

ISSN 1936-5349 (print)  
ISSN 1936-5357 (online)

# HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS  
FELLOWS' DISCUSSION PAPER SERIES

## ON THE UNEXPECTED USE OF UNENFORCEABLE CONTRACT TERMS: EVIDENCE FROM THE RESIDENTIAL RENTAL MARKET

Meirav Furth-Matzkin

Published in *Journal of Legal Analysis*, Vol. 9, No. 1 (June 2017)

Discussion Paper No. 61  
*Revision*

06/2017

Harvard Law School  
Cambridge, MA 02138

This paper can be downloaded without charge from:

The Harvard John M. Olin Fellow's Discussion Paper Series:  
[http://www.law.harvard.edu/programs/olin\\_center](http://www.law.harvard.edu/programs/olin_center)

# ON THE UNEXPECTED USE OF UNENFORCEABLE CONTRACT TERMS: EVIDENCE FROM THE RESIDENTIAL RENTAL MARKET

---

*Meirav Furth-Matzkin\**

## ABSTRACT

This article explores the prevalence of unenforceable and misleading terms in residential rental contracts. For this purpose, the study analyzes a sample of seventy residential leases from the Greater Boston Area in terms of Massachusetts Landlord and Tenant Law. The article's findings reveal that landlords often use deceptive—as well as clearly invalid—provisions in their contracts, and regularly fail to disclose the vast majority of the mandatory rights and remedies that the law bestows upon tenants in their leases. Building on psychological insights and on survey evidence, the article suggests that this drafting pattern may significantly affect tenants' decisions and behavior. In particular, when a problem or a dispute with the landlord arises, tenants are likely to perceive the terms in their lease agreements as enforceable and binding, and consequently forgo valid legal rights and claims. Therefore, the article expects that such clauses will persist as long as monitoring and enforcement mechanisms do not sufficiently deter landlords from using such terms in their contracts. In light of this evidence, the article discusses preliminary policy prescriptions.

---

\* Law School, Harvard University, Cambridge, MA, USA. Email: [mfurth@sjd.law.harvard.edu](mailto:mfurth@sjd.law.harvard.edu)

\* Terence M. Considine Fellow at the John M. Olin Center for Law, Economics and Business, Research Fellow at the Program on the Foundations of Private Law and the Program on Negotiation, and S.J.D. candidate, Harvard Law School. I am deeply indebted to Oren Bar-Gill, Steve Shavell, and Eyal Zamir for multiple conversations and invaluable advice. Thoughtful suggestions and comments were provided by Jonathan Arbel, Netta Barak-Corren, Alma Cohen, Richard Craswell, Barbara Fried, Dave Hoffman, Louis Kaplow, Kobi Kastiel, Yaniv Lushinsky, Florencia Marotta-Wurgler, Zvi Matzkin, Ariel Porat, Henry Smith, Cass R. Sunstein, Aluma Zernik, an anonymous referee, and the participants in the Law and Economics Seminar at Harvard Law School, the Private Law Workshop at Harvard Law School, the 26th Annual Meeting of the American Law and Economics Association (ALEA 2016), the 10th Annual Conference of Empirical Legal Studies (CELS 2015), the third conference of the Stanford Program on Law and Society, the 20th Annual Conference of the Society for Institutional & Organizational Economics (SIOE 2016) and the Doctoral Students Workshop at the Hebrew University Law School. I also thank Jennifer Allison and Arevik Avedian for helpful support with the research and statistical analysis. Generous financial support was provided by Harvard Law School's John M. Olin Center for Law, Economics and Business and the Harvard Law School's Program on the Foundations of Private Law. An earlier version of this article was awarded the Harvard Law School's John M. Olin Prize in Law and Economics.

## 1. INTRODUCTION

Standard form contracts have become omnipresent in our daily lives. A particularly common concern among scholars, regulators, and courts is that such contracts (which consumers often sign without reading) regularly contain one-sided terms (e.g., Kessler 1943; Rakoff 1984; Gillette 2005; Marotta-Wurgler 2008; Ben-Shahar 2010; Radin 2013) or terms that, although enforceable, exploit consumers' cognitive biases (e.g., Korobkin 2003; Bar-Gill 2012). Yet, little consideration has been given to the possibility that consumer contracts include unenforceable terms or misinformation about consumers' legal rights.

The paucity of research on this issue is puzzling in light of the potential impact of such a practice on consumers. Although unenforceable terms might not be salient to consumers during their purchasing decisions, they are likely to affect their perceptions of the law—and consequently their behavior—after making the purchase, when a problem emerges or when seeking to ascertain their rights and remedies as buyers. At this point in time, given that consumers are typically uninformed about the rules mandating their relationships with sellers, they are likely to rely on their contracts for determining their rights and obligations as buyers. If these contracts contain unenforceable clauses that deny (or restrict) their mandatory rights and remedies, or misleading terms that misinform them about the legal state of affairs, uninformed consumers are likely to (mis)perceive such terms as enforceable and binding, and consequently relinquish valid legal rights and claims.<sup>1</sup>

A profit-maximizing seller may realize that she can leverage her superior acquaintance with the law to her advantage, by drafting contracts that are likely to affect consumers' perceptions of their legal rights, and subsequently their decisions, resulting in profit to the seller.<sup>2</sup> Yet, importantly, sellers might also simply lack the incentive to ensure that their contracts comply with the regulatory requirements. Put differently, sellers might use legally invalid terms—not necessarily with the intention of extorting profit, but rather because they are simply uninformed about the applicable law themselves.

Whether the use of unenforceable terms is intentional or inadvertent, it is likely to adversely affect consumers, shaping their decisions and behavior in

---

1 For example, consumers might refrain from filing meritorious suits if their contracts include invalid disclaimers of tort liability or invalid choice of law or choice of forum clauses. See, e.g., Stolle & Slain (1997), Wilkinson-Ryan (2017).

2 This possibility is consistent with the many examples in the literature of sellers knowingly exploiting consumers' misperceptions, through advertising, marketing, and design techniques (Hanson & Kysar 1999; Grubb 2009; Heidues & Koszegi 2010; Spiegel 2011; Bar-Gill 2012; Zamir 2014, pp. 55–66).

several ways. First, when a problem arises, consumers may unquestioningly behave in accordance with their contract terms, ignorant of their unenforceability. Second, even if they do reach out to the seller in an attempt to resolve the problem, they might relent once the seller brings the relevant contractual terms to their attention. Finally, if consumers reach a compromise with the seller, it might be on the basis of the false assumption that their entire contract is enforceable and binding, and might therefore influence the nature of the resulting agreement. In all of these cases, consumers are likely to give up valid legal rights and claims, and end up bearing costs that the law deliberately and explicitly imposes on sellers.

Given the potentially harmful impact of unenforceable and misleading terms on consumers' choices and well-being, one might expect that systematic examination of the "use and abuse of contract behavior in the shadow of contract law and beyond" would be conducted as soon as initial signs of such abuse emerged (Speidel 1995, pp. 254–255). However, this issue has so far gained limited scholarly attention, and empirical investigation into this practice is particularly scarce.<sup>3</sup>

In this article, I empirically explore this understudied pattern of contracting behavior. Building on a hand-collected database of seventy residential rental leases from the Greater Boston Area in Massachusetts, I examine and report whether the sampled contracts comply with, and accurately reflect, the mandatory rules governing tenant–landlord relations. I find, in short, that they often do not. Residential leases regularly misinform tenants about their most basic rights and remedies. And in some cases, they even flatly contravene the law.

This study focuses on the residential rental market, in part because of the significant role that residential leases play in modern urban society, and in part because of the pervasive mandatory regulation of residential leases. This regulation, which includes multiple substantive and disclosure requirements, renders the residential rental market an interesting test case for other types of consumer markets, where such regulation is gradually being adopted.<sup>4</sup>

This article includes two interrelated studies. The first study presents a comprehensive analysis of the use of unenforceable and misleading terms in residential

---

3 The few studies that addressed the use of unenforceable terms in standard form contracts have analyzed the implications of this practice based on the assumption that such terms exist, while often relying on anecdotal evidence (see Olafsen 1978; Kuklin 1988; Stolle and Slain 1997; Sullivan 2009).

4 In light of the growing realization that consumer markets are prone to, and often suffer from, both traditional and behavioral market failures, there is a developing trend toward broader mandatory regulation of consumer contracts around the globe (e.g., Ben-Shahar 2010, p. 228; Braucher 2012). Such mandatory regulation consists of both substantive and disclosure requirements. For example, the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 has introduced both substantive restrictions (including price caps and other bans) and disclosure obligations into the Credit Card market (e.g., Bar-Gill 2012, pp. 105).

leases. Its findings uncover that these contracts not only routinely omit various rights and remedies that the law bestows upon tenants, but also frequently include unenforceable terms that conflict with the law and misleading terms that misrepresent it. Such terms typically purport to shift responsibilities and liabilities from landlords to tenants or to restrict tenants' mandatory rights and remedies.

The second study explores whether, and to what extent, tenants rely on their leases to ascertain their rights and duties, and how rental problems are resolved under the shadow of the lease. Building on a survey of 279 tenants from Massachusetts, the study's findings reveal that most tenants read their leases during the rental period. Moreover, tenants mainly—and sometimes solely—rely on their leases to determine their rights and obligations as renters, and only rarely seek legal advice when a rental problem or a dispute with the landlord arises.

Admittedly, there are multiple types of consumer contracts, and the current study only explores one of them, building on a hand-collected sample of residential leases from Massachusetts. However, in view of the magnitude of the results, and their connection with firmly established evidence of manipulative market practices in other realms not involving contract drafting behavior (such as pricing structures and product design),<sup>5</sup> I expect to find that the identified contracting behavior—the systematic use of unenforceable and misleading contract terms—persists in other types of consumer contracts and markets, where enforcement and monitoring mechanisms do not sufficiently deter sellers from using such terms in their boilerplates.

The article's findings have clear implications for policymakers and regulators: mandatory regulation aimed at enhancing consumers' rights and protections will not be effective unless it is adequately enforced. Legal rights and remedies have little meaning if the consumer or tenant is unaware of them, and she will seldom learn of their existence from the standard form contracts she signs. One possible solution, discussed in the article, is to require landlords to use a pre-approved standard form contract and to employ public enforcement mechanisms to ensure compliance.

The article proceeds as follows. Section 2 presents the study's theoretical background, surveys the relevant literature, and explains the motivation behind this project. Section 3 presents an overview of the residential rental market and of the U.S. Landlord and Tenant Law. Section 4 provides a detailed content-based analysis of seventy residential leases from Massachusetts. This analysis is followed by Section 5, which presents a survey of tenants' experiences with their leases. Section 6 then discusses the implications of the findings and

---

5 The article's findings are consistent with many examples in the literature of sellers knowingly exploiting consumers' misperceptions, through advertising, marketing, and design techniques. See footnote 2 and the references therein.

puts forward several policy prescriptions. Section 7 concludes. The [Supplementary Appendices](#) of this article include the codebook and the survey questionnaire used in this study.

## 2. BACKGROUND AND MOTIVATION

Consumer contracts are everywhere. We sign (or click “I agree” to) them without reading or understanding their terms, even though we realize that they govern our transactions. Much has been written about the “no-reading” problem in consumer contracts, with scholars noting that nobody reads or understands the fine print (e.g., Marotta-Wurgler 2011; Ayres & Schwartz 2014; Bakos, Marotta-Wurgler & Trossen 2014; Ben-Shahar & Schneider 2014), and warning against sellers’ use of onerous or exploitative clauses as a consequence (e.g., Rakoff 1984; Bar-Gill 2012; Radin 2013). While focusing on consumers’ non-readership and on sellers’ incentives to include unfavorable terms, the literature has overlooked a particular pattern of standard form contracting behavior: the systematic inclusion of unenforceable and misleading contract terms.

In fact, over the last couple of decades, only few scholars have actually cautioned against the use of unenforceable terms in consumer contracts. These include Kuklin (1988), who suggested that—in the absence of sufficient sanctions—sellers, employers, and landlords will be incentivized to use such clauses frequently, for profit, as these terms would induce consumers to give up their valid legal rights and claims. Kuklin subsequently analyzed the implications of this practice from ethical, deontological, and utilitarian perspectives. Drawing on this work, Sullivan (2009) continued to examine the potential negative consequences of this practice and to offer policy recommendations (*id.*, p. 1131).

