CONSUMERS' UNREASONABLE TEXTUAL EXPECTATIONS

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The Restatement of Consumer Contracts, at § 4(d), states that "standard contract terms are interpreted in a manner that effectuates the reasonable expectations of the consumer." As the Reporters note, this language derives from the Restatement (Second) of Contracts § 211, itself largely pulled from the insurance context. As § 211 was until recently thought to be nearly dead-letter, the Consumer Restatement's interest in revitalizing the reasonable expectations rule (for interpretation and elsewhere in the document) is of particular interest. The Reporters offer a helpfully capacious definition of what consumers reasonably expect: A "totality of the circumstances," test "in consideration of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and their interaction with the business, including the representations made to them, the typical purpose of such transactions, and the preservation of value of the nonstandard or core terms of the deal." But it's fair to worry that judges will be unable to reliably make this kind of holistic determination in individual cases, as they lack information about consumers' ordinary practices. In this Essay, I summarize the available evidence of what consumers have in mind when they interpret contracts, and a methodological options judges have before them in making reasoned determinations. Contrary to advocates' hopes, § 4(d)'s interpretation principle will be—even if adopted—unlikely to produce uniformly pro-consumer outcomes.

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Introduction

Interpretation of contractual texts typically walks a familiar two-step path.[1] The fact finder first asks if a clause can plausibly take on multiple meanings. That inquiry may be informed by contextual, linguistic, or social cues.[2] If she finds the text plausibly ambiguous, she will permit the parties to offer more evidence about its meaning, drawn from their negotiations and elsewhere, thereby determining a legally operative meaning.[3]

When one party collates the contract and deploys it adhesively to millions of counterparties, this nicely ordered inquiry gets messy.[4] At best, the drafting party's lawyers might be cobbling together a contract from dozens of pieces; more often they are borrowing it whole cloth from others, who took it from still older precedents, and so forth down the rabbit hole.[5] And since consumers neither negotiate for, nor read, terms, figuring out what they *understood* they were entering into seems senseless.[6] They knew they were buying a good or service, with terms attached.[7] This makes the normal science of contractual interpretation—offering an account of what the parties *really meant at formation*—impossible to execute in satisfactory ways.

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[1] For a legible history, Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 Geo. Wash. L. Rev. 1625, 1628–31 (2018) (offering the history of contextualism versus textualism and noting a rise in the latter starting in the early 1990s).

[2] *See* Gregory Klass, Contract Exposition and Formalism 1, 29, 63 (2017) (unpublished manuscript, on file with Georgetown law faculty publications and other works), available at https://scholarship.law.georgetown.edu/facpub/1948 [https://perma.cc/6MAP-Y376] ("The more evidence one allows into interpretation, the less certain the outcome. The costs of such uncertainty in the contractual setting can be especially high.").

[3] *See generally* Gregory Klass, *Contracts, Constitutions and Getting the Interpretation-Construction Distinction Right*, 18 Geo. J. L. & Pub. Pol'y 13, 24–28 (2020) (on the difference between finding meaning and constructing terms).

[4] For the best modern account of this problem, see Gregory Klass, *Boilerplate and Party Intent*, 82 L. & Contemp. Probs. 105, 123–24 (2019).

[5] The case to read is EMMI v. Zurich, discussing the meaning of "in or upon" in a theft exclusion of a jewelry rider in an insurance contract, which seems to have been written in the late 1800s to cover stagecoaches. E.M.M.I. Inc. v. Zurich Am. Ins. Co., 84 P.3d (Cal. 2004); *see also* Stephen J. Choi & G. Mitu Gulati, *Contract as Statute,* 104 Mich. L. Rev. 1129, 1131–32, 1160–61 (2006) (proposing an approach to interpreting "boilerplate" terms akin to legislative history where courts look to the intent of the original drafters of a specific term). David Horton's new paper on arbitration mistakes is further evidence that "drafting" parties' readership might be quite low. David Horton, *Forced Arbitration in the Fortune 500,* 109 Minn. L. Rev. (forthcoming 2025).

[6] *See* Klass, *supra* note 2.

[7] Arthur Allen Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131, 147-48, 150-51 (1970); Bruce A. Ackerman, *Agon*, 91 Yale L.J. 219, 222 (1981) ("[I]n [Leff's] important article, *Contract as Thing*, he insisted that the standard form consumer agreement, though it be called a Contract-with-a-Capital-C, should be regulated as if it were just another inert thing no different in kind from tables or television sets. Only contracts based on bargaining were worthy of the name.").

