Commission to eliminate unfair or deceptive acts or practices in commerce without regard to competition."); *accord A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/R3F6-N8HX].

FTC's mandate to protect consumer rights and deter trade practices that unjustifiably injure consumers.[115] Congress fortified the FTC's UDAP rulemaking authority in the 1975 Magnuson-Moss Act.[116] This Act provides clear legislative authority for the FTC to promulgate industry-wide rules, called Trade Regulation Rules (TRRs), that explicitly identify prohibited UDAPs and serve as the basis for enforcement actions against violators.[117] Part III of this Note proposes that the FTC should use this authority to regulate infinite privity in consumer contracts.

II. CONSUMERS LACK SINCERE LEGAL RECOURSE AND MARKET POWER

Consumers today face "unequal bargaining power, lack of meaningful choice, and unfair terms" in their online transactions,[118] coupled with a dearth of protection from the legal consequences of abusive boilerplate contracts.[119] The current legal tools consumers may wield in disputes over the enforcement of rights-limiting clauses by nonsignatory defendants[120] is generally divisible into three approaches: (i) leveraging traditional contract doctrines, (ii) enforcement of existing consumer protection

115. *See* FTC Policy Statement on Unfairness, App. to Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984); Ian M. Davis, *Resurrecting Magnuson-Moss Rulemaking: The FTC at a Data Security Crossroads*, 69 EMORY L.J. 781, 791 n.61 (2020) (citing H.R. REP. No.75-1613, at 3 (1937)) ("Congress extended FTC's mandate to explicitly encompass consumer protection").

116. *See* 15 U.S.C. § 45 (2021).

117. *See Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973); Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2076 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464). The FTC can also enforce its UDAP provision though administrative proceedings, judicial enforcement in federal district court, and FTC settlement agreements (also known as consent orders). *See* Davis, *supra* note 115, at 795–96; *see generally* JAY B. SYKES, CONG. RSCH. SERV., LSB11159, THE FEDERAL TRADE COMMISSION'S NON-COMPETE RULE (2024) (describing the scope and purpose of the FTC's rulemaking authority under Section 6(g)).

118. Boliek, *supra* note 22, at 99; *accord* Bates, *supra* note 29, at 5 ("Giving effect to a contractual relationship not based on bargaining, choice, and assent is difficult to justify in a legal regime premised on an ideal transaction-type that considers these attributes essential to the contracting process.").

119. *See* David Berman, Note, *A Critique of Consumer Advocacy Against the Restatement of the Law of Consumer Contracts*, 54 COLUM. J.L. & SOC. PROBS. 49, 55, 79 (2020); Boyack, *supra* note 23, at 61 ("Consumers are left vulnerable to companies' complete control of boilerplate terms subject only to regulation or haphazard judicial findings of unconscionability.").

120. This is not an exhaustive list of proposed solutions to this issue, but rather a broad categorization of the most common proposals and existing legal devices relevant to infinite privity in the literature reviewed for this Note.

statutes, and (iii) changing company behavior through market forces.[121] The first two tools are often deployed in individual litigation over specific contracts, while the latter tool addresses the underlying problem—the contractual terms offered by companies in the first place.[122] Part II explains the limits of each of these protective measures and ultimately concludes that the pitfalls are too significant to offer a stable avenue to combat infinite privity.

A. EXISTING CONSUMER PROTECTION TOOLS

This section critically analyzes legal mechanisms that consumers may utilize to challenge a nonsignatory defendant's use of infinite privity to enforce a rights-limiting clause, like forced arbitration or venue.[123] The protective tools discussed in this section operate mostly at the state-level, as state common-law[124] and regulations[125] act as key bodies of law in consumer contract disputes.[126] This Note does not oppose strengthening these state- and litigation-based pro-consumer tools, but also contends that federal regulation would better address infinite privity's harm to consumers.

The following discussion delves into specific flaws limiting the utility of common law and state regulations against infinite privity. The uniting weakness, however, is that both exhibit

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121. *See infra* Part II.A–C.

122. *See infra* note 123, 125, 160 and accompanying text.

123. Most of these mechanisms are "litigation-based" as they require the consumer to instigate legal action. *See* Bates, *supra* note 29, at 6.

124. *See* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630–31 (2009) ("'[S]tate law,' therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'").

125. *See* Overby, *supra* note 62, at 1262. Overby finds that, "at the state law level, specific types of contract terms may be heavily regulated. State UDAPS may impact use of terms in consumer contracts. Finally, individual states may prohibit particular types of terms—state law usury statutes limiting maximum interest rates, for example, are a type of legislative regulation of terms." *Id.*

126. *See id.* at 1261 ("In the United States, regulation of terms in the consumer contract largely occurs at the state level. Two very basic doctrines affecting use of terms are the obligation of good faith and fair dealing and the doctrine of unconscionability."); Woodward, *supra* note 37, at 22; Bates, *supra* note 29, at 39–41. According to Bates, "states have been sensitive to the special needs of consumers. The protections afforded consumers by state legislatures reflect a growing recognition that consumer transactions create special relationships that are based on the status of the parties to the transaction." *Id.* (reviewing examples of state statutes protecting consumers in contracts).

material legal diversity across states and jurisdictions.[127] While core common law contract standards remain consistent,[128] courts' applications vary across states, jurisdictions, and the specific contract or clause at issue.[129] This legal variation is also mirrored in states' distinct consumer protection legislation.[130] Businesses exploit this legal diversity by inserting choice of law or forum-selection clauses that place consumer disputes in corporation-friendly jurisdictions.[131] The prevalence and availability of this corporate maneuver in consumer contracts[132] undermines the

127. *See* Woodward, *supra* note 37, at 11 ("Among the places we have failed miserably to unify the law is in the protective rules different states apply to the business relationships that form between businesses and individuals.").

128. *See* Kim, *Digital Contracts*, *supra* note 24, at 1693 ("The standards of 'notice' and 'manifestation of assent' remain the same [across state courts]."); RESTATEMENT OF CONSUMER CONTS. § 1 (A.L.I. 2024) ("[C]ourts use regular, common-law rules for contracting—often drawn from the Restatement of Contracts" (citing Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099 (9th Cir. 2009)).).

129. *See* Kim, *Digital Contracts*, *supra* note 24, at 1693 (explaining that standards of "notice" and "manifestation of assent" are applied differently based in part on jurisdiction); Woodward, *supra* note 37, at 22 (discussing how states' "peculiar balance of free market and business regulation" manifests in its "judicially-developed principles" and "different ways of viewing the requirements of contract formation"); Canino, *supra* note 24, at 539–46 (concluding that "[t]he contradictory results in the above cases illustrate a fundamental division in judicial approaches to online contracting."). *But see* Hillman & Rachlinksi, *supra* note 22, at 433 ("[W]e contend that the law ultimately has coalesced around a workable set of rules that protects consumers from surprise and unfair terms."). Additionally, the Supreme Court has provided some guiding principles to lower courts for determining the enforceability of arbitration clauses which are regulated by the Federal Arbitration Act. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

130. *See* Woodward, *supra* note 37, at 11 ("Among the places we have failed miserably to unify the law is in the protective rules different states apply to the business relationships that form between businesses and individuals").

131. *See* Woodward, *supra* note 37, at 13–14 ("[T]he innocuous-looking choice of law clause turns out to be the best legal 'cloaking device' yet invented. Who would dream that by 'choosing' Delaware law, one would lose her right to bring a class action?"); *id.* at 60 (discussing "[c]hoice of forum clauses that 'hide' important procedural features, such as the lack of a class action device"); *see, e.g.*, Amy Widman, *Protecting Consumer Protection: Filling the Federal Enforcement Gap*, 69 BUFF. L. REV. 1157, 1162 (2021) (explaining that states enforcement levels vary and that "roughly a third of states bring few or no consumer enforcement actions.").