Yet, despite the concerns that these authors have raised, there has been so far very little empirical investigation into the prevalence of unenforceable terms in consumer contracts. Indeed, although pathbreaking in their depth of analysis, Kuklin and Sullivan have generally taken the use of unenforceable terms as given, based on anecdotal evidence and on sellers’ incentives to include such clauses in their contracts.<sup>6</sup> Other, more empirical works, have addressed the use

---

6 See, e.g., Kuklin (1988, p. 845) (stating, in the first sentence of his article, that: “Contracts and leases commonly include terms that are unenforceable as contrary to common or statutory law,” and referring to a few anecdotal examples of unenforceable terms in a footnote; Sullivan (2009, p. 1128) (admitting that “there are few empirical studies of the frequency within which unenforceable-as-written clauses appear in contracts,” but adding that “the phenomenon is common enough to raise questions as to why it persists,” and continuing the analysis by taking “the invalidity of particular clauses as a given” and examining why they “continue to exist” (*id.*, p. 1131).

of unenforceable and misleading terms only in passing and are already rather outdated.<sup>7</sup>

This scholarly neglect is puzzling in light of the potential impact of the use of unenforceable contract terms on consumers' decisions and welfare. For even if consumers (or some of them) do not read or pay attention to the contract terms *ex ante*, they are still likely to read their contracts (or substantial portions of them) *ex post*, when a problem occurs or when a question arises concerning their rights and obligations as buyers. And at this point in time, they are likely to rely on their contracts in determining their rights and obligations, presuming that their terms are enforceable and binding.

Consumers are likely to make this assumption simply because they may see no other reason for the well-informed seller to use legally invalid clauses. Warren Mueller's classic study from 1970 corroborates this point: most participants in his survey believed that the exculpatory clauses in their mock residential leases were enforceable, when in fact they were unlikely to be upheld in court. In general, the study's participants appeared not to question the validity of their lease terms; some of them even expressed astonishment that a provision in an executed lease could be anything other than "valid and enforceable" (*id.*, p. 277). Mueller therefore observed that "it is possible that the tenant . . . finds it difficult to see any logic in filling a lease form with *legally* worthless verbiage" (*id.*, p. 274). Yet, this widely held common sense assumption is exactly what makes such "*legally* worthless verbiage" a psychologically powerful tool that can significantly affect consumers' perceptions and decisions. Stolle and Slain's (1997) experimental study offers further insight into this effect: it shows that

---

7 See, e.g., Berger (1974). Berger's study examined "how courts respond when a landlord seeks to enforce one of the more onerous terms in his lease against an uncompliant tenant" (*id.*, p. 792). The [Supplementary Appendix](#) to this study consisted of an analysis exploring the one-sidedness of standard form leases from sixteen different cities in the USA. Berger concluded that the sampled contracts are clearly skewed in favor of the landlord (*id.*, p. 791). In the context of the residential market, the author is familiar with one more study that included a content-based analysis of leases. The study was conducted in 1974 by Allen R. Bentley, who proposed an alternative lease, and examined, for these purposes, seven traditional standard form leases in New York, finding that they are out-of-date and seldom revised to reflect regulatory changes in Landlord and Tenant Law. Although these studies have laid the foundations for the current research, they largely focus on different questions, are based on a relatively small sample, and are already out-of-date. The state of the research of this issue in other markets is similar. For example, in the context of employment contracts, Sullivan (2009), in a footnote in his article, presented preliminary empirical evidence that employers often draft overbroad non-compete clauses (*id.*, 1137 n.34). The evidence was based on fifty-two U.S. district court cases decided in 2006. In the context of product warranties, Wisdom (1979) studied the effect of the Magnuson-Moss Warranty Act on sellers' product warranties. He found, *inter alia*, that only two of the sixty-four warranties in the sample failed to meet the substantive requirements concerning implied warranties (*id.*, p. 1133).

exculpatory clauses, if read, often deter consumers from seeking legal remedies.<sup>8</sup>

Given the power of the fine print to create a presumption of enforceability among consumers, profit-maximizing sellers may be motivated to misinform consumers as to their rights and remedies under the law through their contracts. Put differently, a rational seller may use unenforceable and misleading terms if she realizes that consumers might be misled into foregoing legal rights and remedies, resulting in gain to the seller.

To elucidate this point, take another, real-life, illustration: EU Consumer Law dictates that consumers are entitled to a two-year warranty on products purchased. Apple, however, included a contractual term stipulating that consumers are only entitled to a one-year warranty free of charge, while offering consumers to purchase an additional “Protection Plan,” extending the warranty to two years. In 2011, Apple was fined €900,000 by Italian authorities for misleading consumers with regard to its products’ warranty period (Djurovic 2013). Yet a year later, in 2012, the European Justice Commissioner reported that Apple continues to misinform consumers about their warranty rights in at least twenty-one EU countries (Whittaker 2013).

This example demonstrates that sellers may have a strong financial incentive to deceive consumers about the law through their standard form contracts. Indeed, as sophisticated sellers probably understand, even if a consumer suspects that a clause is unenforceable, she might still be deterred from breaching the contractual agreement to which she had “voluntarily consented,” or from challenging its enforceability in court. Consumers might be discouraged from claiming their rights through judicial procedure, given the *in terrorem* effect produced by the mere appearance of the unenforceable provision in the contract.

The deterrent effect of the fear of a potential lawsuit or losing in trial—despite the unenforceability of the contractual provision in question—has been recognized in various contexts. In the case of employment agreements, for example, several scholars have suggested that unenforceable non-compete clauses can induce employees to turn down job offers from competitors in order to avoid the risk of a lawsuit (e.g., Blake 1960, pp. 632–637; Sullivan 1977, pp. 622–623; Sterk 1993, p. 410; Fisk 2002, pp. 782–783). This effect is exacerbated

---

8 Building on this work, Wilkinson-Ryan (2017) finds that consumers feel more legally and morally bound to terms that are disclosed in the contract itself than elsewhere (e.g., in the company’s policy posted on its website), even if the term is legally dubious in either case. She therefore concludes that disclosing unfavorable terms in the contract creates a problematic assumption of enforceability when the terms turn out to be legally questionable.



by the American rule that every litigant must bear her own attorney's fees and expenses.<sup>9</sup>

In light of the potential effect of unenforceable terms on consumers' perceptions and behavior, it is surprising that empirical evidence as to the prevalence of this drafting practice in consumer contracts is scarce. More generally, despite the increasing prominence of standard form contracts in our daily lives, the empirical scholarship analyzing their content is still surprisingly rare.<sup>10</sup>

To complement the existing literature, this article presents a systematic content-based analysis of unenforceable and misleading terms in residential rental contracts in Massachusetts, as well as a survey of tenants' experiences with their leases. The next section will briefly describe the U.S. residential rental market and the Landlord and Tenant Law in the USA and Massachusetts.

### 3. RESIDENTIAL RENTAL CONTRACTS

#### 3.1 The Residential Rental Market

The residential rental market in the USA is constantly and rapidly growing, both in response to urbanization processes and as a consequence of the sub-prime mortgage crisis (Soshkin 2016; Obrinsky 2015). As of October 2016, more than 111 million U.S. residents (or almost 44 million households)—representing 35 percent of the U.S. population—live in rental housing.<sup>11</sup> In Massachusetts alone (as of October 2016), there are more than 800,000 renters, constituting 12.7 percent of the entire population.<sup>12</sup>

The residential rental market consists primarily of individual landlords ("moms and pops") who rent out single units on their own residential property or in small buildings.<sup>13</sup> However, over half of the market's revenue is generated

---

9 Under some statutes, tenants are entitled to attorney's fees, but even if they are aware of these, they may be reluctant to expend the necessary resources to defend their rights and remedies, for fear of the risk (however slight) that the court would refuse to strike down the objectionable lease provision. Ultimately, consumers and tenants might succumb to the written contracts they signed (or clicked "I agree" to), even if they suspect that the clauses they contain will not be upheld by the court.

10 Notable exceptions include: Wisdom (1979; examining the impact of the enactment of the Magnusson-Moss Warranty Act on sellers' product warranties), Priest (1981; examining home appliance warranties), Marotta-Wurgler (2007, 2008, 2011; examining the content of End-User License Agreements), and Schwarcz (2011; examining the content of insurance contracts).

11 See *Quick Facts: Resident Demographics* (2015; updated October 2016), NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), <https://nmhc.org/Content.aspx?id=4708> (last accessed December 29, 2016).

12 See *Number of Renters in Each State*, [http://www.nmhc.org/Content.aspx?id=4708#State\\_Dist](http://www.nmhc.org/Content.aspx?id=4708#State_Dist) (last accessed December 29, 2016).

13 According to Delaney (2004), individual landlords provide for approximately 75 percent of Massachusetts' rental housing (*id.*, p. 1110).

by larger firms, including residential rental companies and real-estate trusts, which dominate the ownership of large apartment complexes (Soshkin 2016; Obrinsky 2015). As of April 2016, the market's annual revenues exceed \$175 billion (Soshkin 2016).

### 3.2 Landlord and Tenant Law: A Brief Overview

In the 1960s and early 1970s, the USA experienced a revolution in Residential Landlord and Tenant Law (Abbott 1976; Cunningham 1979; Schoshinsky 1980; Glendon 1982; Rabin 1984). This revolution, which enhanced the rights of tenants through judicial and legislative lawmaking, was inspired by the rise of the Civil Rights Movement and by developments in Consumer Protection Law. It was rapid and pervasive, with almost all jurisdictions adopting major reforms in Landlord and Tenant Law (Rabin 1984, p. 521).

In many states, legislative reform preceded and often hastened shifts in case law; in others, statutes codified judicial precedents. Some of these statutes focused mainly on establishing new remedies for a landlord's failure to abide by housing regulations. Others limited themselves to granting tenants new rights, and left it to the courts to decide upon the remedies (Glendon 1982, p. 523). The development of new judicial and statutory doctrines in this field resulted in the drafting of the Model Residential Landlord and Tenant Code (the Model Code) and the subsequent enactment of the Uniform Residential Landlord and Tenant Act (URLTA)—a sample law governing residential landlord and tenant exchanges, established in 1972 by the U.S. National Conference of Commissioners on Uniform State Laws. As of 2016, the URLTA has been adopted, in whole or in part, by twenty-six states. Many other states have enacted variations of URLTA or the Model Code.

The changes in Landlord and Tenant Law lie at the crux of the landlord-tenant relationship, both in legal and practical terms. It is not within the scope of this article to discuss these changes at length. However, some of the major changes are worth noting, as they are relevant for this study. One such reform concerns the implied warranty of habitability. Before 1969, the law in most jurisdictions was simple: *caveat lessee*. The landlord was generally not responsible for repairing defects in the premises—regardless of whether they were present when the premises were leased or occurred thereafter—unless the parties agreed otherwise at the time of finalizing the contract. Today, most jurisdictions follow the opposite rule: the landlord is obliged to repair *all* defects (patent and latent), irrespective of when they emerge, and notwithstanding any

agreement to the contrary (Cunningham 1979; Schoshinsky 1980, §3:13; L'Abbate 1981; Bresnick 1982, p. 354).<sup>14</sup>

Another fundamental change concerned the landlord's liability in torts. By 1976, over twenty state legislatures had determined that exculpatory clauses in residential leases, which purportedly disclaimed the landlord's negligence liability for personal injuries or damage to property, were void and unenforceable, and the URLTA adopted this approach.<sup>15</sup> Other changes included anti-discrimination laws; regulation of the landlord's power to evict tenants at the end of a lease; and various other measures aimed at providing tenants with enhanced protections (see, e.g., Rabin 1984, pp. 531–539).

Although Massachusetts has not officially adopted the URLTA, its Landlord and Tenant Laws largely follow the URLTA model. Massachusetts' General Laws include a variety of rules that are protective of tenants, including curbs on landlords' ability to deny liability for loss or damage; anti-discrimination rules; restrictions on landlords' remedies upon tenants' breach of contract; regulation of security deposits and advanced payments; various protections of tenants' procedural rights and access to court; and the imposition of various maintenance and repair obligations on the landlord (see, e.g., Warshaw 2015). For a detailed description of Massachusetts Landlord and Tenant Law, see Section 4.2 below.

## 4. A CONTENT-BASED ANALYSIS OF RESIDENTIAL LEASES

### 4.1 The Sample

This study is based on a hand-collected sample of seventy residential leases from the Greater Boston Area in Massachusetts. The sample was established by approaching tenants, real-estate agents, and private landlords through emails that explained that the leases are being collected for academic research purposes (residential companies that were similarly asked to send their leases refused to cooperate). The snowball method was used to collect a substantial number of leases.<sup>16</sup> Overall, 500 people were approached, and the turnout rate was 14 percent. Most of the leases in the database—forty-nine contracts—were provided by tenants, three were provided by private landlords, and eighteen by real-estate agents. Twenty-three contracts, constituting one-third of the leases in the

---

14 One of the leading rulings on the implied warranty of habitability is *Javins v. First National Realty Corp.* 428 F2d 1071 (D.C. Cir.) 1970.

