The Strip Mining of Legal Rights

American Association for Justice

By: Ralph Nader and Theresa AmatoThe fine print in standard form contracts is undermining tort law, and it is not limited to mandatory arbitration. Corporations use it to insulate themselves and take away consumers' tort law rights in other ways, including unfair choice of law provisions and waivers of liability for negligence.A 78-year-old woman in the Alzheimer's wing of a Colorado nursing home leaves her apartment wearing a bathing suit and carrying a towel. She arrives at the pool about 10 minutes before the instructor for a scheduled swim class. She wears no safety device to trigger a wandering alarm, and there is no lifeguard on duty at the pool. The woman—a wife, mother, grandmother, and former high school teacher—drowns.The families of patients harmed in nursing homes may seek to bring lawsuits to hold wrongdoers accountable for negligence, personal injury, or wrongful death. In many cases this will not be possible, because residents or those acting on their behalf signed nursing home contracts that contained forced arbitration clauses that closed the courtroom doors long before they suffered.Buried among the fine print in the long and tedious standard form contracts prospective nursing home residents are asked to sign, regarding everything from furnishings to facility procedures, may be binding arbitration clauses, waivers of liability, and waivers of other rights, such as a jury trial.Applicants routinely accept boilerplate terms as people do every day—from software to services, and payday loans to employment agreements—usually unaware of the dangers that lurk in these mice-print monstrosities. The family of the drowned resident did not sue, deterred by the signed agreements that included forced arbitration, multiple waivers, and an assumption of risk for pool usage.Some residents refuse to sign these rights-eliminating provisions at the outset; others try to challenge them.1 For example, a representative of Jessie Holloway's estate brought a wrongful death action against the rehabilitation center in Florida where she resided. The trial court found the arbitration clause unenforceable because there was no "meeting of the minds" but "declined to find that Ms. Holloway was incompetent or incapacitated."2Nonetheless, "the contracts were so complex that she could not possibly have understood what she was signing."3The appellate court reversed the trial court, holding that the 92-year-old, with a fourth-grade education and memory problems, waived her rights to go to court when she signed an arbitration agreement upon admission to the facility. The court noted that there was "no

evidence that the admissions staff . . . used any improper methods to obtain Ms. Holloway's signature or that she was misled."4 The court cited clear precedent applying the rationale used to uphold most standard form contracts: that parties are presumed competent, and contracts are enforced unless parties can demonstrate that they were prevented from reading them or induced not to, whether they can or do read them.Even so, the court rebutted this standard legal fiction by acknowledging reality—that "a significant percentage" of applicants will have limitations that make it difficult to understand these contracts.5 With remarkable bluntness, the court agreed that these agreements are "sufficiently complex," that "able-bodied adults would not fully understand" them, and that the same is likely true even for services that clients sign with their hired attorneys.6Therein lies the rub. The court wrote: "Our modern economy simply could not function if a 'meeting of the minds' required individualized understanding" of these unnegotiated contracts.7 Indeed, the financial literacy proficiency level for most consumers is insufficient to meet the "cocktail of terms" that the boilerplate issuers present.8 The quasi-automatic reflex by which consumers sign, click, or tap that they have read and "agree" to the terms hides the big lie that nearly none of them do. According to one large study of online contracts, less than 0.2 percent of the studied shopping population spent even one second reviewing contract terms.9 Standard form contract consent is pure fiction, despite an imposed duty to read.Should state courts want to protect the rights of those who routinely waive their tort rights to redress in contracts, those courts must face the U.S. Supreme Court's pro-arbitration decisions. In 2012, for example, in Marmet Health Care Center, Inc. v. Brown, the Supreme Court overruled the West Virginia Supreme Court of Appeal's decision in three consolidated suits alleging negligence against nursing homes in West Virginia.10 The Supreme Court said that the Federal Arbitration Act (FAA) preempts the state's public policy preference that predispute arbitration clauses categorically should not be enforced in disputes concerning negligence.11State laws or typical defenses to contract formation in equity, such as fraud, duress, or unconscionability, or a challenge to the scope of the provisions or defects within the provision may overcome various waivers or arbitration clauses.12 But the Supreme Court interprets the FAA to preempt and therefore prohibit state laws that categorically interfere with arbitration, including class action waivers in arbitration.13 The Supreme Court held last June that the FAA preempts even where there may be no effective vindication of other substantive federal rights.14 The Court has interpreted the FAA in recent terms to shield wrongdoing by effectively shutting out from the courts cases brought by consumers,15employees,16 and small businesses alleging antitrust.17Contract law thus overcomes tort law in three typical reactions to harmful provisions in the fine print: deterred redress, unfathomable court enforcement, and the Supreme Court's willingness to impose its broad interpretation of the FAA's preemption of state and federal policies intended to protect consumers and workers. These outcomes are