This problem is rarely the subject of sustained scholarly attention, presumably because actual cases turning on the interpretation (as opposed to the construction) of adhesive contracts are rare outside of the insurance context. But Section 4(d) of the Restatement of Consumer Contracts nevertheless restated the law here, offering factfinders a different approach to this set of problems.[8] Like the old religion, it starts by asking if a term is "susceptible to more than one reasonable meaning."[9] But, without saying more on how to make that determination, it recommends that if terms are ambiguous, the factfinder should interpret them in a "manner that effectuates the reasonable expectations of the consumer."[10] As the Comments explain, this standard is intended to be empirically grounded:

> "Consumers' reasonable expectations are determined in context, based on the totality of the circumstances, and in consideration of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and their interaction with the business, including the representations made to them, the typical purpose of such transactions, and the preservation of value of the nonstandard or core terms of the deal."[11]

The new empirical reasonable expectations interpretation standard is a part of a package of consumer protective pieces of the Restatement's treatment of interpretation problem,[12] and should be understood as part of the "get" for the "give" of adopting the sensible standard of reasonable notice to consumer contracts.[13] As the Reporter's notes make clear, they fashioned the standard out of the Second Restatement of Contracts 211, comment (e), which taught that "courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it."[14]

Restatement 211 is a notoriously unsuccessful part of Second Restatement,[15] whose limited uptake mostly confined it to the status of

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[8] Since most consumer contracts are ultimately resolved by arbitrators or dispute resolution providers within firms, any mention of courts in the text is just a shorthand. Suffice it to say: Few of these disputes, wherever heard, turn on hard questions about the text.

[9] Restatement of the Consumer Contracts § 4(b) (Am. L. Inst. 2024).

[10] *Id.* at § 4(d).

[11] *Id.* at cmt. 5.

[12] Along with a strong two-part interpretation-against-the-drafter rule and a non-delegable good faith in performance gap filler.

[13] For work criticizing the "grand bargain", *see* Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart and Lauren E. Willis, *Essay, The Faulty Foundations of the Draft Restatement of Consumer Contracts,* 36 Yale J. on Reg. 447, 452 (2019).

[14] Restatement (Second) of Contracts § 211 cmt. e (Am. L. Inst. 1981).

[15] *See* Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 Wm. & Mary Bus. L. Rev. 733, 757–60 (2016).

a minority rule for insurance contracts.[16] And in moving this idea from Restatement 211's emphasis on construction to a section on the search for meaning, the Reporters relied almost exclusively on insurance caselaw, which might leave them open to the charge that they've gotten beyond their skis.[17]

But this critique is both uninteresting and unfair.[18] Uninteresting, because the question of what's normative in the Restatement and what's descriptive or summative is as old as the concept of a restatement itself, and as well-trodden. Moreover, while it's true that insurance contracts are highly specialized consumer deals that properly are the subject of their own Restatement, many jurists have been attracted to the quasi-normative appeal of Restatement 211 as a method of policing bad bargains.[19] Some kind of gap-filling reasonable expectations doctrine has plausible roots in the relevant jurisprudential community, whether or not legions of cases back it up. And unfair, because there really isn't much authority at all on how to interpret adhesion contracts, at least beyond the usual *contra proferentem* pablum.[20] The Reporters went to battle with the cases at hand.

Rather, the problems with 4(d) are derivative of 211 itself: It seems to invite unprincipled, rudderless, *faux* empirical gap-filling with no methodological guardrails apart from the factfinders' own sense of the right.[21] Given the notable failure of 211 to persuade important jurisdictions to adopt it, we should worry that 4(d) will also become a dead letter, taking with it an important tool to claw back from power in consumer contract relationships from firms. What's needed, then, is an account that will help judges ground their inquiries in the data—that is, some information about consumers' actual reasonable expectations about text and context.

Informed by a new experimental literature on individuals' views about contracting and textualism, I'll offer the beginnings of that account here.[22]

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[16] *See* Restatement of Liability Insurance § 3 cmt. a (Am. L. Inst. 2019) (noting that the plain meaning approach is typically followed instead of contextual approaches. *See also* Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 Wm. & Mary L. Rev. 1389, 1426–30 (2007) (arguing that the doctrine lacks analytical coherence and is inherently vague).