15 URLTA §1.403(a)(4) (1972).

16 The snowball (or chain-referral sampling) approach is used to gain access to samples which are otherwise difficult to collect. See, e.g., Biernacki & Waldorf (1981).

sample, were provided by students who rented out apartments in Cambridge, Boston, or the surrounding areas.<sup>17</sup>

Of the seventy residential leases in the sample, twenty-five were used by residential rental companies and real-estate trusts, forty were used by individual landlords, and five were used by landlords whose type is unknown. The companies in the sample include residential companies and property management firms that operate thousands of apartments, some of which are among the largest firms in the U.S. Residential Rental Market.<sup>18</sup>

Interestingly, thirty-seven of the sampled leases were based on commercial standard forms. The commercial forms (some of which were available online) were drafted by commercial publishers or by landlords' and realtors' associations, representing owners and managers of thousands of residential units across Massachusetts. In some of these forms, certain provisions were amended, added, or stricken, indicating that at least some of the tenants *do* negotiate certain terms with their landlords.

On average, the leases in the sample contained thirty-four clauses, with a mean of eight provisions revolving around issues regulated by Landlord and Tenant Law, and twenty-six dealing with issues that were outside the scope of the mandatory regulation (and therefore left to the discretion of the contracting parties). As elaborated below, the former type of provisions include clauses concerning landlord's liability for loss or damage, maintenance and repair obligations, the hold and return of a security deposit, the termination of the tenancy, entry to the premises, and so forth.

The latter type of provisions commonly addressed issues such as: (i) *Tenant's duties* to insure personal property, deliver the keys at the termination of the lease, and refrain from making unlawful or noisy use of the rented premises; (ii) *Restrictions on tenants' conduct*, including on tenants' ability to paint, decorate, or make any alterations to the premises; to park on the premises; to sublet or

---

17 I recognize that students are over-represented in the sample. One could imagine that landlords might be particularly harsh with students because they are especially likely to be inexperienced and unaware of the law. Students are also likely to be more financially constrained and perhaps more likely to damage property. An alternative hypothesis is that landlords might use harsh contracts with students to enforce such terms selectively only against those students who are behaving unreasonably (in a similar vein, see Bebchuk & Posner 2005). My impression, based on the contracts in the sample, is that landlords used their regular standard form contracts, notwithstanding the fact that tenants were students. Moreover, I ran multiple linear regressions, and found that the tenant's type (a binary variable: student or non-student) did not significantly affect the rates of unenforceable and misleading terms. See the regression table in Section 4.3.3. Yet, future research based on larger and more representative samples is, of course, warranted.

18 The largest company in the sample, headquartered in Boston, operates more than 80,000 units in the USA, and the second largest company in the sample operates more than 10,000 units in the Boston Metropolitan Area.

**Table 1. Summary Statistics of the Apartments and Leases in the Sample**

Variable	n	Mean	SD	Quantiles				
				Min	0.25	Mdn	0.75	Max
Bedrooms	43	2.37	0.90	1	2	2	3	5
Rent (\$)	67	2,060	865	800	1,550	1,930	2,575	6,250
Rental period (months)	70	12	5.97	6	12	12	12	43

assign the premises; or to raise pets in the apartment; (3) *Disclaimers of landlord's liability* for damage resulting from the removal of tenant's goods from the premises, or from the landlord's failure to abide by her duties as a result of governmental actions or regulations; and (4) *Landlord's rights* to terminate the lease in case of fire or other casualty, to be reimbursed for repairs made as a consequence of tenant's negligence or misconduct, and so forth. Most of the leases also contained a *Severability Clause*, stipulating that if any provision is held unenforceable, the remainder of the lease shall not be thereby affected.<sup>19</sup> Although the latter type of terms is not within the scope of this study, it was difficult not to observe that these provisions, left to the discretion of the parties, are generally more favorable to the landlord.

The study focuses on exploring the content of the sampled leases, and does not report the physical characteristics of the forms. However, as a general observation, the leases in the sample were mostly unfriendly to the reader in terms of length, font size, spacing, and the language used. The leases could not be read and easily understood by a layperson without legal assistance. The combination of unfriendly fine print and complex legal jargon was a common and dominant feature of the sampled leases.<sup>20</sup>

Table 1 reports several key summary statistics of the apartments and leases in the sample. The mean number of bedrooms in the sampled apartments is 2.37;

19 Two additional common terms in the sampled leases were the “non-surrender” clause (stipulating that neither the vacating of the premises by the tenant nor the delivery of keys shall be deemed a surrender or an acceptance of surrender of the leased premises) and the “waiver” clause (stipulating that landlord's waiver of one breach of any term under the lease shall not be considered to be a waiver of that or any other term).

20 For example, take the following liability limitation clause: “Tenant agrees to indemnify and save Landlord harmless from all liability, loss or damage arising from any nuisance made or suffered on the premises by Tenant, his family, friends, relatives, invitees, visitors, agents, or servants or from any carelessness, neglect, or improper conduct of any such persons. Subject to the provisions of applicable law, Landlord shall not be liable for damage to or loss of property of any kind while on the premises or in any storage space in the building nor for any personal injury, unless caused by [the] negligence of [the] Landlord.” The combination of the extensive use of legal terms like “indemnify,” “nuisance,” “liable,” and “negligence” and the length of the provision arguably makes it difficult for lay people to read and comprehend.

the mean rental payment is ~\$2,060 per month<sup>21</sup>; and the mean length of the leases is twelve months.

#### 4.2 Methodology

This article presents a content-based analysis of the leases in the sample. I will now briefly summarize the methodological approach and will then proceed to expand upon the details (for an elaborate description of the coding methodology, see the codebook in [Supplementary Appendix I](#)).

The provisions of each lease in the sample were analyzed in terms of the mandatory rules regulating the content of residential leases in Massachusetts. The Massachusetts General Laws and the State Sanitary Code (hereinafter the Code) set forth mandatory arrangements, and determine that any provision purporting to disclaim these mandatory requirements will be void and unenforceable if inserted into residential leases.<sup>22</sup> Alongside these substantive requirements, some rules also set forth disclosure mandates, obliging the landlord to disclose certain types of information to the tenant.<sup>23</sup> Importantly, the use of certain unenforceable lease terms constitutes an ‘unfair or deceptive act or practice’ under Massachusetts General Laws Chapter 93A.<sup>24</sup>

For the purposes of this study, the mandatory requirements under Massachusetts Landlord and Tenant Law were divided into fourteen categories according to subject matter. Each such category regulates a different dimension

- 
- 21 The mean rental price roughly corresponds to the mean rental prices in the Boston Area. In the city of Boston, according to *Jumpshell*, as of 2015 the mean monthly rent is \$2,100 (see Werner 2015). According to the Zillow Rent Index, the mean rental price (as of 2014) was \$2,400 and the median monthly rent (as of 2015) was \$2,480, whereas the mean rental price in Boston Metro was \$2,071. See DeLuca (2014) and Zillow, Boston Rentals, available at <http://www.zillow.com/boston-ma/home-values/> (Zillow is a national online database for real-estate, and the Zillow Rent Index provides estimated monthly rent price computed using a proprietary formula).
  - 22 Mass. Gen. Laws ch. 186, §§11, 15, 15A–F, 16 (2016); 105 Mass. Code. Regs. §410 (2017) (sets minimum standards of fitness for human habitation in residential properties). See also Office of Attorney General (2015).
  - 23 See, e.g., Mass. Gen. Laws ch. 186, §22(f) (2016) (requiring the landlord to disclose the water sub-metering and billing arrangement if the tenant is charged separately for water); 940 Mass. Code. Regs. §3.17.3(b)(3) (2017) (determining that failure to disclose the requirements concerning the hold and return of a security deposit constitutes an unfair or deceptive act or practice).
  - 24 Mass. Gen. Laws ch. 93A (2016). These laws declare that “unfair or deceptive acts or practices in the conduct of any trade and commerce” are unlawful, and authorize the Attorney General to enact rules and regulations determining which acts fall under this definition (*id.*, §2(a),(c)(2016)). The 940 Code of Massachusetts Regulations, promulgated pursuant to the Act, sets forth a non-exhaustive list of unenforceable lease terms, whose inclusion constitutes an unfair or deceptive act or practice. See 940 Mass. Code Regs. §3.17 (2017). This list currently includes only certain provisions, namely: a penalty clause not in conformity with the law, a tax escalation clause not in conformity with the law, a clause requiring advanced payments in excess of those allowed by the law, and a security deposit clause not in conformity with the applicable disclosure obligations.

of the tenant and landlord's relationship, such as: maintenance and repair, advanced payments, and the hold and return of a security deposit. The fourteenth category, "Miscellaneous: Tenant's Rights," consists of nineteen different rights granted to the tenant under Massachusetts Tenant and Landlord Law (the right to a stay of judgment in summary process, the right to recover damages in case of unlawful eviction, the prohibition on discrimination and reprisals, certain rights granted to tenants who are victims of domestic violence, procedural rights, and so forth).

Each sampled lease was examined in terms of all of these categories. Under each category, I noted whether the lease contains a provision that complies with the law, which was coded as "enforceable;" a provision deemed void under Massachusetts Law, which was then coded as "unenforceable;" a provision that selectively discloses the law while misinforming tenants of their rights and remedies, which was coded as "misleading;" or no provision at all, coded as "total omission" or "no provision," as will be explained below.

This coding method allowed me to draw a distinction between misleading clauses that only tell a part of the story, and unenforceable clauses that are in direct and explicit conflict with the law. Whereas unenforceable terms misstate the law by contravening it outright, misleading clauses misstate the law by selectively disclosing only a particular part of it—namely, the tenant's duties or the landlord's rights and remedies. Notably, however, both unenforceable and misleading terms are equally likely to generate tenants' misconceptions about the applicable legal framework. Rather than view this coding as a hard and fast classification, we might think of it as a spectrum, with clauses that are clearly enforceable and accurately reflect the law at one end, clauses that are unequivocally invalid at the other, and various shades of misleading clauses that lie on the cusp between enforceability and invalidity in between.

Although the article has pointed out that landlords have an incentive to include unenforceable and misleading terms in their leases, the coding of a provision as misleading or unenforceable does not imply anything with respect to the *mens rea* of the contract's drafter, nor does it suggest anything about the intention of the landlord who uses it. Rather, a clause is classified as unenforceable based on its divergence from the legal arrangement and as misleading based on its potential impact on the tenant. If a tenant who is unfamiliar with the legal state of affairs is likely to be misled by a certain term upon reading it (typically because it selectively discloses the applicable law), the provision is classified as misleading.

Note that when a lease clause failed to meet the *mandatory* disclosure requirements concerning a specific category, it was coded as "unenforceable" if

the law renders such term void, and as “misleading” if the law does not render the relevant lease provision void, but determines that such a failure constitutes an unfair or deceptive act or practice under the Massachusetts Consumer Protection Act.

Importantly, the study seeks to capture not only the inclusion of provisions that are likely to mislead tenants about the legal state of affairs, but also the exclusion of information concerning the tenants’ rights and remedies from the lease’s scope. In cases of exclusion, the tenant is not misled about the legal state of affairs concerning a specific issue, but simply never learns of the legal arrangement in the first place because it is entirely omitted from the lease. The instances coded as “total omissions” indicate failures to mention the legal arrangement concerning the category at hand. For example, the law mandates the landlord’s and the tenant’s maintenance and repair responsibilities. If the lease did not address any of the landlord’s or tenant’s maintenance and repair duties, it was coded as “total omission” under the “maintenance and repair” category. This classification does not suggest that, as a normative matter, landlords should voluntarily disclose information in their leases about the applicable legal arrangement if the law does not require them to do so. It only indicates that, as a descriptive matter, the relevant lease did not disclose a certain mandatory legal arrangement to the tenant.

In order to distinguish between situations in which the lease fails to disclose a mandatory arrangement and those in which a legal provision becomes inapplicable or irrelevant, the former situations were coded as “total omissions” and the latter—as “no provision.” To illustrate this distinction, consider the landlord’s obligations concerning the hold and return of a security deposit. The law places heavy restrictions on the landlord in this regard, but the landlord can decide not to demand a security deposit at all. If the landlord does not require a security deposit, the legal arrangement concerning the hold and return of security deposits becomes inapplicable. I therefore coded such leases as including “no provision” under the “security deposit” category.