132. *See* John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1181 (2020) ("Today, choice-of-law clauses are everywhere."); John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 165 (2022) (describing how the forum selection clause is "supercharged' and acts as "battering ram capable of smashing its way to the courts of the chosen state in virtually every case where it is invoked"). Interestingly, Facebook replaced its mandatory arbitration clause with a forum selection clause and Amazon removed its mandatory arbitration clause while keeping its choice of forum clause—perhaps hinting at the substantial value of these clauses to businesses. *See* Boyack, *supra* note 23, at 31.

potential of common law principles and state action to authoritatively police infinite privity.[133]

1. *Common Law Protective Tools*

Courts are not blind to the imbalance of power between businesses and consumers that creates a contracting environment ripe for potential abuse.[134] Apart from legislation or regulation, contract common law itself has judicially developed protective principles.[135] This section analyzes two key protective doctrines—reasonable notice and unconscionability—to demonstrate the limits of pro-consumer common law tools in the context of infinite privity disputes arising from consumer wrap contracts. The crux of these tools' inadequacy is their base reliance on the literal, plain language of the contracts drafted solely by the self-interested companies.[136]

Contract law's reasonable notice requirement for mutual assent, a core protective mechanism, is essentially ineffectual for legal disputes involving digital wrap contracts.[137] Courts tend to find that the status quo of consumer wrap contracts generally satisfies the reasonable notice requirement.[138] By following this

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133. *See* Woodward, *supra* note 37, at 11, 14, 60 (discussing how businesses use choice of law and choice of forum clauses to benefit themselves). An in-depth discussion of states' various consumer protection legislation related to consumer contracts is beyond the scope of this Note. For more on the history and substance of state consumer protection law, see Widman, *supra* note 131, at 1160; James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 ANTITRUST L. J. 847, 957–58 (2017).

134. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024); *see also* Becher & Benoliel, *supra* note 22, at 717 ("Courts acknowledge that the typical unequal bargaining power between consumers and firms.").

135. *See* Woodward, *supra* note 37, at 22. Of note, these consumer-protective doctrines developed amid and were informed by the American common law principle of caveat emptor, or "buyer beware." *See* Cooper & Shepherd, *supra* note 133, at 948–49.

136. *See* Fairfield, *supra* note 114, at 574. *But see* Hillman & Rachlinksi, *supra* note 22, at 495 ("Although the electronic environment is a truly novel advance in the history of consumerism, existing contract law is up to the challenge."). Compounding the issue, companies often include "unilateral change" terms, allowing them to adapt and adjust the contract provisions, potentially in response to courts' treatment of certain contract language. *See* Becher & Benoliel, *supra* note 22, at 663, 671.

137. *See* RESTATEMENT OF CONSUMER CONTS.: INTRODUCTION (A.L.I. 2024) (noting that the rules of mutual assent "are limited in their ability to protect consumers from abusive deals").

138. *See supra* Part I.B.1 (discussing wrap contract jurisprudence); *see also* Wilkinson-Ryan, *supra* note 33, at 1753 ("The vast majority of terms no one reads are enforceable. As a matter of black letter law, not knowing the terms of one's contract does not excuse a party from liability.").

logic, courts have already sided with nonsignatory defendants by finding reasonable notice of terms using broad infinite privity language in wrap contracts and enforcing them against consumer plaintiffs.[139] To combat this problem, courts could, in theory, demand increased notice of infinite privity language through bolder warnings or more detailed disclosures—such as a list of entities related to the contracting company. Consumers, however, do not read these contracts, so increased disclosure would not change consumers' actual awareness of the risks they are taking on when agreeing to infinite privity language.[140] And crucially, the substantive unfairness of infinite privity cannot be salvaged by increased notice or disclosure. Even if a contract listed out every subsidiary, affiliate, or parent company in large, bold writing, it would still be unfair to force consumers to contractually bind themselves to tangential or unrelated parties. While improved transparency of terms appears constructive, in the context of infinite privity, these kinds of solutions are merely superficial.

Another oft-debated protective common law doctrine is unconscionability, which has never been a particularly fruitful defense for consumers.[141] Courts can use unconscionability to void

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139. *See, e.g.*, Mey v. DIRECTV, LLC, 971 F.3d 284 (4th Cir. 2020); Frazier v. W. Union Co., 377 F. Supp. 3d 1248 (D. Colo. 2019); Hunter v. NHcash.com, LLC, 2017 WL 4052386, at *7 (E.D. Va. Sept. 12, 2017); *see also* Boardman, *supra* note 83, at 1105 ("Several rules and patterns of judicial interpretation aim for clarity, but perversely result in continuity . . . This drives drafters deeper and deeper into the arms of existing case law as a primary means of selecting clauses."). *But see* Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 505 (E.D.N.Y. 2016) (holding that a nonsignatory defendant could not compel arbitration on the grounds that there was no mutual intent by the parties because "no reasonable person would think that checking a box accepting the 'terms and conditions' necessary to obtain cell phone service would obligate them to arbitrate literally every possible dispute he or she might have with the service provider, let alone all of the affiliates under AT&T Inc.'s corporate umbrella"). The Wexler court relied on the "reasonable expectations" test, which asks whether a party would have reason to think that the party manifesting assent would not do so if that party were aware of the unread term. *See* Wilkinson-Ryan, *supra* note 33, at 1755. Unfortunately, courts have rejected this "reasonable expectations" defense in most contract contexts. *See id.*

140. *See* Stephen F. Ross, *Applying the FTC Act to Anti-Consumer Contract Terms That Are Not Key Salient Terms to Most Consumers*, 53 U. BALT. L. REV. 183, 188 (2024) (explaining that increased disclosure would not be an effective deterrent to anti-consumer contract terms because an "economically rational consumer" views "comparison shopping" for better terms as "useless because all firms use the same anti-consumer terms"); Wilkinson-Ryan, *supra* note 33, at 1747, 1749–50, 1782–83 ("[R]eal readership is understood to be a lost cause, most scholarly support of mandatory disclosure policies stipulates that disclosures are unhelpful to consumers.").

141. *See* Takhshid, *supra* note 37, at 2196 ("Despite unconscionability's pro-consumer tendencies, the number of successful unconscionability claims has not increased over

contract clauses that are procedurally and substantively unfair.[142] Procedural unconscionability is characterized by unequal bargaining power; substantive unconscionability exists where there are overly harsh or one-sided terms.[143] However, the threshold for unconscionability is elusive and high, because courts are wary to interfere with the revered freedom of contract.[144] As businesses made wrap contracts industry-standard, courts began accepting unbargained-for, unknowing consumer assent as sufficient for enforcement.[145] Consequently, it is increasingly difficult for a consumer to prevail on a procedural unconscionability argument.[146] Substantive unconscionability is no easier to demonstrate as courts apply the exacting "shock the conscience" standard for harsh or one-sided terms.[147] The fact that courts have already accepted and enforced infinite privity

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time."). For an argument in favor of unconscionability as an effective tool against unfair terms in digital consumer contracts, see Boliek, *supra* note 22, at 73.

142. *See* RESTATEMENT OF CONSUMER CONTS. § 6 (A.L.I. 2024); *see, e.g.*, Blevins v. Flagstar Bank, F.S.B., 2013 WL 3365252, at *7 (N.D.W. Va. July 3, 2013) (explaining that courts may decide not to enforce an arbitration clauses under the doctrine of unconscionability). More specifically, courts can either sever the unconscionable provision, still giving effect to the rest of the agreement, or void the entire agreement. *See* Lobel, *supra* note 41, at 926.

143. *See* RESTATEMENT OF CONSUMER CONTS. § 6 (A.L.I. 2024).

144. *See, e.g.*, Cohen v. CBR Systems, Inc., 625 F. Supp. 3d 997, 1003 (N.D. Cal. 2022) (explaining that California courts "recognize that showing a contract is one of adhesion does not always establish procedural unconscionability" (citing Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 1348 n.9 (2015))).

145. *See* Gregory C. Cook & A. Kelly Brennan, The Enforceability of Class Action Waivers in Consumer Agreements, UCC L.J., Winter 2008; *see also* Bates, *supra* note 29, at 1–2 (explaining that enforcing seller-drafted terms allows the seller to "reshape the law to its advantage").