not limited to predispute forced arbitration clauses in fine-print contracts; they amount to a coercive judicial repeal of tort law rights and protections through contract.The Court's activist jurisprudence, construing the FAA to vacuum away decades of state and federal government-crafted public policy to protect consumers and workers, can be devastating.18 As contracts undermine tort, the consequences for parties suffering from tortious behavior extend to other provisions in the fine print—which, thanks to proliferating arbitration clauses and class action waivers, may no longer be challengeable in court. These terms include separate waivers to a jury trial and unfair choice of forum, law, or venue restrictions.The fine print may also contain liability waivers for ordinary negligence or consequential damages, harms not anticipated in the scope of various waivers, and even restrictions on the freedom to publicly disparage a product or service. Worse, if none of these provisions are currently present in the fine print, they could emerge at any time, as the party imposing the boilerplate on others may use reserved power in unilateral modification clauses, or state statutes may permit drafters to alter the agreements at a later date.19Moral hazardProfessor Margaret Jane Radin, author of the book Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law,20 is particularly concerned with the way our courts are "allowing contract to gobble up tort."21 She writes that "unless a society adopts some other method of compensation and deterrence, it is important not to allow the basic right to be free of injury from others' negligence . . . to degenerate into a default rule routinely cancelled by boilerplate. . . . [S]uch degeneration allows firms to be irresponsible and makes recipients super-responsible."22 In other words, "the ability to exculpate oneself on a mass-market basis enables a variety of moral hazard"23 by removing the incentive to take precautions. Wrongdoers may routinely fail to take precautions that are much cheaper for them than self-protection would be for consumers, because they are able to escape liability by deleting rights that provide deterrence and redress.Fine-print contract peonage worsens as standard form contracts proliferate, get longer, and change with greater frequency.24 Many of these contracts are not even available to the consumer before the transaction.25 Even if they were, consent has devolved from "meeting of the minds" to "mutuality of assent" to its further degraded state of "acquiescence" in the age of "shrinkwrap," "browsewrap," or "tapwrap."26William Shernoff, pioneer of bad faith insurance law with decades of experience representing consumers, notes that "people usually don't even see these provisions, and before they know it they are giving up their right to a jury trial just to get health insurance."27Consumers in some cases now may be bound the minute they alight on a Web page or open a package, without having seen the contract, even when they have no idea that they are entering a contract.28 The legal fiction of contract consent continues to degrade tort law.Mass commerce has created—and the Supreme Court has allowed—the use of standard form contracts to undermine decades of public policy, both state and federal protections, through faux contractual consent