Since Massachusetts’ landlord–tenant law is based predominantly on statutes that establish clear-cut rules rather than ambiguous standards, it provides relatively objective criteria for determining whether a lease complies with the law, conflicts with it, misstates it, or fails to mention it. Nonetheless, the coding decisions used here required a certain degree of discretion. Deciding whether to code a certain provision as *misleading* typically required the greatest degree of discretion. Unlike the decision of whether to code a provision as enforceable or unenforceable, which solely involved the comparison of the relevant clause to the legal benchmark, the decision whether to code a certain provision as *misleading* inevitably required an estimation of the potential impact of this clause on tenants who are uninformed about the law. Thus, where possible, I consulted



judicial decisions concerning the enforceability and deceptiveness of lease terms in order to maintain a reasonable degree of objectivity and reliability in my coding decisions.

It must be admitted, however, that although the coding method presented above achieves a reasonable degree of objectivity, it has its limitations. First, it does not capture *the extent* to which the clauses in each category deviate from applicable law or misrepresent it. Second, this approach does not assess the relative importance of the different lease terms. In future research, these limitations could be mitigated by creating an “unenforceability and deceptiveness” index, which assigns different scores to different terms, as well as to different degrees of deviations from the law.<sup>25</sup> For the modest purposes of the current research—mainly to take a first step toward exploring the use of unenforceable and misleading terms in residential leases—I chose the current, simpler coding method.

Finally, it was usually the case that different categories were addressed in separate lease clauses. However, in leases that contained several clauses belonging to the same category, the latter were coded holistically. For example, when a lease contained more than one clause concerning maintenance and repair obligations, they were examined in aggregate in terms of the mandatory rules governing them. If, when read together, they conflicted with or misstated the law, they were coded as unenforceable or misleading, respectively. Similarly, when one clause referred to more than one category, it was seen as consisting of several separate provisions.<sup>26</sup>

I will now present the fourteen categories of provisions that are mandated by Massachusetts Landlord and Tenant Law and briefly explain how I coded the provisions in light of this legal framework (the full coding scheme can be found in [Supplementary Appendix I](#)). Overall results will follow.

---

25 Prominent examples of studies using similar indexes include Marotta-Wurgler (2007) and Schwarcz (2011). Marotta-Wurgler’s study examined twenty-three common EULA terms, grouped into seven categories. For the purposes of the study, the author constructed an “overall bias index”, capturing each EULA’s net “buyer friendliness” by assigning points for each term that deviated from the default in favor of either the seller or buyer. Schwarcz (2011), on the other hand, used departure values in order to account for the differences between smaller and larger deviations from the default rule in the context of standard form insurance policies. For a critical review of these indexing methods, see Zamir & Farkash (2015).

26 For example, if one clause addressed both maintenance obligations and the landlord’s liability for loss or damage to the tenant or third parties, it was broken into two provisions for the purposes of the research, and the two provisions were coded separately under each issue. In this case, one clause could consist of an enforceable maintenance provision and an unenforceable liability waiver, and coded accordingly.

#### 4.2.1. *Landlord's Liability for Loss or Damage*

Massachusetts law determines that a landlord cannot renounce her liability for injuries, loss, or damage caused to tenants or third parties through her negligence, omission, or misconduct; and that a lease clause purporting to eliminate said liability shall be void and unenforceable.<sup>27</sup> Clauses that acknowledged the landlord's liability in negligence were therefore coded as enforceable, whereas clauses that excluded or indemnified the landlord from liability were coded as unenforceable. Finally, leases that failed to address landlord's liability were coded as "total omission."

#### 4.2.2. *The Warranty of Habitability*

The warranty of habitability—the landlord's implied guarantee that the leased premises are fit for human occupation—has become an integral part of the Landlord and Tenant Law in Massachusetts.<sup>28</sup> Under the warranty, which cannot be overridden by contract, the tenant is entitled to a safe and habitable living environment throughout the tenancy.<sup>29</sup> If the landlord breaches the warranty by failing to comply with the relevant requirements laid down in the Code or the local health regulations, the tenant has the right to withhold rent and the landlord might be subject to penalties as stated in the Code.<sup>30</sup>

A lease term acknowledging the warranty of habitability was coded as enforceable. On the other hand, a provision disclaiming the warranty, for example, by stating that "there is no implied warranty of habitability," or that "the tenant acknowledges that it accepts the unit in its 'AS IS' condition," was coded as unenforceable.<sup>31</sup> Lease terms that conditioned the warranty's

27 Mass. Gen. Laws ch. 186, §15 (2016); See also *Norfolk & Dedham Mutual Fire Insurance Co. v. Morrison*, 924 N.E.2d 260, 266 (Mass. 2010); *Bishop v. Tess Realty Trust* 942 N.E.2d 173 (Mass. 2011) (holding landlord liable for injury caused to the tenant when ceiling plaster fell into her eye).

28 See *Boston Housing Authority v. Hemingway*, 293 N.E.2d, 843 (Mass. 1973). Such a warranty means that "at the inception of the rental, there are no latent or patent defects in facilities vital to the use of the premises for residential purposes and that such facilities will remain during the entire term in a condition which makes the property livable" (*id.*).

29 See *id.* The Court asserted that, "such warranty, insofar as it is based on the State Sanitary Code and local health regulations, cannot be waived by any provision of the lease or rental agreement" (*id.*, pp. 843). Such a waiver would constitute a violation of Mass. Gen. Laws ch. 93A (2016) (the Consumer Protection Law). See also *Leardi v. Brown*, 474 N.E.2d, 156–167; *Feldman v. Jasinski*, Mass. App. Ct. 243 (2009).

30 *Boston Housing Authority*, *supra* 28 N.E.2d, 844 (Mass. 1985). The Court determined that "the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition."

31 This coding is consistent with the Massachusetts case law. In *Leardi*, *supra* 29 N.E.2d, the Massachusetts Supreme Judicial Court upheld the lower court's decision to deem unenforceable a lease provision stipulating that "[u]nless Tenant shall notify Landlord to the contrary within two

application upon the tenant's fulfillment of her contractual obligations were also coded as unenforceable, as they purported to limit the tenant's absolute right to habitable housing. Finally, if the warranty was not mentioned in the lease at all, it was coded as "total omission" under this category.

#### 4.2.3. *Covenant of Quiet Enjoyment*

Under Massachusetts law, the landlord makes an implied covenant not to disturb the tenant in the enjoyment of the premises, and any waiver of this provision in a contract is void and unenforceable.<sup>32</sup> The law penalizes any landlord who interferes with the quiet enjoyment of the tenant, for example, by willfully failing to furnish hot water, heat, light, or other services, or by attempting to regain possession of the premises by force. Any violation of the landlord's duties that effectively deprives the tenant of her enjoyment of the premises constitutes a breach of the covenant, and entitles the tenant to triple the cost of damages caused or three months' rent (whichever is greater), as well as litigation costs and attorney's fees. The law also prohibits a landlord from taking reprisals against a tenant who reports a breach of the covenant of quiet enjoyment.<sup>33</sup>

Similarly to the coding method applied in the 'warranty of habitability' category, a clause acknowledging the landlord's covenant of quiet enjoyment (even partially or briefly) was coded as enforceable, whereas a clause attempting to disclaim or restrict the covenant by making it contingent upon tenant's fulfillment of her contractual obligations was coded as unenforceable. Lastly, if the covenant was not mentioned in the lease at all, it was coded as "total omission" under this category.

days after taking possession of the premises, the same and the equipment located therein shall be conclusively presumed to be in good, tenantable order and condition in all respects, except as any aforesaid notice shall set forth." This provision was described by the courts as "an unabashed attempt to annul, or render less meaningful, rights guaranteed by the State sanitary code." The Supreme Court upheld the lower court's conclusion that the provision was "deceptive and unconscionable," particularly when viewed in the context of "the fundamental nature of the implied warranty of habitability" (*id.*, pp. 156–160).

32 Mass. Gen. Laws ch.186, §14 (2016) (imposing liability on "any lessor or landlord who directly or indirectly interferes with the quiet enjoyment of any residential premises by the occupant" and determining that "any waiver of this provision in any lease or other rental agreement . . . shall be void and unenforceable"). See, e.g., *Doe v. New Bedford Hous. Auth.*, 630 N.E.2d 248, 255 (Mass. 1994) ("[t]he covenant of quiet enjoyment protects a tenant's right to freedom from serious interference with [her] tenancy—acts or omissions that impair the character and value of the leasehold").

33 Mass. Gen. Laws ch.186, §14 (2016).

#### 4.2.4. *Maintenance and Repair*

The Code places most of the burden of providing and maintaining the premises in a safe and habitable condition on the landlord, while imposing only minimal maintenance obligations on the tenant. The landlord is required to ensure the installation and maintenance of all facilities in the apartment and the common areas under her control.<sup>34</sup> The tenant, on the other hand, only bears maintenance and repair responsibilities with respect to her personal belongings, and is required to maintain the leased premises in a clean and sanitary condition.<sup>35</sup> The Massachusetts law prohibits a landlord from shifting the costs of repairing damage resulting from “reasonable wear and tear” to the tenant.<sup>36</sup> The Code also includes a “repair and deduct” statute, enabling the tenant—under certain conditions—to make repairs and lawfully deduct the cost incurred from the rent, or to treat the lease as abrogated and vacate the premises within a reasonable time period.<sup>37</sup> These benefits cannot be waived by the parties.<sup>38</sup>

I coded clauses that accurately state the division of maintenance and repair responsibilities between the landlord and the tenant as enforceable (even if the clauses only briefly mentioned the landlord’s duties, while elaborating on the tenant’s responsibilities), and provisions purporting to shift the maintenance and repair duties from the landlord to the tenant as unenforceable. Clauses that completely neglected to mention the landlord’s mandatory obligations while exhaustively describing the tenant’s duties were coded as misleading. Finally, leases that did not include a repair and maintenance provision were coded as “total omission.”

#### 4.2.5. *Advanced Payments*

Massachusetts statutes prohibit landlords from requiring—at the start of the tenancy or prior to it—any amount exceeding the first month’s rent, the last month’s rent, a security deposit equal to the first month’s rent, and the purchase and installation cost for a key and lock.<sup>39</sup> A clause that conflicts with these statutes is void and unenforceable, and failure to comply with this provision constitutes an “unfair or deceptive act” in violation of Massachusetts Consumer

---

34 105 Mass. Code Regs. §§410–500; Mass. Gen. Laws ch. 111, §127 (2016).

35 See Mass. Code Regs. §§410.505, 410.602 (2017).

36 Mass. Gen. Laws ch. 186, §15B(4).

37 See *id.*, ch. 111, §127L.

38 See *id.* See also Office of Attorney General (2015, p. 6).

39 See *id.*, ch. 186, §15B(1)(a),(b). The only extra charge that the law allows is a “finder’s fee,” charged by a licensed real estate broker or salesperson. See *id.*, ch. 112, §87D (2016).

Protection Law.<sup>40</sup> Clauses that required payments exceeding those permitted by law—for example, by demanding a security deposit in an amount higher than the first month’s rent or fees in addition to the allowed payments—were therefore coded as unenforceable.

#### 4.2.6. *Last Month’s Rent*

A landlord who receives rent in advance for the last month of the tenancy is obliged to pay interest on this payment.<sup>41</sup> Provisions that acknowledged the landlord’s obligation were coded as enforceable, whereas provisions disclaiming this obligation were coded as unenforceable, and provisions requiring the tenant to pay the last month’s rent in advance without expressly acknowledging the landlord’s duty to pay interest were coded as misleading.

#### 4.2.7. *Security Deposit*

The Landlord and Tenant Law in Massachusetts comprehensively regulates the hold and return of security deposits. For instance, the law requires a landlord to hold the funds in a separate interest-bearing account and to return the deposit (minus any lawful deductions) with interest within thirty days of the tenancy’s termination.<sup>42</sup> Additionally, the landlord may deduct from the deposit only the expenses listed in the statute, after providing the tenant with an itemized list of the damages. Failure to “fully and conspicuously” state the landlord’s said obligations in “simple and readily understandable language” constitutes an unfair or deceptive act or practice under the Massachusetts consumer protection laws.<sup>43</sup> Provisions that fully disclosed the landlord’s obligations were therefore coded as enforceable, whereas provisions that disclaimed any or all of these obligations were coded as unenforceable. Lastly, provisions that failed to meet the disclosure requirements set forth by the law were coded as misleading.