146. Unconscionability has a "strong moral valence," and judges are making those calls based on their "notions of fairness" in the cases before them. *See* Benjamin C. Zipursky & Zahra Takhshid, *Consumer Protection and the Illusory Promise of the Unconscionability Defense*, 103 TEX. L. REV. 847, 874 (2025). Precedent impacts these notions. *See* Bates *supra* note 29, at 1–2 ("[W]hen the law enforces the terms of the contract supplied by the seller, in effect it is allowing the seller to reshape the law to its advantage"). The almost universal judicial acceptance of consumer contracts' unique procedure, which is marked by power imbalance, accumulates to weigh against findings of procedural unconscionability. *See* RESTATEMENT OF CONSUMER CONTS. § 6 (A.L.I. 2024) ("Are all consumer contracts procedurally unconscionable? . . . The absence of a clear criterion for procedural unconscionability has diminished the usefulness of that requirement and has led courts to set it aside in many cases."); *see also Grand Prospect Partners*, 232 Cal. App. 4th, at 1348 n.9 (explaining that California courts do not necessarily treat adhesion contracts as procedurally unconscionable).

147. *See* RESTATEMENT OF CONSUMER CONTS. § 6 (A.L.I. 2024) ("Courts have also recognized that parties should be free to agree to one-sided deals as long as the process of agreement leads to a meaningful quid pro quo."); *accord* Cook & Brennan, *supra* note 145 ("[I]t is well settled that a contract of adhesion is not necessarily substantively unconscionable.").

language—even for *future* affiliates—suggests that plaintiffs would struggle to meet this high standard.[148] The judicial system aims for "clarity, but perversely results in continuity."[149] Here, consumer contract precedent has and continues to dull unconscionability's pro-consumer edge.[150] Common law contract doctrines broadly may be able to provide a relief valve for particularly offensive cases, but they cannot provide consumers with predictable, accessible protection that infinite privity warrants.[151]

2. *State UDAP Statutes*

States' consumer protection states—known as state UDAPs or "little FTC" acts[152]—are a critical component of the United States' consumer protection regime, including regulation of consumer transactions.[153] These state UDAPs, however, are conceptualized as complements to federal action,[154] rather than standalone regulations sufficient for nationwide consumer protection.

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148. *See also* Berman, *supra* note 119, at 74 (discussing the somewhat subjective "normative labels" that courts rely on to assess potentially unconscionable terms).

149. Boardman, *supra* note 83, at 1106.

150. See Zipursky & Takhshid, *supra* note 146, at 874, for a discussion of unconscionability's normative nature. Furthermore, courts' assessment of unconscionability of infinite privity language could vary depending on the industry or corporate structure implicated by the consumer agreement, leading to inconsistent or obscure standards. *Cf. supra* note 142 and accompanying text (discussing the normative nature of courts' unconscionability inquiry). For example, a court may find it shocks the conscience for Walt Disney Parks to try, as a nonsignatory, to enforce a class action waiver from a consumer's agreement with a thematically attenuated Disney entity, like ESPN+. Would that same court think it unconscionable for Whole Foods Market, as a nonsignatory, to enforce a forced arbitration clause from a consumer's Amazon contract?

151. *See* Lobel, *supra* note 41, at 949 (explaining that protective contract doctrines provide inconsistent restrictions on "onerous terms"); Bates, *supra* note 29, at 6 (explaining that the costs of litigation preclude many consumers from being able to challenge these contracts in courts at all).

152. *See* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practice Laws*, 81 ANTITRUST L.J. 911, 912 (2017).

153. *See* Matthew W. Sawchak & Troy D. Shelton, *Exposing the Fault Lines Under State UDAP Statutes*, 81 ANTITRUST L. J. 903, 906 (2017) (describing how state UDAPs have provided consumers with protection during "periods of less vigorous enforcement by federal agencies.").

154. *See* Pridgen, *supra* note 152, at 911 ("State UDAP laws were initially passed to extend consumer protection from the Federal Trade Commission to the states and to individuals. In this respect, these state UDAP laws achieve the same complementary enforcement by federal, state, and private parties that has been in place"); *see also* Schwartz, *supra* note 113, at 11–12 (explaining how state law developments and their impact can act as evidence for use by the FTC).

Notably both state attorneys general and private plaintiffs can bring suit under state UDAP statutes.[155] This broader enforcement scheme admirably encourages legal experimentation.[156] But, as discussed, companies have a legal loophole through choice of law or forum-selection clauses that help them dodge consumer-friendly state laws or jurisdictions.[157] While states should continue to strengthen these statutes based on local needs, there remains a need for national, unifying guidance to extinguish infinite privity.

B. CORPORATIONS ARE IMPERVIOUS TO CONSUMER COMPLAINTS

Beyond bringing legal action, some scholars have argued for tactics to increase "real readership"[158] or disclosure of terms in order to make firms' contract quality more responsive to consumers.[159] Under this theory, the belief is that increased readership or disclosure would ignite consumers to flex their buying power to influence the contract terms that businesses offer.[160] In reality, however, businesses structure the consumer contracting environment to be impervious to consumer preferences

155. *See* Sawchak & Shelton, *supra* note 153, at 903.

156. *See id.* This legal diversity flows naturally from the reality that "[e]ach state has its own peculiar balance of free market and business regulation." Woodward, *supra* note 37, at 22.

157. *See supra* Part II.A.

158. *See* Boyack, *supra* note 23, at 4.

159. *See* Smith, *supra* note 26, at 528–29; Fed. Trade Comm'n, Consumer Protection in the Global Electronic Marketplace: Looking Ahead 2 (2000), https://www.ftc.gov/system/files/documents/reports/consumer-protection-global-electronic-marketplace-looking-ahead/electronicmkpl.pdf [https://perma.cc/DCB4-Y75E] ("Accordingly, participants recognized a heightened need for disclosures about online businesses, the goods and services they offer, and the terms and conditions of transactions.").

160. *See* Boyack, *supra* note 23, at 4 ("Some advocates claim that consumer market choices coupled with adequate disclosures mitigates the assent deficit in consumer transactions" (internal quotations omitted)); *cf.* Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy* 6 (George Mason L. Sch. L. & Econ. Working Paper Series, Paper No. 04-19, 2004), http://ssrn.com/abstract_id=545182 [https://perma.cc/D9PR-YSME] ("In competitive markets, when consumers dislike the offerings of one seller, they can turn to others . . . . [This competition] motivates sellers to provide truthful, useful information about their products7 and drives them to fulfill promises concerning price, quality, and other terms of sale."). *But see* Ayres & Schwartz, *supra* note 74, at 546 (explaining that "competition cannot cause firms to improve contract quality because consumers cannot shop comparatively for terms of whose existence they are unaware").

on these terms.[161] This section outlines how key features of digital consumer contracts foreclose any truly disruptive collection action by consumers.[162]

The Restatement of Consumer Contracts found that consumers lack sufficient "information, sophistication, and incentive," to police the terms of wrap contracts.[163] A lack of customer scrutiny[164] incentivizes contract drafters to insert bloated terms to create an expansive legal shields for their corporate clients.[165] These shields acts to deregulate economically powerful corporate actors by forcing consumers into a legal landscape[166] curated to the former's advantage.[167]

Whether digital or not, consumers simply do not want to read the lengthy agreements.[168] This is unsurprising given that

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161. *See* OREN BAR-GILL, INTRODUCTION IN SEDUCTION BY CONTRACT 3 (2012) ("As contractual complexity increases in response to consumers' imperfect rationality, the cost of comparison shopping also increases, resulting in hindered competition.").

162. *See* Kessler, *supra* note 32, at 640 ("[S]tandard form contracts [ ] enable companies to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms." (internal quotations omitted)).

163. RESTATEMENT OF CONSUMER CONTRACTS: INTRODUCTION (A.L.I. 2024); *accord* Boyack, *supra* note 23, at 4; *cf.* Symposium, *supra* note 113, at 785 (explaining that few people "chose to opt-out of having their information shared" after "billions of privacy notices were sent to consumers").

164. *See* RESTATEMENT OF CONSUMER CONTRACTS: INTRODUCTION (A.L.I. 2024). Consumers' failure to read form contracts "is said to cause two problems. First, the consumer cannot be taken actually to consent to the legal relationship the form contract creates if the consumer is ignorant of that relationship. Second, competition cannot cause firms to improve contract quality because consumers cannot shop comparatively for terms of whose existence they are unaware." Ayres & Schwartz, *supra* note 74, at 546.