[17] Of ten cases offering substantive support for 4(d) in the Reporter's Notes, four are straightforward insurance cases. But only four of those cases are about interpretation, as opposed to deciding whether to override a term because it wasn't anticipated by consumers. Of the four interpretation cases, three concern insurance.

[18] It's particularly unfair as the section was foisted on the Reporters late in the day. *See* Patricia A. McCoy, *Inflection Points in the Drafting of the Restatement on Consumer Contracts: The Arc of Salience*, 15 Harvard Bus. L. Rev. (forthcoming 2025) (explaining drafting history).

[19] *See, e.g.*, Zacks, *supra* note 15, at 772–89 (arguing for revitalized use of 211).

[20] It's hard to prove the negative, but my own efforts to find examples for this article convinced me of its truth. See also Adam Levitin, *The Death of Consumer Contract*, 15 Harvard Bus. L. Rev. (forthcoming 2025) (offering explanation for lack of caselaw).

[21] Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 Stan. L. Rev. 545, 560 (2014) (arguing that 211 invites substantive review).

[22] For an account of the problems of answering some of these questions with experiments, see generally Kevin Tobia, *Experimental Jurisprudence,* 89 U. Chi. L. Rev. 735 (2022).

Rather than do so in the traditional three-part structure, complete with a literature review that might be as unread as consumer contracts themselves, I'll try out a more helpful and familiar form: Question and answer.

I. Discussion

A. How Should Courts Determine If a Contract Is Reasonably Susceptible of More Than One Meaning?

The Restatement of Consumer Contracts (RCC) offers no new method to determine if a contract is reasonably susceptible of more than one meaning, so it's worth recapping the Second Restatement's approach to this always-thorny problem. Generally, that approach is contextual, urging the factfinder to look at many sources of meaning, from text to context, in determining whether a phrase is ambiguous.[23] This approach is out of step with several commercially important jurisdictions, notably New York and Delaware.[24] Whether it still captures the prevailing national majority approach nationwide is unclear.

As this threshold question can be outcome determinative, it's been the preoccupation and bane of generations of contracts scholars.[25] It is thus a little surprising that the RCC doesn't much advance the ball in thinking about whether there ought to be a *consumer* approach to the determination of ambiguity. Perhaps the reason is that the caselaw is too thin to permit that kind of advance, or too confused.

In my view, courts ought to treat the problem of ambiguity in mass adhesive contracts as distinct from that in commercial deals. Like all interpretative questions, asking if a term is ambiguous—that is, is it capable of more than one meaning—turns on some account of how the reader will understand it. Standardized consumer contracts are defined by non-readership both before formation and after it; the law reviews are full of complaints (mostly overwrought, to be fair) that consumers could not understand such clauses even if they tried with reasonable effort.[26] That fact alone suggests that the two-step approach of finding ambiguity using the text and resolving it using context

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[23] Restatement (Second) Of Contracts, *supra* note 14, at §§ 212–216; U.C.C. § 2-202 (Am. Law Inst. & Unif. Law Comm'n 1977).

[24] Cunningham, *supra* note 1.

[25] As Professor Brian G. Slocum puts it, "the determination of ambiguity by the judiciary is entirely standardless and discretionary. The definitions of ambiguity used by courts are themselves vague, ambiguous, and unhelpful.". Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 Md. L. Rev. 791, 794 (2010).

[26] The paper to read is Yonathan A. Arbel, *The Readability of Contracts: Big Data Analysis*, 21 J. Empirical Legal Stud. 927 (2024).

misses something important in the standard form context: There won't be context, and the text's audience is fictive.

A possible reading of the RCC, though not one it explicitly advances, is that the "reasonable expectations" test should be imported into the determination of ambiguity as well.[27] That is, making the question of ambiguity into an empirical one, asking a critical mass of consumers would in fact perceive ambiguity, or reasonably should have.

That reading would be consistent with the proposal offered by one of the Reporters, together with Lior Strahilevitz, to determine ambiguity using surveys of consumers.[28] The authors argued that it would make sense to collapse the ambiguity and interpretation questions into one:

> "[If the] survey produces a winner—an interpretation supported by a statistically significant and large enough majority—the court would adopt this as the meaning of the disputed language. If no clear winner emerges, the court would rule that the disputed term is inherently ambiguous and the party that bears the burden to prove a specific meaning of the term lose."[29]

In the years since the publication of this proposal, the general project of empirical interpretation of legal texts has significantly advance for statutory law.[30] But, as I've previously argued, using survey evidence to interpret adhesion contracts may be a solution that is too expensive and uncertain to get traction in courts.[31] Here, one salient technical problem is that by necessity, consumers would have to be given snippets of text to react to, almost certainly shorn from the commercial context. This makes it difficult to know what to do if respondents reflect back a diversity of interpretative perspectives.

