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Lauren Scholz joined the College of Law in 2017. Before coming to FSU, she was a fellow at the Project on the Foundations of Private Law and the Berkman Klein Center for Internet & Society, both at Harvard Law School. She also was a fellow at Yale Law School's Information Society Project.

Before entering academia, Scholz was a law clerk for the American Civil Liberties Union of Massachusetts and the Center for Democracy and Technology.

Her research interests include contracts, torts, commercial law, information privacy and intellectual property. Lauren earned a B.A. at Yale University and a J.D. from Harvard University.

The New Consumer Boilerplate

Contemporary developments in the economy have made recent contract law's talismanic use of assent as indicator of contract terms untenable. Courts and observers should not presume assent is the best indicator of a contract's terms. To illustrate the waning role of individualized assent in the information economy, the Article discusses three phenomena: (1) a pervasive, networked digital environment, in which full participation in the economy and society necessitates being party to certain types of contractual relationships, (2) market concentration of key digital resources and capabilities, and (3) consumer-company relationships, originating from boilerplate, where companies routinely deviate from the stated boilerplate terms in their resolution of disputes. Together, these illustrations create a picture of assent in large swaths of the modern economy as a legal fiction. This legal fiction, as applied to consumer boilerplate terms, is cumbersome at best and perniciously distortionary to the economy and society at worst. Assent to boilerplate terms is not relevant to describing the actual terms of the relationship the parties intended to create in forming the contract.

Where the conduct of parties indicates a contract has been formed, this Article proposes layering a "Step 0" test onto evaluation of consumer boilerplate to determine whether assent is relevant for determination of terms. This test considers, (1) whether the transaction type and terms is optional for a reasonable consumer, and (2) whether the average company would have appropriate information and economic leverage to craft terms. If the answer to both prongs of Step 0 is positive, contractual interpretation of the text of the boilerplate agreement continues as ordinary contract interpretation rules dictate. Given a failure at Step 0, however, the non-drafting party's assent is not an indication that boilerplate terms are a description of the contractual relationship between the parties. Instead, courts and commentators should determine the terms of the agreement in light of the economic realities of the transaction. This approach has precedent in contract law and commercial law more broadly. Affirmatively, the Article suggests that implying a fiduciary relationship between consumer and firm may be appropriate in some clickwrap and browsewrap boilerplate transactions.