165. *See* Boardman, *supra* note 83, at 1105 ("With the consumer out of the room, edits and additions to boilerplate are targeted to courts alone. The new language does not need to make sense to a layman."); Lobel, *supra* note 41 at 889 ("Attorneys drafting boilerplate contracts frequently operate under a 'more is more' mindset.").

166. Katharina Pistor argues that "holders of capital" use private law to avoid regulation while still maintaining access to legal enforcement mechanisms that benefit them. *See* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 211, 220, 223, 226 (2019). Pistor describes how holders of capital maintain legal power by using their "bargaining power to force their contracting parties, including consumers, to accept arbitration over courts for settling disputes and disavowing class actions in arbitration along the way." *Id.* at 213, 214–15.

167. *See, e.g.*, Carrington, *supra* note 28, at 362 ("It is of course in the interest of any litigant to control the resolution of all these features of conventional American civil procedure. It may be especially advantageous to gain such control if the client hiring the lawyer to write the contract is engaged in sharp business practices and thus expects to be an habitual defendant in civil actions." (internal quotations omitted));Bates, *supra* note 30, at 4 (2002) ("By institutionalizing the economic disparity between sellers and consumers, standard form contracts enhance significantly the ability of sellers to exploit the dependence of consumers on the market to provide the goods they need.").

168. *See* Ayres & Schwartz, *supra* note 74, at 550 (describing an "avalanche of real-world evidence that virtually no one wants to read contract terms regardless of how accessibly

businesses design the contracts in part to discourage people from reading them.[169] Reading is costly with little return, as comprehension is unlikely[170] and consumers have a low individual probability of being impacted by an unfavorable term.[171] Even if some consumers are aware of the terms, businesses' universal use of these provisions leaves consumers without practical alternatives.[172] Increased notice or disclosure of terms, therefore, is unlikely to increase readership or inspire collective action because consumers believe that "all firms use the same anti-consumer terms" and such terms are therefore unavoidable.[173] This is particularly true in the context of infinite privity language because it is unrealistic to expect a consumer to research a company's corporate structure and then properly weigh that risk before accepting.[174]

Even if a consumer did investigate what possible affiliates or subsidiaries could be covered by the infinite privity language, they usually must rely on unverified websites or try to navigate complicated legal documents, such as a Form 10-K from the

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rendered those terms are."). Discussing consumers and small businesses, Woodward notes that "[n]either will likely read choice of law clauses." Woodward, *supra* note 37, at 64; *accord* Tim R. Samples et. al., *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKELEY TECH. L.J. 47, 49 (2024) ("Prominent legal minds—including the Chief Justice of the Supreme Court—have confessed to glossing over the terms of their own consumer contracts.").

169. *See* Boliek, *supra* note 22, at 84 (noting that consumer contracts are "written to discourage people from reading them"); OREN BAR-GILL, *supra* note 161, at 248 (explaining that consumers "bear the costs created by these contracts" as "they are designed to exploit our cognitive biases").

170. *See* Berman, *supra* note 124, at 63 ("[C]onsumers face cognitive limits, as reading contracts is both intellectually taxing and time-consuming."); Becher & Benoliel, *supra* note 11, at 661 ("[T]he consumer must deal with a lengthy and complex contract, which the consumer often cannot read or understand.").

171. *See, e.g.*, Wilkinson-Ryan, *supra* note 33, at 1753 ("Meanwhile, the expected benefit of any investment in reading standard terms is low for three reasons: (1) the transaction itself is minor; (2) the probability of unfavorable terms is low; and (3) the probability of a given consumer being affected by an unfavorable term is low.").

172. *See* Boyack, *supra* note 23, at 60 ("Consumers cannot avoid standard terms with unilateral change provisions, however, because they are ubiquitous. There is essentially zero market choice."); *FAIR Act Letter to Congress*, *supra* note 9.

173. Ross, *supra* note 140, at 188; *see* Boyack, *supra* note 23, at 30 ("Theoretically, a consumer who learns of onerous terms might walk away from the transaction, but there may not be an adequate market substitute that offers significantly better terms.").

174. *See supra* note 169–171 and accompanying text; *see also* Symposium, *supra* note 113, at 784 ("In practice, most consumer consent is illusory. When given the opportunity, most consumers do not exercise choice. The costs of doing so, even if not very high, are not worth the perceived benefits.").

SEC.[175] Adding to the high cost of reading and comprehending the terms, many firms employ clauses allowing them to make unilateral changes to those terms.[176] Accordingly, getting consumers to read and understand the terms is a potentially incessant endeavor.

Critically, neither increased readership nor comprehension would change the immense economic power advantage firms have over consumers.[177] Individual consumers have functionally no bargaining power to negotiate or change the terms of these contracts.[178] Yet, companies legitimize exploitive contract provisions like infinite privity by arguing that the transaction was consented to by the consumer—all in the name of freedom to contract.[179] By propagating nonnegotiable legal scrawl, "large hierarchical firms [ ] set the tone of modern commerce" and then retain the power to dictate the conditions in which consumers may exercise their legal rights to obtain redress for corporate wrongdoing.[180] Consumers should push back on these terms where they can,[181] but infinite privity ultimately requires federal

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175. *See, e.g.*, Comcast Corp., Annual Report (Form 10-K) (Jan. 31, 2024); Anders Bylund, *What does Alphabet own?* FOOL.COM (Aug 9, 2024, at 3:51 PM EST), https://www.fool.com/investing/how-to-invest/stocks/what-does-alphabet-own/ [https://perma.cc/FZV3-Q665].

176. *See* Becher & Benoliel, *supra* note 21, at 663, 668.

177. *See infra* note 178 and accompanying text. "[C]onsumers have a choice in the sense that they can choose not to participate in market transactions" online, but this is a meaningless choice as companies are also in control of shifting their business models to digital platforms. Bates, *supra* note 30, at 1.

178. *See* Ayres & Schwartz, *supra* note 74, at 546 ("[C]ompetition cannot cause firms to improve contract quality because consumers cannot shop comparatively for terms of whose existence they are unaware"). Stephen Ross explains that because consumers are unable to "reasonably" avoid non-salient contract terms (e.g., forced arbitration clauses), it is unlikely that increased competition would promote more consumer choice for non-salient terms. Ross, *supra* note 140, at 187; *see also* Bates, *supra* note 30, at 1 ("The rights and responsibilities [of each party to the transaction] are controlled by the seller who supplies the contract that governs the relationship created by the exchange.").

179. *See* KIM, WRAP CONTRACTS, *supra* note 22, at 72–73.

180. *See* Rakoff, *supra* note 24, at 1176; note 167 (discussing how companies benefit from controlling the terms of consumer contract); *see also* Fairfield, *supra* note 62, at 550–51 ("[W]hen one says 'consumer contracts' in this field of academic inquiry, it almost never means 'contracts written by consumers,' but instead means only those entered into by consumers.").

181. Hope for increased consumer power was initially revived as "the reduced costs of online communication allow consumers to act more effectively against sellers who offer unpopular terms, encouraging those sellers to offer better ones." *See* Robert Brendan Taylor, *Consumer-Driven Changes to Online Form Contracts*, 67 N.Y.U. ANN. SURV. AM. L. 371, 373, 378 (2011). Disney's withdrawal of their motion to compel arbitration in *Piccolo* seems to suggest some credence to this idea. *See supra* Introduction. Nonetheless, relying on consumer outrage to change firm behavior is not sustainable and implies waiting for

attention. The existing legal landscape offers insufficient protective tools for consumers to meaningfully spar with a nonsignatory company in an infinite privity dispute.