A different approach to the problem of determining ambiguity would be to start with the fact-finder examining the text (using the traditional tools to determine ambiguity) but then ask a large language model to generate potentially debiasing answers of its own, thus exposing her to alternative plausible readings and their statistical likelihood to be majoritarian ones. This was

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[27] *See* RCC, Note D, *citing* Katze v. Randolph & Scott Mut. Fire Ins. Co., 341 N.W.2d 689, 692 (Wis. 1984) for the proposition that the case resolved the "ambiguity of a term by adopting the meaning that a reasonable person in the position of an insured would have understood the words to mean.").

[28] *See* Omri Ben-Shahar & Lior J. Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. Rev. 1753 (2017); *But cf.* Stephen Mouritsen, *Contract Interpretation Using Corpus Linguistics*, 94 Wash. L. Rev. 1337 (2019) (arguing for using corpora not surveys).

[29] Ben-Shahar & Strahilevitz, *supra* note 28, at 1777.

[30] *See, e.g.*, James A. Macleod, *Ordinary Causation: A study in Experimental Statutory Interpretation,* 94 Ind. L.J. 957 (2019); Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726 (2020).

[31] Yonathan Arbel & David A. Hoffman, *Generative Interpretation*, 99 N.Y.U. L. Rev. 451, 473 (2024) (articulating concerns).

the approach I offered with Yonathan Arbel in *Generative Interpretation*, and which has gotten at least one appellate court's attention.[32]

The gist of our claim is that large language models are particularly good at offering majoritarian readings of phrases read in the context of contracts, and can probabilistically estimate what meaning the ordinary reader of that document will take. To the extent that the search for ambiguity is just this—how likely is it that the alternative reading would be held by the reader—these models may permit a more transparent, and less motivated, methodology to determine if more context and discovery is necessary.

An important difference between surveys and LLMs (Large Language Models)—apart from one being directly measuring attitudes and the other predicting them—is that the former almost by necessity collapses the threshold and the merits question into one. Even if judges are willing to make the leap notwithstanding settled precedent, the move toward unitary review makes sense if there really isn't going to be particularly useful information coming in the second phase of the interpretation process. But that will not always be the case, either because there is lurking out there highly salient extrinsic information about the drafters' meaning, or because something about the kind of contract under review gives us reason to think that the audience would not have a majoritarian understanding of a phrase in mind. In such cases, we need a more iterated method.

B. In Determining Meaning, How Should Reasonable Expectations Be Measured?

If any of the above methodologies lead the fact-finder to ask about the consumers' reasonable expectations, the RCC encourages that inquiry to focus "consideration of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and their interaction with the business."[33] I read this provision to urge courts not to look at expectations about contracts in general but rather in particular commercial contexts and given what consumers ordinarily actually think. This is an important directive, though it appears to put pressure on the uniformity called for by Restatement 211.[34]

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[32] Arbel & Hoffman, *supra* note 31, at 473–96 (making claim); United States v. Deleon, 116 F.4th 1260, 1273 (2024) (performing LLM analysis of in statutory case); Snell v. United Specialty Insurance Company, 102 F.4th 1208, 1125 (2024) (using LLM to help interpret a contract).

[33] Restatement of the Consumer Contracts § 4 cmt. 5 (Am. L. Inst. 2024).

[34] Section 211: Subsection 2 states that an adhesive term be "interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." Restatement (Second) Of Contracts, *supra* note 14, at § 211(2).