---

40 See *Dolben Co., Inc. v. Friedman* (Mass. App. Div. 1 2008) (determining that charging an “application fee” is an unfair and deceptive practice, in violation of §15B and G.L.c.93A); *Carter v. Seto* (Mass. App. Div. 2005) (determining that the residential landlord’s collection of \$150 as “deposit” for electric garage door in addition to \$2,000 security deposit for the first month’s rent was unfair and deceptive because it violated the prohibition on demanding a security deposit higher than the first month’s rent).

41 Mass. Gen. Laws ch. 186, §15B (2)(a).

42 See *id.* See also *Karaa v. Kuk Yim*, 20 N.E.3d 943 (Mass. App. Ct. 2014) (determining that “failure to establish a separate, interest-bearing account or to provide a tenant with an appropriate receipt” represents a failure to comply with the subsection, and entitles the tenant to “immediate return of the security deposit”).

43 Mass. Code Regs. §3.17.3(b)(3) (2017).

#### 4.2.8. Late Payment Fees

Massachusetts Landlord and Tenant Law does not prohibit or cap late payment penalties in a residential lease, but requires that such fees be imposed only after the default has lasted for at least thirty days.<sup>44</sup> Provisions requiring late fees to be paid after at least thirty days have elapsed were therefore coded as enforceable, whereas clauses that demanded the charges to be paid before the thirty days' period were coded as unenforceable.

#### 4.2.9. Attorney's Fees

According to Massachusetts law, whenever a lease provides that the landlord may recover attorneys' fees and expenses resulting from the tenant's failure to perform her obligations, there is an implied covenant by the landlord to reimburse the tenant for reasonable attorneys' fees and expenses resulting from the landlord's breach.<sup>45</sup> Any lease agreement that disclaims the right of the tenant to recover attorney's fees and expenses in these circumstances is void and unenforceable.<sup>46</sup> Provisions stipulating that both landlord and tenant will be able to recover attorney's fees and expenses resulting from the other party's breach were thus coded as enforceable, whereas clauses allowing the landlord to recover attorney's fees and expenses while disclaiming the tenant's right to recover such fees were coded as unenforceable, and one-sided attorney's fees clauses, mentioning only that the landlord may recover attorneys' fees and expenses, were coded as misleading.

#### 4.2.10. Tax Escalation

In case of an increase in real-estate tax, the law allows landlords to require tenants to make additional payments only if their leases meet certain disclosure

---

44 Mass. Gen. Laws ch. 186, §15B(1)(c). See also *Commonwealth v. Chatham Development Co., Inc.* 731 N.E.2d 89 (Mass. 2000) (determining that the landlord's requirement of constable fee if the rental payment was one-day late was an unfair and deceptive practice, since it imposed late fees for payments not yet thirty days overdue).

45 Mass. Gen. Laws ch. 186, §20.

46 See *id.* ("Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy").

obligations.<sup>47</sup> Any lease provision that violates these disclosure requirements is deemed to be against public policy and void.<sup>48</sup> Tax escalation clauses that met these disclosure requirements were therefore coded as enforceable, whereas provisions failing to fully disclose the required information were coded as unenforceable.

#### 4.2.11. *Utilities' Payment*

Massachusetts Law requires the landlord to pay for electricity, gas, and water, unless there is a meter that separately calculates the tenant's use and the agreement sets forth that the tenant is responsible to pay for these utilities. With respect to water, the law determines that the landlord may not charge the tenant separately unless the signed lease "clearly and conspicuously" provides for such a separate charge and fully discloses "the details of the water sub-metering and billing arrangement."<sup>49</sup> Leases that provided either that the landlord shall pay for utilities or that the tenant shall pay for utilities, while disclosing the details of the watering sub-metering and billing arrangement, were therefore coded as enforceable, whereas leases obliging the tenant to pay for water without disclosing the relevant details were coded as unenforceable. If a lease did not contain any clause concerning utilities' payments, it was coded as a "total omission" under this category.

#### 4.2.12. *Termination of Tenancy due to Non-payment of Rent*

According to Massachusetts law, a landlord is required to give a written fourteen days' notice before terminating a residential lease due to non-payment of rent. A landlord is also prohibited from denying the tenant's right to cure the non-payment by paying the amount owed within the statutory reinstatement period.<sup>50</sup> Clauses that disclosed the fourteen-days' notice requirement were coded as enforceable. On the other hand, provisions that reduced or denied the fourteen -days' notice period were coded as unenforceable. Provisions that set forth the landlord's right to terminate the tenancy due to non-payment of rent, while neglecting to mention the fourteen -days' notice requirement, were coded as misleading. Importantly, leases that mentioned the fourteen -days'

---

47 The lease should disclose the following: (i) that the tenant is obliged to pay only the proportion of increased tax as the leased unit bears to the entire real-estate being taxed; (ii) the exact percentage of the increase which the tenant is required to pay; and (iii) that if the landlord obtains an abatement of the real-estate tax, she would refund a proportionate share of such abatement, less reasonable attorney's fees, to the tenant. See Mass. Gen. Laws ch. 186, §15C.

48 See *id.*

49 See *id.*, §22(f)

50 See *id.*, §11, 15A.

notice requirement, but neglected to mention the tenant's right to cure the breach by paying the rent due during this period, were coded as enforceable, although a more stringent coding might have classified them as misleading. Lastly, leases that did not contain provisions referring to the termination of the lease at all were coded as "total omission."

#### 4.2.13. *Restrictions on Landlord's Right of Entry*

Massachusetts legislation restricts the landlord's right of access to the premises to the limited purposes set forth in the statute—namely, to inspect the premises, to make repairs, or to show them to a prospective tenant, purchaser, mortgagee, or its agents.<sup>51</sup> The statute renders unenforceable any provision contravening these limitations.<sup>52</sup> Clauses that limited the landlord's right of entry as set forth in the law were coded as enforceable, whereas clauses enabling the landlord to enter the premises for purposes other than those allowed by law were coded as unenforceable. Leases that did not contain provisions concerning landlord's entry to the premises were coded as "total omission."

#### 4.2.14. *Miscellaneous: Tenant's Rights and Landlord's Liabilities*

The Massachusetts statutes confer certain inalienable rights on tenants. These include the tenant's right to a jury trial;<sup>53</sup> to damages in case of constructive or unlawful eviction;<sup>54</sup> to stay of summary judgment;<sup>55</sup> to receive a copy of the lease within thirty days;<sup>56</sup> to repair and deduct the cost of repair from the rent;<sup>57</sup> to receive relocation benefits under the landlord's insurance policy;<sup>58</sup> and the landlord's obligations toward tenants who are victims of domestic violence, rape, sexual assault, or stalking.<sup>59</sup> The statutes also prohibit landlords from

---

51 See *id.*, §15B(1)(a).

52 See *id.*, §15B(8).

53 See *id.*, §15F.

54 See *id.*; 940 Mass. Code. Regs. §3.17(5).

55 Mass. Gen. Laws ch. 239, §12.

56 See *id.*, ch. 186, §15D.

57 See *id.*, ch. 111, §127L.

58 See *id.*, ch. 175, §99, Clause 15A. According to this provision, the landlord is also obliged to disclose these relocation benefits in the lease agreement and is not allowed to waive them under any lease agreement ("The landlord or lessor of the property shall notify each tenant or lawful occupant in writing of the benefits payable under this clause at the beginning of the lease or tenancy period. A waiver of this provision in any lease or other rental agreement shall be void and unenforceable.")

59 These obligations include the landlord's duty to change the dwelling unit's locks upon demand and the tenant's right to terminate the lease agreement within three months of the most recent act of violence. See *id.*, ch. 186, §§24–28.



reprisals against tenants for bringing claims against them,<sup>60</sup> from discriminatory restriction of occupancy, and from discrimination in housing.<sup>61</sup> The “miscellaneous” category groups these rights together. It consists of nineteen sub-categories, where each category represents a different right that the law confers upon the tenant. Under each sub-category, clauses that accurately set forth the tenant’s right were coded as enforceable, clauses that disclaimed it were coded as unenforceable, and leases that did not mention it at all were coded as “total omission.”

The next section reports the results of this content-based analysis.

## 4.3 Findings

### 4.3.1. General Overview

The study reveals that residential leases often contain unenforceable and misleading clauses, and that these contracts systematically fail to disclose the vast majority of the tenant’s rights and remedies. A total of fifty-one leases, constituting 73 percent of the sample, included at least one unenforceable clause, and sixty-five leases, constituting 93 percent of the sample, included at least one misleading clause. Forty-seven leases, or 67 percent, included both unenforceable and misleading terms, and all of the leases in the sample failed to disclose at least nineteen of the possible twenty-six provisions concerning tenant’s rights and remedies and landlord’s duties and liabilities.

Figure 1 shows the distribution of the different types of clauses across the different categories (excluding the 14th category), and Figure 2 breaks down the 14th category (“Miscellaneous: Tenant’s Rights”) into its nineteen constituent rights and reports the prevalence of the different types of clauses across these sub-categories.

Interestingly, the highest rates of unenforceable clauses appeared in the “warranty of habitability,” the “maintenance and repair,” and the “liability for loss or damage” categories. Unenforceable clauses, attempting to disclaim or restrict the warranty of habitability, appeared in almost 29 percent (twenty out of seventy) of the sampled leases. The same rate of unenforceable terms appeared in the “maintenance and repair” category: twenty out of the seventy sampled leases included unenforceable “maintenance and repair” clauses, purporting to reshape the landlord’s legal obligations by shifting the responsibilities for maintenance and repair from the landlord to the tenant.<sup>62</sup> Most of these unenforceable clauses not only placed the burden of maintenance and repair on the tenant, but also added that if

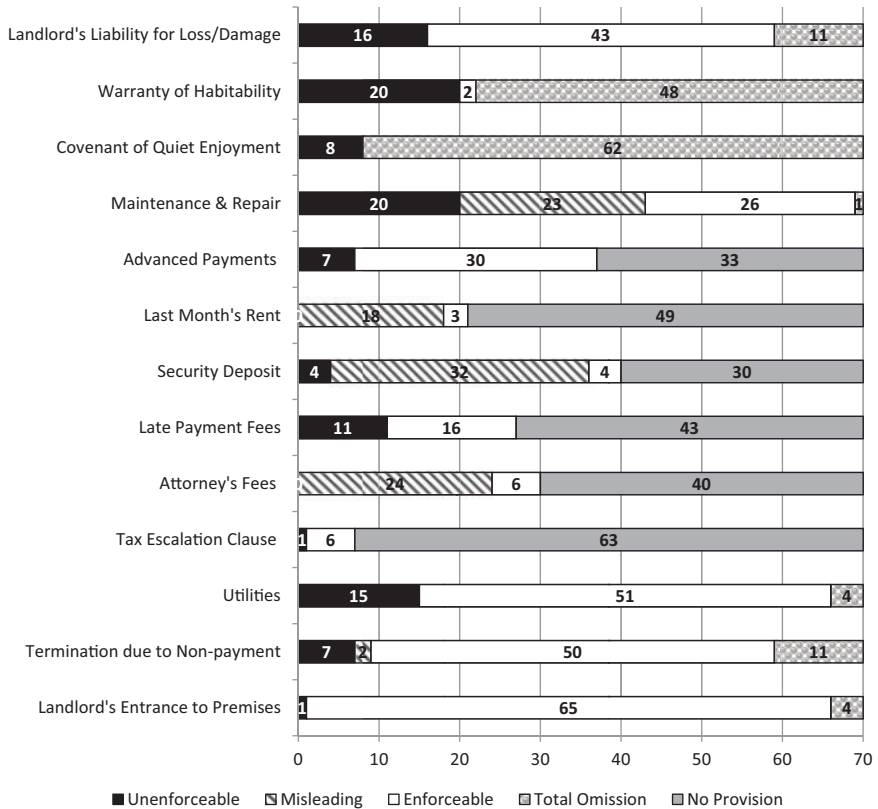
---

60 See *id.*, ch. 186, §18.

61 See *id.*, ch. 184, §23B and ch. 151B, §4.

62 For example, some of these leases provided that “[the] tenant will, at its sole expense, keep and maintain the premises and appurtenances in good and sanitary condition and repair” or that “[the] tenant agrees to be responsible and to pay, in addition to rent, for all damage [to the apartment].”