III. INVITE-ONLY: FTC UDAP RULEMAKING TO CURB INFINITE PRIVITY

No matter the transparency of a business' connections, consumers should not be locked into contractual clauses with an unknown, unexpected "rainbow of nonsignatory defendants."[182] The current legal landscape, however, leaves consumers functionally defenseless against infinite privity.[183] Scholarship occasionally categorizes consumers' lack of bargaining power, choice, and legal recourse as a market failure, but this description does not fully capture the reality.[184] While rhetorically useful to justify regulatory intervention, this framing implies that diminished consumer power and choice are incidental effects of evolving consumer markets. This is not so. Companies deliberately design and update their consumer contracts to shape a legal landscape that helps them maintain these market dynamics—and any effective intervention must begin with that recognition. Existing "market forces and common law together" may, therefore, be "insufficient to discipline bad actors" and mitigate harm to consumers from online adhesion contracts.[185] Given this reality, the unreliability of common law protective tools, and the indiscriminate effect of infinite privity on consumers across industries, the public interest would be better served by

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some particularly horrible violation of public norms, such as Disney's response to Piccolo's wrongful death claim. *See also* Boyack, *supra* note 23, at 31 (arguing that although companies "occasionally change their terms strategically in response to negative publicity or calls for stricter regulation," these "sporadic checks will not adequately constrain everyday overreach in boilerplate provisions—particularly abuses that are so pervasive that they have become the new industry standard").

182. Horton, *supra* note 14, at 659.

183. *See supra* Part II.

184. *See, e.g.*, KIM, WRAP CONTRACTS, *supra* note 23, at 76 ("Wrap contracts contribute to market failure when businesses use them to legitimate practices lacking transparency and courts enforce them by constructing assent which is divorces from the intent of the parties."); Smith, *supra* note 35, at 528–29 (describing the state of online consumer contracts as a market failure).

185. *See* Muris, *supra* note 160, at 12–13 (explaining that "market forces and common law together may be insufficient to discipline bad actors" where sellers are not concerned about reputation or where they assume that "few injured consumers will undertake the often difficult task of suing to vindicate their rights").

cohesive federal regulation addressing the infinite privity problem.[186]

The FTC's statutory mission and experience regulating market economy issues and consumer welfare[187] makes it the optimal entity to provide the necessary regulation. This Note proposes the FTC promulgate a trade regulation rule to specifically prohibit, as an unfair practice,[188] nonsignatory defendants from attempting to enforce certain rights-limiting contract clauses against consumers in legal disputes unrelated to the consumer's original agreement. Part III.A. highlights that the FTC can appropriately wield its unfairness jurisdiction to address the infinite privity problem. Part III.B argues that FTC UDAP rulemaking is the optimal mechanism for effective regulation of infinite privity because of its comprehensive procedural process, forthrightness, and general applicability. Part III.C briefly reviews the legal durability of this Note's proposed rule and UDAP rulemaking at large. Finally, Part III.D proposes language for this suggested rule.

A. INFINITE PRIVITY IS WITHIN THE SCOPE OF FTC UNFAIRNESS JURISDICTION

1. *The FTC's Conception and Enforcement of its Unfairness Authority*

The FTC's evolving approach to unfair acts and practices demonstrates that infinite privity is well within its intended and

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186. *See* Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and A Suggestion*, 15 ANGLO-AM. L. REV. 255, 259 (1986) (explaining that the "public interest is best served by restrictions and regulations on the individual's private right of freedom of contract" where contracts have the "potential to affect a wide and indiscriminate range of persons in society" either as contract parties or through disruption of "fundamental social and economic norms").

187. For some, the FTC may be viewed solely through its antitrust agenda, which can feel distant from daily consumer welfare issues. But former FTC Chairman Timothy Muris noted, "[b]oth consumer protection and competition serve the common aim of improving consumer welfare, and they naturally complement each other. A focus on competition theory that excludes consumer protection is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating." Muris, *supra* note 160, at 17.

188. While the FTC may prohibit an act or practice that is unfair, deceptive, or both, this Note's proposed solution to infinite privity is grounded in the FTC's regulation of unfair practices. *See* FED. RSRV., CONSUMER COMPLIANCE HANDBOOK 1, https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf [https://perma.cc/E8X3-2CCF]. For information on the FTC's deceptive practices standard, see John D. Dingell, FTC Policy Statement on Deception, App. to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984).

actual jurisdiction. Congress intended the FTC's UDAP authority to shift in step with commercial developments, which is reflected in its decision not to explicitly define UDAPs in Section 5.[189] As early as the 1970s, the FTC generally contemplated businesses' use of certain consumer contract terms as a potential unfair practice.[190] Further, trends in proposed rules after the Magnusson-Moss Warranty Act suggest that the FTC views its rulemaking authority as particularly apt for regulating consumer contracts.[191]

In promulgating its Holder in Due Course Rule, for example, the FTC justified its prohibition by relying on unfair dynamics that similarly arise from infinite privity.[192] The Holder in Due Course Rule applies to lender-creditor relationships and prohibits—as an unfair practice—a set of contract terms that cut off a consumer's legal claims and defenses.[193] In laying out its policy concerns justifying the Holder in Due Course Rule, the FTC's voiced concerns over the same context facilitating infinite privity: where

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189. *See* FTC Policy Statement on Unfairness, *supra* note 115, at 1072.

190. *See* Erxleben, *supra* note 58, at 349 (reviewing FTC UDAP actions to set more fair standards in certain commercial transactions with consumers) (referencing Montgomery Ward & Co., FTC ORDER No. C-2602 (Jan. 1975); Spiegel, Inc., FTC ORDER No. 8990 (initial decision Jan. 1975); West Coast Credit Corp., FTC ORDER No. C-2600 (Jan. 1975); Commercial Serv. Co., TRADE REG. REP. ¶ 20,531 (proposed complaint)); *see, e.g.*, FTC Credit Practices Rule, 16 CFR § 444.1 (2019) (prohibiting creditors from using certain contract provisions the FTC found to be unfair to consumers).

191. *See* Schwartz, *supra* note 113, at 12. The three groups of rules that tend to be proposed are: "1) rules to prohibit contractual provisions which favor sellers and creditors and adversely affect consumers; 2) rules to promote or require disclosure of material information about products or services; and 3) rules to protect particularly vulnerable consumer groups from unconscionable selling practices." *Id.*

192. The rule is formally known as the "Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses," but the FTC refers to it as the Holder Rule. *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (2019); *FTC Staff Issues Note on Holder Rule and Large Transactions*, FED. TRADE COMM'N (April 14, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/04/ftc-staff-issues-note-holder-rule-large-transactions [https://perma.cc/KNG7-J69L].

193. *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (2019). This rule is "still holding strong." *See FTC's Holder Rule Still Holding Strong*, FED. TRADE COMM'N (Sep. 30, 2024), https://www.ftc.gov/business-guidance/blog/2024/09/ftcs-holder-rule-still-holding-strong [https://perma.cc/7UVE-39ME]. In its initial promulgation of this rule, the FTC explained that its Section 5 authority was appropriately applied to consumer contracts of adhesion "where such contracts contain terms which injure consumers, and where consumer injury is not offset by a reasonable measure of value received in return." *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53524 (Nov. 14, 1975). The FTC stated that the economic injury to consumers "results from terms contained in form contracts," noting that "consumers rarely comprehend the significance of these devices at the time when the transaction is consummated." *Id.* at 53523–24.

one party holds significant advantages over consumers, it is appropriate for the Commission to investigate whether that party is unfairly exploiting its market power in adhesive contracts.[194] While the Holder in Due Course Rule was limited to particular types of buyers and sellers, the FTC does not need to circumscribe its authority as such.[195] The FTC recently reiterated this point in the text of its Rule on Unfair or Deceptive Fees when it clarified that it did not have to "find that the unfair or deceptive act or practice is widespread within every individual context or industry to issue a rule targeting a specific practice across industries."[196] The FTC's activism in the consumer privacy space also implicates consumer contract clauses blanketly across markets, further suggesting that the FTC comfortably regulates at the intersection of freedom of contract and unfair trade practices.[197]

2. *Infinite Privity Passes the FTC's Substantial Injury Test*

The FTC's jurisdiction over unfair practices is guided by its "substantial injury" inquiry[198]—a test that infinite privity readily satisfies. As codified in Section 5(n),[199] the substantial injury test articulates a cost-benefit analysis that accounts for the varied impacts of purportedly unfair practices on consumers, businesses, and the economy as a whole.[200] Consumer injury warranting FTC

194. *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53524 (Nov. 14, 1975).