That's because there is evidence that individuals' general contracting attitudes different from those they hold in particular circumstances. As Tess Wilkinson-Ryan, Emily Campbell and I have exploring in a series of papers, individuals' views about promising morality are *thin*.[35] We prefer specific performance to expectations damages in general, but when informed of the possibility of money damages, we move off of that heuristic.[36] When asked if breach is good, sometimes, we assent, but in particular cases we think it's inappropriate.[37]

Stepping back, we've found that individuals develop their views about promissory behavior—and how those promises ought to be interpreted and given meaning—based in part on their own commercial backgrounds, which vary. We might be formalist about terms and conditions because our day-to-day experiences with them are that they are used as they are written by firms, but sometimes we learn (through experiences in the gig economy) that other terms, like Ubers', sometimes don't quite mean what they say.[38] As we argued:

> "Our view is that researchers looking to understand how identity interacts with contract should be sensitive to the complexity and contingency of our contracting identities. To be grounded, the field should start with the deals laypeople enter, and map out exactly how attitudes, experience and identity interact in particular kinds of contracting and in particular sorts of social contexts. Identity and commercial experience constitute each other: our recommendation is that scholars start with hypotheses focusing on learning and oversample the groups they hope to learn about."[39]

This suggests the value of the Restatement's specific orientation but also the difficulty of its ascertainment. When thinking about how to measure what consumers think a text means, having more specific questions will generate more accurate answers, but impedes fact-finders' ability to generalize across fact patterns and economize on dispute resolution costs.[40]

There are a few ways one could approach the problem of learning about particular contracting ecosystems. In a normal commercial case, one can ask the parties. But asking the parties is not a particularly sensible approach in consumer contracting, since the parties might be represented in an aggregate

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[35] *See* Tess Wilkinson-Ryan, David A. Hoffman and Emily Campbell., *Expecting Specific Performance,* 98 N.Y.U. L. Rev. 1633 (2024); Tess Wilkinson-Ryan, David A. Hoffman and Emily Campbell *Contracts for Everyone* (U. Pa. L. Sch., Pub. L. Res. Paper No. 24-54, 2024), https://ssrn.com/abstract=5052807.

[36] *See Expecting Specific Performance*, *supra* note 35, at 1653–62.

[37] *See Contracts for Everyone*, *supra* note 35.

[38] *See id.* at 42 (describing study 2).

[39] *Id.* at 50.

[40] *Id.*

litigation, whose named representatives might not have generalizable views. Ben-Shahar and Strahilevitz's survey approach does appear to offer an alternative path here, though it remains subject to some of the concerns I raised above.

A different approach would be to use semi-structured interviews or other qualitative techniques to learn from market participants.[41] It is unclear whether this kind of work would be practicable in court proceedings. Thus, imagine you were to consider a dispute about the terms of use of a gaming platform. Would it be sensible to interview a large sample of gamers? How would information from those interviews plausibly be introduced in court (through an expert report, to be sure, but would it survive *Daubert* review as sufficiently reliable and generalizable)? And, given the heterogeneity you'd expect even within defined communities, it seems relatively clear that sociological approaches will defeat the sort of commonality required for class-wide adjudication of interpretative issues. (It is not clear which way this cuts respecting consumer protection, since many consumer contract law claims are adjudicated as firm defenses to obligation, not affirmative claims to liability for breach).

Again, large language models might be of use. Yonathan Arbel and I engaged thisexercise when we asked a model to the language from *C & J Fertilizer v. Allied Mutual*,[42] a famous insurance case that used the reasonable expectations doctrine to decide about the effect of a contracts' text.C&J had a burglary insurance policy from Allied Mutual, and in discussions preceding the purchase the insurance company tried to make it clear that the policy would not cover an inside job. That exclusion was embodied in the following text:

> "[Allied will pay for] the felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals. . . ."

When a burglar robbed the fertilizer plant, he left tread marks in the mud and forced entry into the warehouse. The insurance company, denying the claim, argued that by its plain language, the absence of visible marks made by tools (as opposed to tires) meant that it didn't have to pay.

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[41] *Id.* at 10–12 (describing literature on law and sociology of commercial contracts); *see generally* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 641 (2017); John F. Coyle, *Interpreting Forum Selection Clauses*, 104 Iowa L. Rev. 1791, 1797–98 (2019) (advancing a similar approach); Yair Listokin, *The Meaning of Contractual Silence: A Field Experiment*, 2 J. Legal Analysis 397, 398–99 (2010).

[42] This discussion is taken from Arbel & Hoffman, *supra* note 31, at 475–76; C& J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975).