**Figure 1. The Distribution of the Different Types of Clauses across Categories. When a lease contained a provision complying with and adequately reflecting the law, it was coded as “enforceable.” When a provision was deemed void under Massachusetts Law, it was coded as “unenforceable.” A provision that selectively disclosed the law while misinforming tenants of their rights and remedies was coded as “misleading,” and when a lease contained no provision at all under a certain category, it was coded as “total omission” (when the lease failed to disclose an applicable mandatory arrangement) or “no provision” (when the parties exercised discretion, rendering the legal arrangement inapplicable).**



the tenant fails to make repairs, the landlord may make such repairs and recoup the costs as additional rent,<sup>63</sup> whereas the law sets forth the exact opposite arrangement: under certain conditions, tenants in Massachusetts have a legal right to make repairs and deduct up to four months' rent to pay for them.<sup>64</sup>

63 Such clauses typically stipulated, for example, that, “If Tenant fails within a reasonable time, or improperly makes such repairs, then and in any such event or events, Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand.”

Finally, 23 percent of the leases (sixteen out of seventy leases) included an unenforceable provision exculpating the landlord from liability in negligence.

The fact that the highest rates of unenforceable clauses appeared in these three categories is perhaps not surprising: in these categories, the law imposes relatively high costs on the landlord; hence, including enforceable clauses poses a considerable potential risk. Consequently, residential leases often attempt to limit or claim exemption from these mandatory responsibilities.

Where the law allocates duties, it is also relatively easy to selectively disclose them in a way that reveals only the tenant's obligations. Many maintenance and repair clauses that were not unenforceable *per se* were often misleading, in that they selectively disclosed only the tenant's maintenance and repair responsibilities, while failing to mention the landlord's. Such clauses appeared in almost one-third (twenty-three out of seventy) of the sampled leases. The highest rates of misleading clauses were observed, however, in the "attorney's fees" and "security deposit" categories. One-sided attorney's fees provisions, stipulating that the tenant will be liable to pay the landlord's attorney's fees and expenses without mentioning the tenant's respective right to recupérate legal costs if she prevails in trial, appeared in 34 percent (or twenty-four out of seventy) of the sampled leases, or in 80 percent of the thirty leases containing an attorney's fees clause.<sup>65</sup>

Notably, the law *does not* oblige landlords to disclose the tenant's right to recover her attorney's fees and expenses whenever an attorney's fees provision is inserted into a lease. Rather, it sets an interpretive rule, instructing courts to interpret one-sided provisions as mutual obligations to pay the attorney's fees of the prevailing party.<sup>66</sup> This rule is aimed to take the sting out of a one-sided

---

64 This right is termed the right to "repair and deduct." See the "repair and deduct" statute, set forth in Mass. Gen. Laws ch. 111, §127L.

65 For instance, some leases provided that: "Should it become necessary for [the] Landlord to employ an attorney to enforce any of the conditions or covenants hereof . . . , tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee" or that: "In the event that the LANDLORD reasonably requires services of an attorney to enforce the terms of the Lease or to seek to recover possession or damages, the TENANT shall pay the LANDLORD the reasonable attorney's fee incurred and all costs, whether or not a summary process action or other civil action is commenced or judgment is obtained." Such a clause was found, *inter alia*, in the MA Association of Realtor's form lease.

66 Mass. Gen. Laws ch. 186, §20. ("Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any

attorney's fees clause by reading a mutual obligation into it. Yet, this article suggests that even though one-sided attorney's fees clauses are, in fact, unenforceable-as-written, the law did not take the sting out of them, as they are still likely to mislead tenants into believing that they will have to pay the landlord's attorney's fees and expenses if the landlord prevails in trial, whereas the landlord has no such obligation. The fact that the vast majority of the leases including an attorney's fees clause used a one-sided provision is therefore not at all surprising. If the law does not impose disclosure obligations on landlords, they have no reason to share information concerning the tenants' rights with the tenants themselves (and in fact they have multiple reasons not to).

Remarkably, even when the law *does* impose disclosure requirements, residential leases often fail to meet them. Forty-six percent (thirty-two out of seventy) of the sampled leases, or 80 percent of the forty leases demanding a security deposit, required the tenant to provide a security deposit without disclosing some or all of the landlord's obligations concerning the hold and return of the deposit, as required by law.<sup>67</sup> Similarly, 26 percent (eighteen out of seventy) of the sampled leases, or 86 percent of the twenty-one leases demanding advanced payment of the last month's rent, did so without disclosing the landlord's obligation to pay interest on this payment.<sup>68</sup>

Notably, even the clauses classified as "enforceable" under some categories routinely neglected to address the tenant's relevant mandatory rights. For example, out of the fifty leases that contained enforceable "termination of tenancy" clauses, stipulating that the landlord should provide fourteen days' notice before terminating the lease due to non-payment of rent, only three leases disclosed the tenant's right to cure the breach and prevent the termination of the lease by paying the rent due during the notice period.

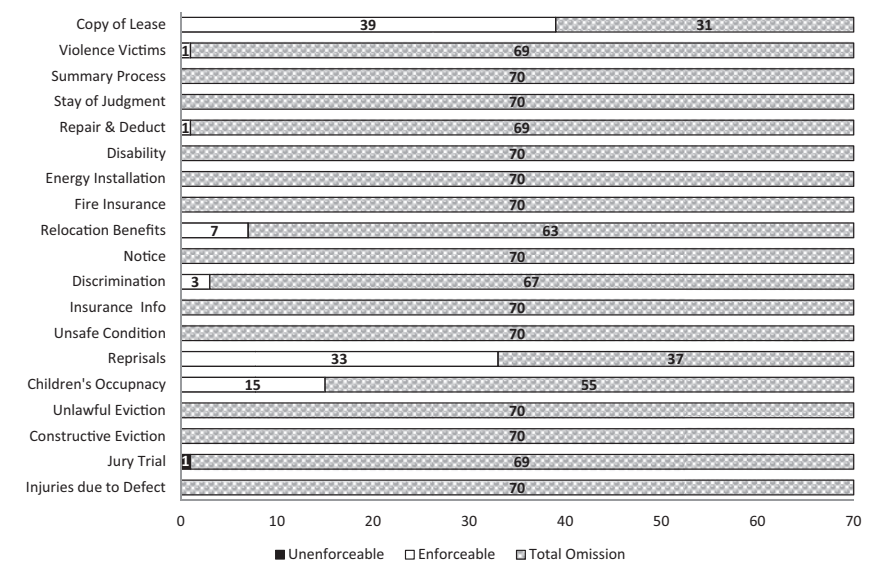
Strikingly, the landlord's mandatory warranties and covenants were also rarely mentioned in the leases. Even though the warranty of habitability and the landlord's covenant of quiet enjoyment are now integral components of Massachusetts Landlord and Tenant Law, 69 percent of the leases in the sample (forty-eight out of seventy) did not mention the warranty of habitability at all, and 89 percent (sixty-two out of seventy leases) failed to refer to the landlord's covenant of quiet enjoyment. This is perhaps not surprising: landlords do not

action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant.")

67 See *id.*, ch. 186, §15B.

68 See *id.*, §15B (2)(a).

**Figure 2. The Distribution of the Different types of clauses across the sub-categories under the 14th category (Miscellaneous: Tenant’s Rights). When the lease does not include a term disclosing an applicable mandatory right granted to the tenant, it is classified as “total omission.” On the other hand, when a lease deviated from the mandatory legal arrangement, it is coded as “unenforceable.” Otherwise, it was coded as “enforceable.”**



have an incentive to voluntarily turn these implicit warranties and covenants into explicit ones. When the leases *do* mention these warranties or covenants, they usually purport to make them contingent upon the tenant’s behavior or to disclaim them altogether.<sup>69</sup>

In a similar vein, most of the mandatory rights granted to tenants were not mentioned in any of the sampled leases. Figure 2 illustrates these findings. It shows the distribution of unenforceable clauses, enforceable provisions, and total omissions across the nineteen different rights under the 14th category.

As manifested in this figure, the vast majority of the tenant’s mandatory rights were absent from the residential leases in the sample. In fact, thirteen out of the nineteen rights (or 68 percent) grouped under this category were not mentioned even once in any of the sampled leases. Some of the tenant’s rights, or landlord’s respective obligations (such as the right to receive a copy of the lease, the prohibition on reprisals, and the prohibition on restricting the

<sup>69</sup> For example, some leases stated that “tenant, upon payment of all of the sums referred to herein as being payable by tenant and tenant’s performance of all tenant’s agreements contained herein and tenant’s observance of all rules and regulations, shall and may peacefully and quietly have, hold and enjoy said premises for the term hereof.”

occupancy of children) were occasionally mentioned, yet only in a small subset of leases.

On the other hand, it should be noted that none of the sampled leases explicitly negated any of the rights granted to tenants under this category, except for the tenant's right to a jury trial, which was denied only in one of the leases. This may be attributed to the fact that such clauses would not only be undoubtedly invalidated by the court and expose landlords to sanctions, but may also induce tenants' suspicions as to their enforceability. It may, therefore, be more prudent on the part of the landlord to simply refrain from mentioning these rights altogether.

#### 4.3.2. *The 'Legal Fallback' Language*

Many of the unenforceable and misleading terms contained what I shall term *legal fallback phrases*: clauses stipulating that they are "subject to applicable law," that they apply "to the extent permissible by law," and so forth. Take clauses addressing the parties' maintenance and repairs responsibilities, for example. Many of the leases included clauses stipulating as follows:

The Lessee shall keep and maintain the leased premises and all equipment repaired . . . . The Lessor and Lessee agree to comply with any responsibility which any may have *under applicable law* to perform repairs upon the leased premises. If Lessee fails within a reasonable time, or improperly makes such repairs, then Lessor may (but shall not be obligated to) make such repairs and Lessee shall reimburse the Lessor for the reasonable cost of such repairs in full, as additional rent, upon demand. (emphasis added)

The use of the legal fallback language here could be interpreted as a way to signal to the tenant that the landlord may have maintenance and repair obligations under the law, even though none are explicitly mentioned in the lease. But why does the lease mention only the tenant's obligations, while excluding the landlord's duties? For lack of any other satisfactory explanation, it is inevitable to deduce that the landlord's duties are not explicitly mentioned in the lease simply because the landlord has no interest in mentioning them. In fact, the landlord has a clear incentive not to describe her obligations in the lease. Indeed, these obligations are mandatory, and their exclusion from the lease does not make them any less binding. But disclosing the landlord's duties is likely to inform the tenant of rights and remedies she would not otherwise be aware of. It is therefore not surprising that the vast majority of the sampled leases do not disclose such rights and remedies, particularly if the landlord has no legal obligation to disclose them. Yet, this still begs the question: why do lease provisions often include a legal fallback phrase?

One possible explanation is that this drafting technique is intended to shield such provisions from judicial intervention, while keeping the tenant in the dark with respect to her rights and remedies. To see this, let us look at another common use of the legal fallback language, this time in the context of the “tenancy termination” clauses. Such clauses typically determine that if the tenant fails to comply with “any lawful term, condition, covenant, obligation, or agreement,” then the landlord, “without necessity or requirement of making any entry may (subject to the tenant’s rights *under applicable law*) terminate this lease by . . . a fourteen day written notice to the tenant to vacate said leased premises upon the neglect or refusal of the tenant to pay the rent . . .” (emphasis added).

It seems that the legal fallback language here implicitly refers to the tenant’s mandatory right to cure the breach by paying the rent due during the notice period.<sup>70</sup> Yet, why do leases regularly fail to explicitly mention the tenant’s said right? If it is in order to save space, the provision could have been easily shortened, for example, by using the word “term” without adding the synonyms (“condition, covenant, obligation, or agreement”) afterward. It seems that the lease deliberately neglects to inform the tenant of her right to cure the breach simply because the landlord has no incentive to draw the tenant’s attention to the possibility of dodging eviction by paying the rent due.

Yet, again, why was the legal fallback language used? One possible explanation is that this wording is an attempt to signal to the court that the tenant could (and should) have known about her right to cure the breach, even though this right is not explicitly mentioned in the lease. Put differently, this may be an attempt to obscure the fact that the lease provides an incomplete and one-sided picture of the legal state of affairs.

The use of the legal fallback language is, at the very least, disquieting. Indeed, this wording may be meant to signal the parties’ acknowledgment that in a particular context, some legal restrictions may apply. Yet, it may also be an attempt to immunize an otherwise unenforceable or deceptive clause from judicial intervention. At the very least, this language indicates that a certain legal dimension has been left out of the contract, such that only a part of the picture is revealed. Notwithstanding its intended effect, it seems that this language is likely to misinform tenants about the legal state of affairs, and, more precisely, about their rights and remedies as renters.