195. *See infra* notes 196–197 and accompanying text.

196. *See* Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2076 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464).

197. *See* Smith, *supra* note 35, at 538 ("Privacy policies too are properly characterized as contracts, yet this designation has posed no impediment to the FTC's assuming the role of regulator . . . [I]t has also not prevented the Commission from ignoring the dickered terms and enforcing an alternate regime of consumer expectations."); FED. TRADE COMM'N, PROTECTING CONSUMERS IN THE NEXT TECH-ADE 30 (March 2008), https://www.ftc.gov/sites/default/files/documents/reports/protecting-consumers-next-tech-ade-report-staff-federal-trade-commission/p064101tech.pdf [https://perma.cc/7MV9-AWAR] ("The Commission also will use Section 5 to attack acts and practices that, through deception or unfairness, threaten consumer privacy in the marketplace.").

198. *See infra* note 199.

199. Section 5(n) states that to declare an act unfair, the FTC must demonstrate that the act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." 15 U.S.C. § 45(n) (1994).

200. *See* Symposium, *supra* note 113, at 801. The FTC also looks to outside judicial principles and policies to inform its view of 'harm.' *See* FTC Policy Statement on Unfairness,

attention can take various forms under this standard—from monetary harm to unwarranted health and safety risks.[201]

The FTC requires that an act or practice causes, or is likely to cause, an unavoidable, substantial injury to consumers that is not outweighed by its benefits to consumers or competition.[202] Infinite privity satisfies this standard, placing the problem within the FTC's mandate to regulate through UDAP rulemaking. First, the inability to assert certain legal rights in disputes with a defendant substantially harms consumers when they do not intend to—nor have any option not to—waive those legal rights to unknown defendants.[203] Similar to the unfair practice prohibited by the Holder in Due Course Rule,[204] infinite privity in rights-limiting contract clauses directly implicates consumers' ability to access legal redress and monetary relief from businesses they allege wronged them.[205]

Second, any benefits to consumers or competition do not outweigh this injury. While standardized contract terms may enhance the efficiency of transactions,[206] infinite privity terms fabricate vague entanglements with indeterminate contractual parties—providing no value to the exchange itself. Genuine nonparties, meanwhile, can enforce the terms of an agreement through existing common law doctrines, like equitable estoppel.[207] Finally, as explained throughout this Note, consumers cannot realistically police or avoid infinite privity language in the digital marketplace.[208] Under its Rule on Unfair or Deceptive Fees, the

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Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984). For example, the FTC referred to First Amendment cases protecting consumers' right to access information when determining that advertisement restrictions unfairly hinder consumers' ability to make informed choices did in fact tend to harm consumers. *See id*.

201. *See* FTC Policy Statement on Unfairness, *supra* note 115, at 1073. More subjective types of harm, like "[e]motional impact" are unlikely to "make a practice unfair." *Id.*; *see also* Davis, *supra* note 115, at 795 ("[S]peculative and subjective harms are rejected in favor of more concrete harms related to financial, health, and safety risks."). For example, the FTC referred to First Amendment cases protecting consumers' right to access information when determining that advertisement restrictions unfairly hinder consumers' ability to make informed choices. *See* FTC Policy Statement on Unfairness, *supra* note 115, at 1075.

202. *See supra* note 199.

203. *See* Overby, *supra* note 62, at 1276 ("The question of creating just and accessible systems for resolving consumer disputes plays an important role in consumer protection. To paraphrase the old saying, rights must have remedies.").

204. *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (2019).

205. *See supra* notes 37–47 and accompanying text.

206. *See supra* notes 28–30 and accompanying text.

207. *See supra* note 97 and accompanying text.

208. *See supra* Part II.B.

FTC found that consumers suffer from certain cognitive biases preventing consumers from reasonably avoiding injury, and the market is unlikely to correct the issue given its widespread use.[209] While the relevant cognitive biases may differ, the FTC's logic there maps directly onto the reality of infinite privity.[210]

B. STRENGTHS OF FTC UDAP RULEMAKING

The FTC's UDAP rulemaking authority, specifically, is well-suited to bring consumers' contract reality into the realm of their reasonable expectations of privity; deter deployment of infinite privity; and provide industry-wide, transparent guidelines to the benefit of both businesses and consumers. The rulemaking procedures "encourage broad participation" by interested parties and the resulting rule creates a "bright-line standard of conduct" which serves the "interest of clarity, uniformity, and fairness."[211]

1. *Procedure Accounts for Interested Parties' Feedback and Results in Clarity*

The required procedure for promulgating Trade Regulation Rules (TRRs)—which goes beyond the Administrative Procedure's Act's minimum requirements for notice and comment rulemaking[212]—should not be viewed as a burden, but rather as a benefit. The rulemaking process—particularly the informal hearings—also allows consumers, businesses, and other stakeholders to highlight practical implications and raise questions unique to specific industries or jurisdictions.[213] At the

209. *See* Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2079 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464).

210. *See supra* Part II.B.

211. *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53522 (Nov. 14, 1975).

212. While the Act imposed procedural requirements beyond those of the Administrative Procedure Act's (APA) standard for notice-and-comment rulemaking, the procedure is not as extensive as that required for formal rulemaking. *See* Davis, *supra* note 115, at 800. In addition to the APA requirements, to promulgate a TRR, the FTC must provide an informal hearing (where parties can present evidence and cross-examine witnesses, if necessary); provide advanced notice of proposed rulemaking to Congress; consider regulatory alternatives; and demonstrate that the activity at issue is "prevalent." *See* FTC General Procedures 16 C.F.R. §§ 1.7-1.20 (2025).

213. *See* Kurt Walters, FTC Rulemaking: Existing Authorities & Recommendations 2–32 (July 13, 2019) (unpublished note), https://papers.ssrn.com/sol3/papers.cfm?abstractid=3794346 [https://perma.cc/74TB-HB6S].

informal hearings, for example, interested parties can present evidence and cross-examine witnesses.[214] Per procedure, the FTC would also have to address any particularized concerns in its promulgation of the Final Rule.[215] The Final Rule will be developed in response to this feedback and continued FTC research,[216] increasing the likelihood that the rule's actual ramifications match the intended protective goal, while addressing stakeholders' concerns.

2. *Uniformity Eases Enforcement and Fairly Manages Expectations*

UDAP rulemaking allows the FTC to tackle infinite privity through a uniform, cross-industry directive that can provide clarity to interested parties and eases the agency's enforcement burden.[217] As discussed, the question of whether and under what conditions nonsignatory defendants can fairly enforce a contract has troubled courts for some time.[218] Courts have already terribly distorted centuries-old common law traditions, like mutual assent, in attempting to fit modern consumer contracts under their legal frameworks.[219] A uniform rule prohibiting infinite privity would help contain this doctrinal distortion by signaling that businesses cannot stray indefinitely from core contractual principles without risking a finding of unfairness or illegality.

Unlike many state consumer protection statutes that allow private rights of action, the FTC is the only body allowed to sue based on violations of its UDAP regulations, further ensuring a

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214. *See* FTC General Procedures 16 C.F.R. §§ 1.11–1.12 (2025).

215. *See* FTC General Procedures 16 C.F.R. § 1.14 (2025).

216. *See* FTC General Procedures 16 C.F.R. §§ 1.11, 1.14 (2025) (discussing the preliminary and final regulatory analysis the FTC must issue for TRRs); *cf.* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53517–20 (Nov. 14, 1975) (discussing and responding to opposition to FTC UDAP proposed rule).

217. *See infra* Part III.C.1 (discussing how this proposed rule on infinite privity would prevail in the FTC's cost-benefit analysis for unfair practices).

218. *See, e.g.*, AtriCure, Inc. v. Meng, 12 F.4th 516, 523 (6th Cir. 2021) ("How does this mix of state and federal rules apply to whether an arbitration contract may be enforced by or against nonparties? Courts have struggled with the question over time."); *see also, e.g.*, Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009) (deciding whether to let a third-party enforce the contract at issue); Kramer v. Toyota Motor Corp., 705 F.3d 1122 (9th Cir. 2013) (deciding whether to grant a nonsignatory defendant's motion to compel).