The Iowa Supreme Court held that the exclusion applied in this way violated the insured's reasonable expectations. The key piece of the courts' reasoning closely tracks the RCC:

> "[N]othing relating to the negotiations . . . would have led plaintiff to reasonably anticipate defendant would bury within the definition of 'burglary' another exclusion denying coverage when, no matter how extensive the proof of a third-party burglary, no marks were left on the exterior of the premises."[43]

This is a form of specific reasonable expectations on the cheap. Simply looking at the contract and thinking, in an armchair way, about how the parties would have thought led the court to a view about what a normal person would have expected. The question is whether that approach can be made more robust. Arbel and I asked a large language model whether, in light of circumstances, it would agree that this is how individuals would respond to the text in context. It disagreed with the court, anchoring more heavily on the text in light of the circumstances, a result that appears to fit with the prevailing criticism of the case.[44]

This suggests that at it's at least plausible to use large language models to provide guardrails on the question of reasonable expectations in particular contexts. By way of further example, consider James B. Nutter and Company v. Murphy,[45] one of the only non-insurance cases the Reporters offered in support of the reasonable expectations interpretative rule. In *Murphy*, elderly individuals entered into reverse mortgages that permitted the lender "to invoke the power of sale and any other remedies permitted by applicable law."[46] The question in the case was whether this language could be interpreted to permit the lender to invoke a statutory foreclosure provision. Caselaw had found that the provision could be invoked by "incorporating the exact language defining the statutory power of sale in [the law in] the text of the mortgage," "by referring to this definition, generally by use of the term "statutory power of sale," or "by including language in the mortgage defining a power substantially similar to that of the statutory power."

The parties agreed that the first and third possibilities were off the table: The question was whether the reverse mortgage referral to "the power of sale" was sufficiently specific to invoke the second possibility. The Court found the contract ambiguous because it didn't explicitly use the term "statutory" before "sale." But, it concluded, a *reasonable consumer* would have expected that

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[43] *Id.* at 177.

[44] Arbel & Hoffman, *supra* note 31, at 476; *Cf.* C & J Fertilizer, Inc., 227 N.W.2d at 184 (LeGrand, J., dissenting) (arguing that the reasonable expectation is to show forceful entry because plaintiff's agent expected that of the insurance contract for his own property).

[45] James B. Nutter & Co. v. Murphy, 478 Mass. 664 (2018).

[46] *Id.*

the provision permitted a foreclosure because in a reverse mortgage, a lender must have retained that power, and there was no other legal power that the contract could have been referring to that gave the lender a remedy for breach.

The case is well-argued and plausible. But even this brief description suggests difficulty in predictably defining reasonable expectations in a complicated commercial context. Most of the court's analysis turns on its views about consumers' knowledge of reverse mortgages and their economic consequences, their reactions to the coverage of state law, and a lawyers' understanding of how parties likely act to protect themselves.[47]

I asked ChatGPT to react to this fact pattern and offer a view on the parties' reasonable expectations. As it noted:

> [T]he average borrower would likely not even know such a nuance existed, let alone agree or disagree with it. Their understanding would be more along the lines of: "If I default, the lender can foreclose and sell my house." They wouldn't parse the phrase into "statutory" versus "nonstatutory" powers. They would simply take for granted that, in case of default, the lender can do whatever the law allows to recover its money.

Like the model, I am concerned that any description of what counts as reasonable really ends up being more of a normative two-step than a prediction about how actual people will act in the counterfactual where they paid attention to the details. But, in line with best practices, I asked the model to perturb the question step in 100 different ways (that is, to change its phrasing). It noted that more legal complexity—focusing on the factors the court focused on—would reduce its confidence that consumers would agree, since that would increase variance. But it generated a variety of ways of asking about consumers' expectations. For example:

> "If the mortgage isn't paid, can the bank end your ownership and sell your home without your input?"
>
> "Is foreclosure the lender's ultimate remedy when a homeowner will not pay the mortgage?"
>
> "If you owe on a house and refuse to pay, can the lender legally auction it off?"

It then created a distribution of simulated possibilities of whether the borrower would expect statutory foreclosure given the contractual text.

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[47] Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 70 SMU L. Rev. 3, 66–68 (2017). (confusion about the meaning of debt collection notices); *Cf.* Shayak Sarkar, *Consumer Expectations and Consumer Protection*, 88 Geo. Wash. L. Rev. 949 (2020) (describing expectations in other consumer facing markets).