Interestingly, the concerns raised by this drafting practice were addressed by the Supreme Judicial Court of Massachusetts in 1985, during the *Leardi v.*

---

70 Mass. Gen. Laws ch. 186, §11.

*Brown* case.<sup>71</sup> There, the Court upheld the lower court's decision to deem unenforceable a lease provision stipulating that:

THERE IS NO IMPLIED WARRANTY [that] THE PREMISES ARE FIT FOR HUMAN OCCUPATION (HABITABILITY) except so far as governmental regulation, legislation or judicial enactment otherwise requires (*id.*, p. 156).

The Court rejected the landlord's claim that the provision is rendered perfectly lawful by the inclusion of the legal fallback clause, and determined as follows:

In determining whether an act or practice is deceptive "regard must be had, not to the fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public." . . . Taken as a whole, [the provision] clearly tends to deceive tenants with respect to the "landlord's obligation to deliver and maintain the premises in habitable condition." [. . . since it] suggests, as the judge found, that the implied warranty of habitability is "the exception and not the rule, if it exists at all." Indeed, the average tenant, presumably not well acquainted with our decision in *Boston Housing Authority v. Hemingway* is likely to interpret the provision as an absolute disclaimer of the implied warranty of habitability. The conjunction of bold face and small print suggests, as the judge recognized, "a clear and calculated effort to further mislead tenants." It suggests to tenants that their signatures on the lease constitute a waiver of their right to habitable housing. (*id.*, p. 156).

It is clear from the Court's reasoning that a 'legal fallback' clause cannot save an otherwise unenforceable clause from being invalidated, in view of the deceptive impact of such wording on tenants.<sup>72</sup> More than twenty years have passed, and landlords in Massachusetts still routinely use legal fallback language in their leases.

#### 4.3.3. *Drafting Differences Between Companies and Individual Landlords*

As recalled, the residential rental market consists primarily of two types of market players: (i) *Individual landlords*, who rent out single units on their own residential property or in small buildings; and (ii) *Larger firms*, including residential rental companies and real-estate trusts, that dominate the ownership of large apartment complexes and generate over half of the market's revenues.

---

<sup>71</sup> In Leardi, *Supra* 29 474 N.E.2d.

<sup>72</sup> See *id.*, p. 1094.



The article set out to test whether there was a significant difference in the pervasiveness of unenforceable and misleading terms between these two types of landlords.

At least in theory, we might expect differences in the drafting practices of individual landlords and residential companies. While it is reasonable that some individual landlords are uninformed of the law governing their relations with tenants, it seems unlikely that residential rental companies, which are sophisticated and repeat market players, will be similarly ignorant of the legal state of affairs. Yet, this difference may lead to two competing hypotheses. On the one hand, we may speculate that rational profit-maximizing firms will use unenforceable terms so as to extort profit from consumers' ignorance of the law. That is, if the expected gain from misleading tenants into forgoing valid legal rights and remedies exceeds the expected costs (because the probability of detection is sufficiently low, the sanctions are sufficiently low, or both), residential companies may be incentivized to use unenforceable and deceptive clauses in their form contracts. Individual landlords, on the other hand, are less likely to intentionally use unenforceable terms. They may, however, still use such terms unknowingly if they are uninformed about the applicable law and lack the incentives or the means to ensure that their contracts comply with the regulatory requirements. It stands to reason, then, that if rational profit-maximizing firms intentionally use unenforceable and misleading terms in their leases, we will see higher rates of unenforceable and misleading terms in their lease forms than in the contracts used by individual landlords.

On the other hand, we may expect that residential companies, who are informed of the law, will exhibit caution and refrain from including unenforceable lease terms, in light of the sanctions and reputation costs involved. In other words, residential companies, as well as landlords' associations and commercial publishers, may experience negative consequences as a result of their use of unenforceable terms more often than individual landlords. These consequences may include legal sanctions, such as court-awarded damages, or reputational costs.

Although the Massachusetts consumer law applies equally to individual landlords and companies,<sup>73</sup> the former might be exposed to sanctions to a lesser extent, and might consequently continue to use unenforceable terms. There are several reasons to expect that individual landlords will be less exposed to the

---

73 The regulations set forth in the 940 Code of Massachusetts Regulations determine that an owner of one or more residential units may be liable under the statute for engaging in "unfair or deceptive acts or practices" (see 940 Mass. Code Regs. §3.01 (2017)), defining "owner" as: "any person who holds title to one or more dwelling units in any manner including but not limited to a partnership, corporation or trust."

negative consequences of including unenforceable terms in their leases as compared with residential companies and real-estate trusts. First, individual landlords typically own few apartments, whereas residential companies usually own hundreds or even thousands of units. This means that if class actions are filed against these companies, they are likely to be exposed to significantly higher sanctions. Second, courts may be inclined to impose higher standards on companies, which are sophisticated market players, than on individual landlords, who may unknowingly use unenforceable lease terms. Third, enforcement agencies (like the General Attorney or the Consumer Protection Division in Massachusetts) may be more interested in targeting residential companies who engage in deceptive market practices rather than individual landlords, in light of the expected difference in the scope of harm to consumers. Relatedly, residential companies may be more acquainted with judgments and enforcement actions sanctioning landlords for engaging in deceptive market practices, either because they are more often targeted by the enforcement authorities or because they are usually more informed about the legal state of affairs than individual landlords. This, in turn, may also lead them to exercise more caution in the drafting of their leases.

The sample consisted of twenty-five leases used by residential companies and real-estate trusts, and forty leases used by individual landlords, allowing me to examine possible differences between these types of landlords. In addition, thirty-seven of the sampled leases were based on commercial standard forms. These forms (some of which were available online) were drafted by commercial publishers or by landlords' and realtors' associations, representing owners and managers of thousands of residential units across Massachusetts. The commercial forms were extensively used both by residential companies and by individual landlords: fifty percent of the companies in the sample, and 60 percent of the sample's individual landlords, used commercial forms. I therefore also tested whether there was a significant difference in the pervasiveness of unenforceable and misleading terms between the two types of leases: the ones which were based on commercial standard forms and the ones that were not based on a ready-made commercial form.

In order to examine these differences, I conducted a series of multiple linear regressions. In each regression, the independent variables were the landlord's type (residential company or individual landlord) and the lease type (commercial form or non-commercial form). Several apartment, lease, and tenant characteristics were included as controls. These included the number of bedrooms, rental amount (in dollars), tenants' type (student or non-student) and the lease's length (in months). In each regression, the dependent variable was different. In the first regression, the dependent variable was the number of *unenforceable* terms in each lease; in the second, it

**Table 2. Multiple Linear Regressions: Unenforceability and Lease and Landlord Characteristics**

Variables	Unenforceable terms	Misleading terms	Total omissions	Enforceable terms
Residential company	-0.712* (0.381)	0.507 (0.357)	-1.599* (0.844)	1.993*** (0.683)
Commercial lease	-1.059*** (0.347)	-0.155 (0.301)	0.350 (0.765)	0.740 (0.718)
Bedrooms	-0.210 (0.210)	0.082 (0.144)	-0.169 (0.472)	0.281 (0.486)
Rent	-0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	-0.000 (0.000)
Tenant (not student)	0.542 (0.423)	0.106 (0.283)	-0.895 (0.839)	0.195 (0.775)
Length	-0.012 (0.027)	-0.018 (0.024)	0.062 (0.064)	-0.038 (0.041)
Constant	2.559*** (0.706)	1.369*** (0.474)	24.593*** (1.334)	4.665*** (1.292)
Adjusted $R^2$	0.08	-0.07	0.03	0.07
$N$	40	40	40	40

\* $p < 0.1$ ;

\*\* $p < 0.05$ ;

\*\*\* $p < 0.01$

Standard errors are reported in parentheses. In the “Unenforceable Terms” column, I regressed the number of unenforceable terms on the landlord type (a binary variable taking one of two categories: individual landlord versus residential company) and lease type (a binary variable taking one of two categories: commercial versus non-commercial form), and other apartment, lease, and tenant characteristics (number of bedrooms; rental amount in dollars; a binary variable taking one of two categories: student or non-student tenant; and the length of the lease in months) were included as controls. The other columns differ in their dependent variables (misleading terms, total omissions, and enforceable terms), but share the same independent variables as the first column.

was the number of *misleading* terms; in the third, it was the number of *total omissions*; and in the fourth, it was the number of *enforceable terms*. Table 2 presents the results.

As shown in the table, leases used by residential rental companies contained significantly higher rates of enforceable terms ( $b = 1.993$ ;  $SE = 0.683$ ;  $p < 0.01$ ), and lower rates of unenforceable terms ( $b = -0.712$ ;  $SE = 0.381$ ;  $p < 0.1$ ) and total omissions ( $b = -1.599$ ;  $SE = 0.844$ ;  $p < 0.1$ ), than those used by individual landlords. Note, however, that the differences in the rates of unenforceable terms and total omissions are only marginally significant, and therefore should only be taken as suggestive.<sup>74</sup> There was, however, no significant

<sup>74</sup> A similar result is reached under a  $t$ -test analysis. Leases used by residential companies included, on average, significantly fewer unenforceable clauses and significantly more enforceable clauses than

effect of landlord type on the rate of misleading terms in residential leases.<sup>75</sup> Interestingly, similarly to contracts used by residential companies, the contracts that were based on commercial forms also included significantly lower rates of unenforceable terms than their non-commercial counterparts (this time, the difference was highly significant:  $b = -1.059$ ;  $SE = 0.347$ ;  $p < 0.01$ ).<sup>76</sup>

Although these results are preliminary and suggestive, they seem to indicate that residential companies and commercial drafters are typically more careful than individual landlords in the drafting of their leases, and that unenforceable terms are often included as a result of landlords' mistakes. Misleading terms, on the other hand, are equally prevalent in leases used by both types of landlords, possibly because such clauses are less likely to expose landlords to sanctions, whereas they *are* equally likely to prevent the landlord from incurring certain costs. Put differently, it is possible that residential companies use misleading clauses as frequently as private landlords because such clauses may benefit them without exposing them to real sanctions.

## 5. A SURVEY OF TENANTS' EXPERIENCES WITH THEIR LEASES

### 5.1 Background Motivation and Hypotheses

The above content-based study established that unenforceable and misleading terms are prevalent in residential leases. In order to assess the policy implications of this phenomenon, however, it is first important to explore whether, and to what extent, these contractual clauses actually play a role in tenants' decisions and behavior.

Admittedly, the use of unenforceable and misleading terms may only affect tenants' perceptions and decisions to the extent that they rely on their contracts. Unenforceable and misleading terms have little meaning if tenants do not read their leases. And indeed, there is increasing empirical evidence showing that consumers do not read or pay attention to the fine print before making a purchasing decision (Bakos, Marotta-Wurgler & Trossen 2014; Blaszczak-

leases used by individual landlords. When comparing the mean number of unenforceable terms between the two groups, the  $t$ -statistic was 1.4, with 63 degrees of freedom ( $p < 0.1$ ). When comparing enforceable terms, the  $t$ -statistic was  $-2.6$ , with 63 degrees of freedom ( $p < 0.01$ ).

75 When comparing the mean number of misleading terms between the two groups, the  $t$ -statistic was 0.1, with 63 degrees of freedom ( $p = 0.46$ ).

76 A similar result is reached under a  $t$ -test analysis. On average, leases based on commercial forms included significantly fewer unenforceable clauses than leases based on non-commercial forms. When comparing the mean number of unenforceable terms between the two groups, the  $t$ -statistic was 3.6, with 67 degrees of freedom ( $p < 0.01$ ).

Boxe 2014; Hoffman 2016). Yet, readership rates may vary across consumer markets and contracts. In fact, in certain types of consumer contracts, there is empirical evidence that consumers (or a considerable proportion of them) *do* read and pay attention to the fine print. For example, in the specific context of residential rental contracts, a classic study conducted by Warren Muller in 1970 found that 57 percent of the respondents in the sample had thoroughly read their rental contracts before renting an apartment (*id.*, p. 256).<sup>77</sup>

More importantly, this article seeks to draw a distinction between readership *ex ante* and readership *ex post*. Namely, I wish to suggest that even if tenants do not necessarily read their leases *before* deciding to rent an apartment, they are likely to look at their leases at a later stage, when seeking to verify their rights and duties, typically when a problem occurs or a dispute with the landlord arises; and that at this point in time, they might be adversely affected by the use of unenforceable and misleading contract terms.