219. *See supra* Part I.B.1.

consistent legal landscape.[220] While private rights of actions can be important for vindicating consumer rights, they are not well suited for enforcing a prohibition against infinite privity, because fact-specific private litigations across jurisdictions challenging the bounds of infinite privity would risk highly disjointed and inscrutable jurisprudence across geography.[221]

UDAP rulemaking can also save corporate resources and time by providing businesses with a clear signal of agency expectations, simplifying company compliance.[222] Uniformity across businesses and industries also facilitates even-handed regulation of infinite privity.[223] This contrasts with other consumer-protective measures, like state law or other agency rulemaking, both of which are restricted by either industry or jurisdictional dimensions.[224] Along with providing more transparent notice to consumers and businesses, rulemaking eases the FTC's enforcement burden.[225] Unlike case-by-case adjudication, the FTC would not have to repeatedly prove that a nonsignatory's particular use of infinite privity language was unfair when pursuing an enforcement action.[226]

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220. *See* Sawchak & Shelton, *supra* note 153, at 903, 905; *see supra* Part II.A.2. Given that many states adopt and mirror the FTC's UDAP policies, FTC UDAP rulemaking also contributes to stronger state protections. *See* Sawchak & Shelton, *supra* note 153, at 904.

221. *See supra* Part II.A.1. It is incredibly expensive for individuals to access courts and is often economically infeasible for consumers. *See* Muris, *supra* note 160, at 12 ("Moreover, as is well known, resort to courts for enforcement of consumer transactions is often economically infeasible.").

222. *See* Walters, *supra* note 213, at 32; *see also, e.g.*, *FTC Escalates Enforcement Against Cancellation Policies Utilized with Subscription Product Orders*, FOSTER GARVEY (Sept. 5, 2025), https://www.foster.com/newsroom-alerts-ftc-escalates-enforcement-against-cancellation-policies-utilized-with-subscription-product-orders [https://perma.cc/LQ2E-TRGM] (explaining that "[c]ompanies should treat [FTC] enforcement actions [against unfair cancellation policies] as a clear warning and proactively review their subscription practices to mitigate legal and reputational risk").

223. *See* Schwartz, *supra* note 118, at 26 (arguing that "from the standpoint of business," applying the same standards to the entire industry "may be the fairest, most equitable approach to law enforcement.").

224. *See supra* Part II.A.

225. *See* Walters, *supra* note 213, at 32 ("A rule can save limited agency time and resources compared to case-by-case enforcement by reducing the burden of what the agency must prove anew in each enforcement action.").

226. *See* Smith, *supra* note 35, at 541 ("Specific rules for what constitutes an unfair consumer contract term remove the burden from the FTC of having to prove that a company acted unfairly.").

C. ASSESSING LEGAL DURABILITY

Administrative rulemaking often invites a variety of legal challenges.[227] A key strength, however, of utilizing the FTC UDAP rulemaking authority is its clear statutory framework.[228] Congress cemented the FTC's UDAP rulemaking authority in 1975, when it passed the Magnuson-Moss Warranty Act.[229] UDAP rulemaking is accordingly grounded in explicit language from Congress in both the 1938 Wheeler-Lea amendment and the 1975 Magnuson-Moss Warranty Act,[230] making it more resilient to statutory or constitutional challenges.

An FTC rule regulating infinite privity would likely withstand challenges that it exceeds the scope of the FTC's unfairness authority. This Note has articulated strong, straightforward arguments that the consumer injuries caused by infinite privity meet all three prongs of the standard to justify an FTC finding of unfairness.[231] The similarities between the unfair contract practice identified in the still-standing Holder in Due Course Rule and the proposed rulemaking also support the contention that infinite privity is within the FTC's TRR statutory authority.[232] FTC TRRs have, however, previously been struck down for lacking adequate support in the factual record.[233] This is unlikely to be an issue for promulgating a rule against infinite privity considering the pervasiveness of these clauses and the existing circuit split.

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227. *See, e.g.*, Wes Davis & Richard Lawler, *Guess Who's Suing the FTC to Stop 'Click to Cancel'*, THE VERGE (Oct. 23, 2024, 10:15 PM UTC), https://www.theverge.com/2024/10/23/24278020/ftc-click-to-cancel-subscriptions-rule-lawsuit-telecoms-security-advertising-groups [https://perma.cc/RZ89-WXWZ] (explaining that industry groups representing companies like Comcast, Paramount, and Disney challenged the "Click to Cancel" rule, arguing that "the FTC is trying to 'regulate consumer contracts for all companies in all industries and across all sectors of the economy'").

228. *See infra* notes 114–117.

229. *See* 15 U.S.C. § 45 (2021). The Magnuson-Moss Act added specific procedures for UDAP rulemaking. *See* Jeffrey S. Lubbers, *It's Time to Remove the Mossified Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982–84 (2015).

230. *See* The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975); HOLMES, UDAP REPORT, *supra* note 113; Fairfield, *supra* note 114, at 589 n.248.

231. *See supra* Part III.A.2.

232. *See supra* Part III.A.1.

233. *See* Walters, *supra* note 213, at 23; *see, e.g.*, Katharine Gibbs Sch. (Inc.) v. Fed. Trade Comm'n, 612 F.2d 658 (2d Cir. 1979) (rejecting FTC trade regulation rule in part because it lacked sufficient specificity).

But the FTC should still take care to record every dimension of the infinite privity problem.[234]

Admittedly, the FTC is not particularly popular within the Trump Administration.[235] During Trump's first term, the FTC notably reduced its enforcement activity.[236] And under the second Trump administration, the FTC recently allowed the Non-Compete Clause Rule to be struck down.[237] The FTC has, however, continued to use its UDAP authority to pursue enforcement actions against businesses that impose unreasonably high barriers for consumers to cancel their subscriptions or memberships.[238] Thus, the current Commissioners do not seem categorically opposed to carrying out their consumer protective role; although, their recent actions suggest they may be partial to case-by-case adjudication rather than rulemaking. President Trump also released an Executive Order on Reducing Anti-Competitive Regulatory Barriers, calling for agency heads to identify regulations that may

234. The TRR's factual record should include data and research about the pervasiveness of infinite privity language in wrap contracts, consumer understanding of these contract clauses, and interconnectedness of modern marketplaces. *Cf.* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53507–17 (Nov. 14, 1975) (reviewing significant background and data regarding the regulated unfair practice).

235. *See* Amy Howe & Kelsey Dallas, *Trump Administration Asks Justices to Block Reinstatement of FTC Commissioner*, SCOTUSBLOG (Sep. 4, 2025, 17:38 EST), https://www.scotusblog.com/2025/09/trump-administration-asks-justices-to-block-temporary-reinstatement-of-ftc-commissioner/ [https://perma.cc/J7JM-XTST]; Aidan T. Kane et al., *What Will Deregulation Look Like Under the Second Trump Administration?* BROOKINGS (February 24, 2025), https://www.brookings.edu/articles/what-will-deregulation-look-like-under-the-second-trump-administration/ [https://perma.cc/E6EE-Z434]; Matt Sledge, *The Looming GOP Battle Over Whether You Have To Go To Hell and Back to Cancel Amazon Prime*, THE INTERCEPT (Nov. 15, 2024, 5:00 EST), https://theintercept.com/2024/11/15/click-to-cancel-ftc-trump/ [https://perma.cc/U3L6-93LS]; Jody Godoy, *FTC's Republicans Back Trump's Bid for Agency Control*, REUTERS (Feb. 25, 2025, 16:38 EST), https://www.reuters.com/world/us/ftcs-republicans-back-trumps-bid-agency-control-2025-02-25/ [https://perma.cc/BW25-3GN3]; *Insight Into the Upcoming Trump Administration's Antitrust Policy*, PERKINS COIE (Jan. 10, 2025), https://perkinscoie.com/insights/update/insight-upcoming-trump-administrations-antitrust-policy [https://perma.cc/A7N7-FXED].

236. *See* Widman, *supra* note 131, at 1160 (discussing how federal agencies like the FTC "abandoned its enforcement role under the Trump Administration.").

237. *See* Press Release, FTC, Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule (Sept. 5, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule [https://perma.cc/24E2-4AGM].