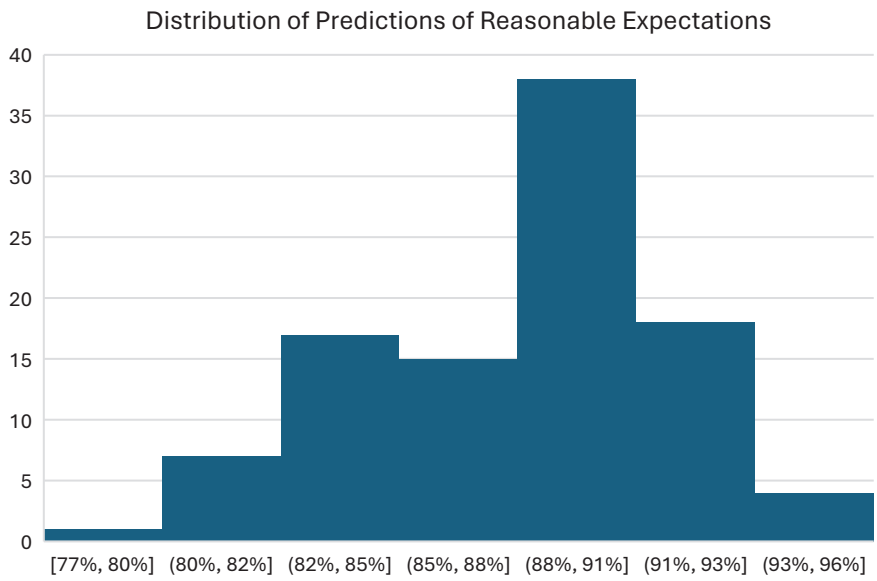

FIGURE 1: PROBABILITY DISTRIBUTION GENERATED FROM PROVIDING CHATGPT THE TEXT OF MURPHY AND THEN STATING "NOW, SIMULATE 100 DIFFERENT VARIETIES OF THE QUESTION OF WHAT CONSUMERS 'REASONABLE EXPECTATIONS' WOULD BE OF WHETHER A LENDER CAN INVOLUNTARILY FORECLOSE ON THEIR HOUSE POST DEFAULT AND PROVIDE A PROBABILITY DISTRIBUTION OF THE LIKELIHOOD THAT THE ANSWER IS YES."

As you can see, this essentially approximates the upshot of the court's analysis, but with a bit more scaffolding that describes how the model predicts that the contract and context will interact. My sense is that some judges may find this quick and dirty way of soliciting ordinary intuitions about contractual text attractive.

What this sort of work doesn't do, at least at the moment, is to enable the fact-finder to probe real individuals' responses to slightly varied textual formulations, and interact those formulations with information about consumers' prior knowledge and experience with the good. That is, take the survey idea proposed by Ben-Shahar but give it a bit more realism. Interestingly, new work incorporating LLMs into surveys (permitting dynamic surveys with interactive chatbots) suggests that we could perhaps get some traction on these sorts of problems in the near future.[48]

[48] *See* Thomas H. Costell, Gordon Pennycook, and David G. Rand, *Durably Reducing Conspiracy Beliefs Through Dialogues with AI*, 385 SCI. 6714 (2024).

C. What Do We Already Know About Individuals' Intuitions Regarding Interpreting Text?

Putting aside this as-applied set of questions, we already do have some evidence at hand of individuals' general views about the effect of text. The best work on the effect of textual disclosures is by Wilkinson-Ryan, whose two important papers on this topic suggest that individuals generally think that individuals generally believe the fine print is enforceable as it is written, and defines what is lawful.[49]

Now the fact that individuals believe that terms are binding doesn't necessarily tell us a lot about how to *interpret* them, particularly those that are arguably ambiguous. Work on statutory interpretation about the ordinary understandings of language are useful, but might not translate when interpreting contractual language. To get purchase there, courts may consider turning to evidence about consumer confusion, which is persistent. In recent work, Roseanna Sommers, studying pre-dispute arbitration clauses, found that potential customers systematically underestimated the prevalence, and misunderstood the import, of such terms, thinking that signing them would not make it impossible to sue in court.[50] Nor did customers understand the mechanics of opt-out provisions, making the choice that such clauses offer somewhat illusory. As she summarized her research:

> "When prompted, consumers report that they generally do not read the fine print, that they are unaware they are agreeing to submit all claims to binding arbitration, that they assume they have no meaningful choice about whether to agree to arbitration, and that they mistakenly believe that even after executing agreements containing mandatory arbitration provisions, they still retain the right to access the public courts."[51]

It's hard to know exactly what to make of this data about consumers' confused expectations. That consumers in the wild are persistently mistaken about what terms they get and their legal effect, doesn't exactly suggest a that there is a lay approach to the problem of interpretation. But the evidence might rule out the natural supposition that consumers favor themselves *as a class*.