insulated from court challenges through federal preemption via the FAA.What can be doneAppellate litigator Deepak Gupta notes that the Supreme Court will not solve this problem and that we should look to legislation or agency regulations.29 Joseph Belluck, an experienced trial litigator, says that legislatures should prohibit waivers for negligence as a danger to the deterrent effect of the tort system: “It’s bad public policy to allow someone who has committed a negligent act to escape liability for that. . . . It ignores the role of the tort system.”30 And Radin suggests the courts could treat the contracts themselves as intentional torts and turn the tables against tortfeasors.31We need a broad fix that neither places the burden on consumers to read and refuse harmful provisions nor individual courts to maneuver around a pro-arbitration Supreme Court. Without an organized constituency, including lawyers who understand these issues, reform efforts will not gain the momentum needed. The civil justice system is under attack, and consumers, workers, small businesses, and their lawyers should be at the barricades. To help:First, contact Congress now. Sen. Elizabeth Warren (D-Mass.) has said that it is wrong that people can be cheated in the fine print through “tricks and traps.” To start, Congress should pass the Arbitration Fairness Act of 2013–2014, sponsored by Sen. Al Franken (D-Minn.) and 23 cosponsors at press time (S. 878), and Rep. Henry “Hank” Johnson Jr. (D-Ga.) and 71 cosponsors at press time (H.B. 1844), to ban predispute arbitration of cases involving civil rights, antitrust, employment, and consumer disputes, and restore them to the courts.32Congress should hold hearings on and ban per se unconscionable boilerplate terms beyond forced arbitration, such as unfair choice of law, forum, and venue provisions; unilateral modification; waivers of liability for negligence; and deprivation of speech rights.Second, send comments to agencies that have the power to regulate in this area, such as the Consumer Financial Protection Bureau and the Securities and Exchange Commission.Third, absent legislation to prohibit unfair terms, federal and state agencies should use their budgets and bully pulpits alike to focus on the corporate fine-print contracts and posit alternatives. We suggest they develop model, consumer road-tested, standardized contract provisions without unconscionable terms favoring vendors or employers. A “fair contract seal of approval,” akin to a “fair trade” or “green-star” seal, could help designate a simple, do-no-harm type of contract in every industry.Fourth, tell the stories of those harmed. Use the small claims courts to provide visibility and remedies, especially when there are no alternative fora. Share the sample egregious terms you have encountered, the horrible outcomes that demonstrate how the private ordering of contracts undermines tort law, and ideas for model provisions.33The true cost of boilerplate to our economy includes the devastation and personal suffering these nonnegotiable contracts wreak as they spin off “externalities,” the way corporate polluters spin off their diseases: defrauded consumers, devastated families harmed by negligent and wrongful behavior, and workers prevented from redressing workplace wrongs, to name just a few. These crises share one common feature: people bound by

unfavorable terms they have not read or cannot understand, who are saddled with harms, ranging from economic insecurity to unchallenged wrongful death. For them, the law has been appropriated by private corporations.Instead of taking proactive measures to address harmful contractual terms, government allows economic catastrophes and ignores the unredressed and vast imbalance of power between corporate profit maximizers and consumers. Lawyers and the government have to stop this expanding coup d'etat against the civil justice system on the front end, instead of reacting defensively—and far too little—to the damage done to people and our country's economy.Ralph Nader is a consumer advocate and can be reached at info@csrl.org. Theresa Amato, the executive director of Citizen Works and its Fair Contracts Project, can be reached at theresa@citizenworks.org.—© 2014, Ralph Nader and Theresa Amato.Notes:See Paul Bland, Fighting Mandatory Arbitration Clauses, 48 Trial (Oct. 2012).Spring Lake NC, LLC v. Holloway, 110 So. 3d 916, 917 (Fla. 2d Dist. App. Feb. 2013).Id.Id.Id. at 918.Spring Lake NC, LLC, 110 So. 3d at 918.Id. The Florida Supreme Court declined to accept jurisdiction. Est. of Holloway v. Spring Lake NC, LLC, 2014 WL 351928 (Fla. Jan. 29, 2014).Lauren E. Willis, Against Financial-Literacy Education, 94 Iowa L. Rev. 197, 211–26 (2008).Yannis Bakos et al., Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts 3, 26 (4th Annual Conf. on Empirical Leg. Stud., N.Y.U. L. & Econ. Research Paper No. 09-40, Oct. 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256 (study of 45,091 households shopping online showed that only one or two in 1,000 accessed the End User License Agreements terms for a median time of 29 seconds; average agreements of 2,277 words take an average reader eight to 10 minutes to read).132 S. Ct. 1201, 1203-04 (2012) (per curiam).Id. (leaving open on remand that arbitration clauses could be "unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA").See e.g. AT & T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (California's state law deeming class action arbitration waivers unconscionable preempted by the FAA; the FAA's "savings clause," set forth in 9 U.S.C. §2, "preserves generally applicable contract defenses").See e.g. Concepcion, 131 S. Ct. 1740; Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp., 559 U.S. 662 (2010) (price-fixing antitrust claims against shipper in arbitration barred because FAA does not force a party to submit to class arbitration unless the parties explicitly agreed).Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310–11 (2013) (FAA does not permit courts to invalidate Amex's contractual class arbitration waiver where substantive antitrust rights would be too costly to vindicate by businesses seeking to challenge tying arrangement).See e.g. CompuCredit Corp v. Greenwood, 132 S. Ct. 665 (2012) (Credit Repair Organization Act (CROA) is subject to the FAA, and therefore CROA claims could be subject to arbitration clauses).See e.g. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (arbitration applies to employee race discrimination claim); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