238. Although the Eighth Circuit voided the Click-to-Cancel Rule (FTC regulation designed to make it easier for consumers to cancel online subscriptions), Trump's FTC continues enforcement against unfair cancellation policies through adjudication. *See* Complaint at 2–3, Fed. Trade Comm'n v. Fitness Int'l, LLC, No. 8:25-cv-1841 (C.D. Cal. Aug. 20, 2025); *FTC Escalates Enforcement Against Cancellation Policies*, *supra* note 218.

"impose distortions on the operation of the free market" for potential rescission.[239] It is unclear what regulations amount to free market "distortions," but rules constraining consumer-businesses contracts could fall under this category.

This Note's proposed rule does not seek to disrupt the freedom of contract between a business and its consumers. Rather, it reinforces the bounds of that relationship to the parties who are actually exchanging value with each other. But even if the current administration does not view this as a worthy policy goal, the Commission's UDAP rulemaking authority is safeguarded from complete ruin[240], and the next administration should consider regulating infinite privity under its consumer protection mission.

D. PROPOSED RULE LANGUAGE

Before offering potential rule language, this Note highlights key considerations that should shape the contours of a prohibition on infinite privity. To survive judicial review, the rule must define the bounds of unfair use of infinite privity with sufficient specificity.[241] The Proposed Rule should explain—using example language—that the insertion of broad infinite privity language or exhaustive disclosures cannot save a business from being considered a nonsignatory to a consumer wrap contract.[242] But drafting lawyers are creative, so the rule should go beyond this baseline proscription on infinite privity language. The rule, therefore, should pull language from relevant common law doctrines, like equitable estoppel, to shape the outer bounds of a

239. *See* Proclamation No. 14267, 90 Fed. Reg. 15629 (Apr. 15, 2025).

240. The FTC's UDAP authority has also weathered backlash from powerful industries and the deregulatory periods of both Reagan and Trump I. *See* Walters, *supra* note 213, at 2; Widman, *supra* note 132, at 1160 (discussing the deregulatory period of Trump I administration). The recent public attacks on the FTC's rulemaking authority are focused on its regulation of unfair methods of competition. *See* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277, 298 (2023). *Contra* Memorandum from Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Directive Regarding Labor Markets Task Force to Daniel Guarnera, Christopher Mufarrige, Ted Rosenbaum, & Clarke Edwards (Feb. 26. 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/memorandum-chairman-ferguson-re-labor-task-force-2025-02-26.pdf [https://perma.cc/N23C-UVAN].

241. *See* Katharine Gibbs Sch. (Inc.) v. Fed. Trade Comm'n, 612 F.2d 658, 664 (2d Cir. 1979) (striking down an FTC rule for lacking sufficient specificity); Am. Fin. Servs. Ass'n v. Fed. Trade Comm'n, 767 F.2d 957, 968 (D.C. Cir. 1985) (explaining that the reviewing court "must perform [its] quintessential judicial function of determining whether the Commission has acted within the bounds of its statutory authority").

242. For examples of this broad infinite privity language, *see supra* note 47.

nonsignatory covered by this rule: specifically, that a business or corporation is considered a nonsignatory to a consumer wrap contract if they are *not* "inexorably intertwined" with the contract at-issue and its obligations.[243] Expanding the scope of the term "nonsignatory" in this way would help limit businesses from being able to simply include a blanket list of entities purported to be covered by a contract or reinvent infinite privity in some new form.[244]

The Proposed Rule can simply prohibit nonsignatories' attempted *enforcement* of infinite privity language,[245] meaning businesses would not have to rewrite their digital contracts. As a starting point, this Note suggests the following language and guiding principles to ground the appropriate scope of the rule:

> "[I]t is a violation of this Rule and an unfair or deceptive act or practice in violation of section 5 of the FTC Act"[246] for any corporation or business,[247] of which a consumer has brought legal action, to attempt to enforce, through legal means, provisions of a digital wrap contract, of which said corporation or business is not a signatory to, that require a consumer to "disclaim[ ] or waive[ ], or purports to disclaim or waive, any substantive State or Federal law designed to

243. *See* Nitsch v. DreamWorks Animation SKG Inc., 100 F. Supp. 3d 851, 867–68 (N.D. Cal. 2015) (describing the requirements of equitable estoppel).

244. Given the complexity of corporate structures and their legal implications, this Note does not attempt to define which entities qualify as signatories or are in privity through nonsignatory doctrines such as equitable estoppel or third-party beneficiary". This section of the rule should be developed in conjunction with internal FTC research and dialogue with businesses. Of particular interest would be how this rule should account for business' own advertising of their brands or divisions as distinct, even if they are not distinct legal entities themselves. To understand the potential ramifications of this portion of the rule, consider Nestlé's expansive list of brands. *See Brands A–Z*, NESTLÉ https://www.nestle.com/brands/brandssearchlist [https://perma.cc/7HVU-D8QX] (last visited Oct. 12, 2025).

245. The FTC should be careful to note the distinction between nonsignatories' use of infinite privity language and the reasonable application of third-party exception contract doctrines like equitable estoppel.

246. Negative Option Rule, 89 Fed. Reg. 90476, 90539 (Nov. 15, 2024) (to be codified at 16 C.F.R. pt. 425).

247. This Note suggests repurposing other FTC UDAP rules' definitions where possible to encourage consistency across the FTC's enforcement authorities. Here, "'[c]orporation' is defined to include any company, trust or association, incorporated or unincorporated, 'which is organized to carry on business for its own profit or that of its members.'" Federal Trade Commission Act § 4, 15 U.S.C. § 44. And, "[b]usiness means an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations." Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2166 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464).

> protect or benefit consumers, or their remedies, unless an applicable statute explicitly deems it waivable."[248]

This Note offers this Proposed Rule with humility and maintains that continued research and stakeholder feedback—as provided for by UDAP rulemaking procedures—would produce a strong prohibition on infinite privity.

CONCLUSION

For the foreseeable future, consumers will continue signing onto digital wrap contracts stuffed with terms that barricade potential paths to legal redress. Ironically, in the name of protecting the freedom to contract, courts accepted a corporate-imposed legal regime that is built to gag consumer-party autonomy.[249] As it stands, consumers face near-insurmountable hurdles in vindicating their legal rights against large businesses,[250] and well-deserved attention has been paid to the various rights-limiting clauses employed by crafty corporate drafters. The United States consumer protection regime must now grapple with *who* can justifiably enforce those clauses against consumers. This Note focuses on a lesser-appreciated, but insidious, dimension of consumer wrap contracts—infinite privity. And the Proposed Rule would assure consumers of agency and reciprocity in their daily digital contracts. Prohibiting infinite privity would ensure that only the corporate parties providing transactional value to consumers—and not extraneous corporate

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248. *See* Prohibited Terms & Conditions in Agreements for Consumer Financial Products or Services, 90 Fed. Reg. 3566, 3596 (proposed Jan. 14, 2025). In January 2025, the Consumer Financial Protection Bureau (CFPB) proposed a rule that sought to "prohibit certain contractual provisions in agreements for consumer financial products or services. The proposal would prohibit . . . any provisions purporting to waive substantive consumer legal rights and protections (or their remedies) granted by State or Federal law." *Id.* at 3566. The Trump Administration later withdrew this proposed rule in May 2025. *See* Prohibited Terms and Conditions in Agreements for Consumer Financial Products or Services (Regulation AA); Withdrawal of Proposed Rule, 90 FR 20569, 20569 (May 15, 2025). While the rule has now been withdrawn, the FTC can still look to the CFPB's defined waivers of law and its non-exhaustive list of prohibited waivers of law in drafting the infinite privity rule. *See id.* at 3596.

249. Freedom of contract is "premised on party autonomy" and contract law accordingly developed around the concept of a horizontal relationship between "parties who can each provide some contractual input." Boyack, *supra* note 23, at 1. Modern standard-form consumer contracts, however, are defined by one-sided terms that are unfavorable to the consumer. *See supra* Part I.

250. *See supra* Part I.B.

affiliates or subsidiaries—reap the benefits of those consumers' contractual waivers.