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[49] *See* Tess Wilkinson-Ryan, *A Psychological Account of Consent of Fine Print*, 99 Iowa L. Rev. 1745, 1770 (2014); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017).

[50] *See* Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, 19 PLOS One (2024); *see also* Jeffrey Sovern, Elayne E. Greenberg, Paul K. Kirgis and Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 Md. L. Rev. 1 (2015).

[51] Sommers, *supra* note 50.

In work on insurance contract interpretation, Solan and his co-authors did not find a general preference for or against interpretations that favored insurance companies. However, that work did find a "false consensus" affect, in that respondents believed their own views were more commonly held than they actually are.[52]

D. What About Reasonable Expectations as a Defense to Obligation?

In its notes, the RCC expands on cases holding that reasonable expectations can affect construction even when the meaning of a text isn't unclear. As the Reporters explain:

> "[This idea] has particularly strong justification when consumers' reasonable expectations were cultivated by the business's precontractual promises or affirmations of fact, and, in such circumstances, a construction or interpretation of the contract in a manner that gives effect to consumers' reasonable expectations is preferred . . . This rule protects consumers' expectations that the business has reason to anticipate would arise from the circumstances surrounding the business's interaction with consumers, and that are central to consumers' decision to enter the transaction."

This sort of idea finds significant support in the caselaw and in the scholarship.[53] I take it that this idea is meant to have independent force from other provisions of the RCC, which deny enforcement to unconscionable provisions or those that are generated by deception (Sections 6, 7, 8) and the provisions on denial of integration for contractual statements that aren't part of the consumers' reasonable expectations (Section 9).

I'll say little about this free-floating defense here—I think it will be addressed in other pages of this Review. But I do worry that to the extent the RCC intends to center its inquiry on consumers *actual* expectations given the all the circumstances including the text, they run into the set of findings I've alluded to above, namely that consumers would prefer to privilege text over context.[54]

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[52] *See* Lawrence M. Solan, Terri Rosenblatt and Daniel Osherson, Essay, *False Consensus Bias in Contract Interpretation*, 108 Colum. L. Rev. 1268, 1288–91 (2008) (explaining that "false consensus bias" may cause contracting parties not to recognize different interpretations of their agreement until litigation, at which point judges fall victim to the same bias).

[53] *See* Lior Jacob Strahilevitz & Jamie Luguri, *Consumertarian Default Rules*, 82 Law & Contemp. Prob. 139 (2019); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015).

[54] *See generally* Roseanna Sommers & Meirav Furth, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 Stan. L. Rev. 503, 541–45 (2020) (summarizing research).

E. When Should We Ignore Consumers' (Un)Reasonable Expectations?

As you will have seen from the summary above, consumers are generally textualist, but at other moments, they will have idiosyncratic views based on their own experiences with particular goods and services. The question is: What if those views in generally don't serve their interests? The RCC appears to rest on the assumption that consumers in general would expect and want the outcome of consumer disputes to go against firms. Not only do they think that their views are more common than they are, but they are also self-serving. However, it is possible that as a class, consumers would prefer to see adherents stuck to the literal language of the bad deals they are forced to serve, even if they themselves would want out of those deals or might want government regulation to save them.

What should be done about these kinds of expectations? My title calls them unreasonable, and I mean that provocatively. It isn't reasonable, contract scholars believe, to be held to deals backed by such thin consent. One possibility would be to ignore the evidence of naïve formalism that scholars have begun to offer in interpreting terms, in favor of a more normative account of what "reasonable" expectations mean. That wouldn't suggest we ought to ignore consumers actual experiences, but rather that lawyers would predict how consumers *should* have felt given the context of their transactions, whether they actually did feel that way or not.

This kind of normative version of reasonableness is, after all, how we operate many other aspects of the legal system. But it is not one that the Restatement of Consumer Contracts gives much time or space to describing, presumably because it is out of step with the project's general, admirable, empirical bent. That leaves it for scholars and courts to develop a vision of "reasonable expectations" that respects consumer agency but also doesn't always defer to their views.