(arbitration applies to employee age discrimination claims).See Stolt-Nielsen S.A., 559 U.S. 662.See Margaret L. Moses, Arbitration Law: Who's in Charge?, 40 Seton Hall L. Rev. 147 (2010).David Horton, The Shadow Terms: Contract Procedure and Unilateral Amendments, 57 UCLA L. Rev. 605, 608-10 (2010) (both contracts and some state statutes confer unilateral modification powers, though courts are split on enforcement).(Princeton U. Press 2013).Memo. from Margaret Jane Radin, Professor, U. of Mich. L. Sch., to Ctr. for Study of Responsive Law, Contract Gobbling Up Tort (Dec. 13, 2012) (on file with authors).Margaret Jane Radin, Boilerplate: A Threat to the Rule of Law?, in Private Law and the Rule of Law (Lisa M. Austin & Dennis Klimchuk eds., Oxford U. Press forthcoming 2014).Margaret Jane Radin, An Analytical Framework for Legal Evaluation of Boilerplate, in George Letsas et al., Philosophical Foundations of Contract Law (Oxford U. Press forthcoming 2014).See Florencia Marotta-Wurgler & Robert Brendan Taylor, Set in Stone? Change and Innovation in Consumer Standard Form Contracts 3-5 (7th Annual Conf. on Empirical Leg. Stud., N.Y.U. L. & Econ. Research Paper No. 12-40, July 11, 2012), http://ssrn.com/abstract=2106875.See. e.g. James Gibson, Vertical Boilerplate, 70 Wash. & Lee L. Rev. 161, 192–93 (2013) (vertical boilerplate study of average computer purchase revealed 74,897 contractual words, the majority of which had terms presented after arrival or product opening).Nancy S. Kim, Wrap Contracts: Foundations and Ramifications 26–27, 35–36 (Oxford U. Press 2013).Telephone interview with William M. Shernoff, founding partner, Shernoff Bidart Echeverria Bentley LLP (Oct. 1, 2013).Kim, supra n. 26, at 1–2.Interview with Deepak Gupta, principal, Gupta Beck PLLC (Apr. 22, 2013).Interview with Joseph W. Belluck, principal, Belluck & Fox LLP (June 7, 2013).Radin, supra n. 20, 197–216.E.g. to address the nursing home context, Congress could have passed the Fairness in Nursing Home Arbitration Act of 2012, which eliminated predispute arbitration clauses in nursing home contracts. It died in committee.Consider sharing these examples with Faircontracts.org by emailing info@faircontracts.org.