The main goal of this survey-based study concerning tenants' experiences with residential leases is to examine the possibility that tenants might never read their leases or might become informed of the law by alternative means, thus weakening the conclusion that unenforceable and misleading clauses are likely to be harmful to tenants. The survey was targeted at exploring the hypothesis that when a rental issue or problem arises, tenants are likely to rely on their contracts as their main source of information about their rights and duties as renters. More specifically, the study sought to examine three inter-related questions: (i) Do tenants rely on their leases when they experience a problem during their rental period or wish to learn about their rights or duties as renters? (ii) Do tenants seek other—alternative or complementary—sources of information, such as legal or web-based advice? (iii) How are rental problems ultimately solved: Do tenants comply with their contractual arrangement, do they reach a different, *ad-hoc*, agreement with their landlord, or do they seek legal remedies?

## 5.2 Sample

The survey was conducted using Amazon.com's Mechanical Turk online labor pool. The sample consisted of 279 participants (60 percent female, eighteen years of age or older). In terms of race, 75 percent of the participants were white, 8 percent were African-American, 5 percent Hispanic, and the remaining 12 percent were a mix of other categories. In terms of age, 4 percent of participants were below twenty, 40 percent between twenty and thirty years old, 45 percent

---

77 The high rate of readership in this context may be attributed to the importance that tenants ascribe to these long-term transactions.

between thirty and fifty years old, and 11 percent over fifty years old. In terms of household income, 44 percent of the sample reported household income below \$40,000 per year, 25 percent between \$40,000 and \$60,000, 22 percent up to \$100,000, and 9 percent reported household income greater than \$100,000 per year. In terms of education, 11 percent of the sample had no college education, 29 percent had some college education, 45 percent were college graduates, 12 percent reported having a master's degree, and 3 percent reported having a professional degree. Only five participants (less than 2 percent of the sample) had obtained a law degree.

### 5.3 Survey Design

Participants were first asked if they lived in rental housing and if they had a written lease. Only those who answered both questions affirmatively—a total of 279 residential tenants—were included in the survey. They were presented with a list of possible rental issues or problems (e.g., a maintenance and repair problem, a problem with their security deposit, and the like), and were asked to indicate whether they had experienced any of these, or other, problems during their rental period.

Participants who reported experiencing a rental problem were then asked what they did as a consequence. More particularly, respondents were asked to indicate whether—as a result of the rental problem they had incurred—they contacted their landlord, looked at their lease, consulted an attorney, checked the web or other sources for legal information, consulted a family member or friend, or took any other step to solve the problem. Subsequently, participants were asked how the issue was ultimately resolved, if at all, i.e., whether they acted in accordance with the lease, reached a different agreement with the landlord, resorted to legal means, and so forth. Finally, respondents were asked if they had looked at their leases during the rental period, and if so, under what circumstances.

Through these questions the study sought to shed light on the role that residential leases play in tenants' decisions and behavior. More specifically, the survey was aimed at revealing whether tenants rely on their leases when a problem occurs during the rental period, or alternatively become informed of their legal rights and remedies by other means, such as legal counsel or Internet resources. Finally, the survey was targeted at uncovering how frequently, if at all, tenants act in accordance with their leases when a problem occurs. These questions are important, since they have a direct and crucial bearing on the impact of unenforceable and misleading terms on tenants' perceptions and decisions. For instance, if tenants rarely read their leases, or regularly become informed of the law by alternative means, unenforceable and misleading

contract terms may have little or no effect on their decisions and behavior. If, on the other hand, most tenants rely on their residential leases as their main source of information—and usually act in accordance with their leases when a rental problem or issue arises—it is likely that unenforceable and misleading terms will harm them.

#### 5.4 Results

As recalled, the survey's participants were asked whether they experienced any issue or problem during the rental period, what they did as a result, and how their problem was solved. Answering these questions, the vast majority of the participants (258 participants, or 92.5 percent of the respondents) reported that they had experienced at least one issue or problem in connection with their tenancy during their rental period.<sup>78</sup> Remarkably, more than 90 percent of them (234 out of 258 participants) also reported looking at their leases, either at the beginning of the lease or at a later stage—when a problem arose or when seeking to ascertain their rights and duties as renters and the landlord's corresponding rights and obligations. For example, participant #69 reported looking at her lease to see “what was covered for repair,” and participant #251 reported looking at it “to check the landlord[’s] and my own responsibility.”

The important informational role that leases serve in tenants' understanding of their rights and obligations as renters was evident from participants' responses. For example, participant #245 explained: “I was going through a rough time and wanted to know what fees I'd incur if I broke my lease.”<sup>79</sup> Similarly, participant #105 reported looking at the lease “when I had a problem or question, [in order] to clarify what I could do about it,” and participant #96 reported looking at the lease “to be sure that I understood it and whether my issue could be solved by it.”<sup>80</sup>

---

78 The most common rental issues, according to the survey, were that something in the apartment needed repair (reportedly experienced by 239 tenants); that the tenant wanted to bring pets into the apartment (reportedly experienced by 121 tenants); and that the tenant wanted to end the lease earlier (reportedly experienced by 110 tenants). A significant proportion of tenants also reported experiencing problems concerning the security deposit (64 tenants), a late payment fee (67 tenants), and discovering defects or unsafe conditions in the apartment (67 tenants).

79 In a similar vein, participant #21 explained: “when I knew I wanted to terminate my lease early, I looked at it to see what the penalties would be.”

80 Other examples include the following responses: Participant #6: “I looked to see the pet policy and if small pets were allowed”; Participant #17: “I thought I had been asked for too high a security deposit”; #187: “[I] looked to see what it said about repairs”; Participant #21: “When I knew I wanted to terminate my lease early, I looked to see what the penalties would be”; Participant #65: “to check late fees”; Participant #234: “I looked at the lease to confirm what they would fix and not fix.”

Notably, some participants indicated looking at their leases at times when they feared that their landlord would otherwise try to absolve herself of any responsibility to solve the problem, or when the landlord delayed or refused to provide a solution. For instance, participant #101 explained: “I looked at my lease any time I had an issue with the rental because I knew the landlord was going to say it wasn’t their job.” And participant #153 explained that “[some] items needed repair, and I wanted to see what the lease had to say about this, since my landlord was taking too long to get repairs done.” Interestingly, some participants even described how their behavior had been directly impacted by what they had read in their leases. Take, for example, participant #159 who “wanted to see if I could hang pictures on the wall. I ended up not hanging pictures because it was stated in the lease not to.”

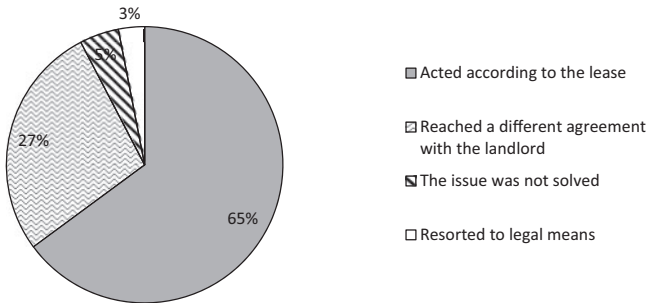
Interestingly, a significant portion of the renters who reported incurring a rental problem—as many as 131 tenants out of 258 or 51 percent—reported looking at their leases directly as a result. In contrast, only 7 percent (seventeen participants) reported consulting an attorney; 24 percent (or sixty-two participants) reported searching the Internet or other sources; and 33 percent (or eighty-five participants) reported consulting a family member or a friend. Out of the 131 respondents who reported looking at their leases, a significant portion—42 percent (fifty-five tenants)—reported relying on their leases as their *sole* source of information.

Although preliminary and suggestive, these findings indicate that significant proportions of tenants read their leases when a problem occurs. Perhaps more importantly, many of the tenants who read their leases rely on them as their sole source of information. Indeed, the findings reveal that fewer than half of the tenants search the web or consult a family member or a friend, and only a small subset of the tenants—less than 10 percent—obtain legal counsel in relation to a tenancy-related problem.

Perhaps more importantly for the current study, when asked how the problem was ultimately resolved, a significant majority of the respondents—65 percent (85 out of 131 subjects)—reported that they had acted according to their leases. In contrast, only 3 percent of the participants (4 out of 131 subjects) reported that they had resorted to legal action or had threatened to do so, 27 percent (36 out of 131 subjects) reported that they had reached a different agreement with their landlord, and the remaining 5 percent (6 out of 131 subjects) reported that the issue was not solved, that they failed to reach an agreement with the landlord, or the like. These results indicate that most tenants who read their leases when a problem occurs subsequently act in accordance with the lease, and others enter into negotiation with the landlord. Notably, even if tenants reach a different agreement with the landlord, it might be on the basis of the assumption that their leases accurately reflect



**Figure 3. Participants' Reported Solutions ("How was the rental issue solved?")**



the legal state of affairs, an assumption that might shape the nature of the resulting agreement. Figure 3 shows these results.

These findings suggest that residential leases play an important role *ex post*, both as an informational source and as a benchmark for the solution of the problem.

## 6. DISCUSSION AND IMPLICATIONS

The study's findings uncover that residential leases frequently include provisions that contravene the law, misinform tenants about their rights and remedies according to the law, or both. The vast majority of the sampled leases fail to disclose most of the tenant's mandatory rights and remedies, while overstating the tenant's obligations and the landlord's corresponding rights and remedies. Residential landlords rarely volunteer to inform tenants of their rights and remedies if they are not legally required to do so. Indeed, they often even fail to meet the mandatory disclosure requirements that the law explicitly imposes on them.

It is important to note that the study does not provide proof that the use of unenforceable terms in residential leases is *intentional*. In fact, its results seem to suggest that at least in certain cases, unenforceable terms are inserted as a result of landlords' mistakes or out of their ignorance of the law. Yet, it is hard to imagine that the leases' widespread omission of the vast majority of the tenant's mandatory rights and remedies, and the prominence of clauses expressing the landlord's rights and remedies, is coincidental. Rather, it seems that the drafters of these leases intentionally refrain from using any term that might armor tenants with information that could backfire against the landlord.

In recent years, it has been suggested that sellers retain self-serving terms in standard form contracts to protect themselves from opportunistic consumers, but that they only selectively enforce these terms on account of reputational considerations (Bebchuk and Posner 2005; Johnston 2007). The inclusion of unenforceable and misleading clauses, or the omission of many of the tenants'

rights from the leases' scope, may similarly be seen as landlords' attempt to immunize themselves from opportunistic tenants.<sup>81</sup>

The finding that leases used by residential companies contain lower rates of unenforceable clauses (and significantly higher rates of enforceable terms) than those used by individual landlords may suggest that companies, which are typically well-acquainted with the law (and are typically assisted by law firms or in-house counsel), are more cautious in drafting their lease forms than are individual landlords. Individual landlords, on the other hand, might unknowingly use unenforceable clauses in their contracts. Even if they know about the terms' unenforceability, they might be willing to bear the risk of using them if they are rarely exposed to the negative consequences (such as legal sanctions) that such use might entail. Notably, there is no significant difference in the rates of misleading clauses across individual landlords and residential companies. This finding may indicate that when the risk of sanctions is low, both individual landlords and companies may attempt to leverage tenants' ignorance of the law to their benefit.

Admittedly, these results are only suggestive and are based on a rather small sample of individual landlords and residential companies in the Boston area. They should be therefore subject to future investigation. Similarly, the explanations that the article provides for these findings should be further explored. For example, it is desirable to investigate if the sanctions for including unenforceable terms have a similarly deterrent effect on both types of landlords, and if not, why. One possibility is that courts treat these two types of landlords differently in light of their different levels of sophistication. It may be the case that although courts easily hold residential companies liable for using unenforceable and deceptive terms in their contracts, they are not as eager to impose sanctions on individual landlords, who do not necessarily have deep pockets and who may unknowingly use unenforceable terms.

Whether the continued use of unenforceable and misleading terms in residential leases is intentional or not, it is likely to generate tenants' misperceptions concerning their rights and duties, consequently affecting their behavior in detrimental ways. The residential rental market is characterized by asymmetric and imperfect information; even though both parties may be imperfectly informed, landlords typically know more about their contract terms and the attendant regulatory rules than their tenants (or at least it is relatively cheaper and easier for landlords to become informed). If they misrepresent the law in their contracts instead of disclosing important information to the tenants, most

---

81 From informal interviews with landlords and real-estate agents, it seems that landlords perceive the residential rental legislation as biased in favor of tenants, and fear that tenants will use any failure on their part to fully abide by the regulation against them, especially in the event that landlords seek to evict tenants from their apartments. In practice, tenants indeed sometimes use violations of the landlord and tenant regulations as defense in eviction suits.

tenants are likely to rely on the selective information provided to them in the contract rather than obtaining information independently, on the assumption that their leases accurately represent the law.

While the impact of unenforceable and misleading terms on tenants' decisions and behavior should be further explored, the survey's findings suggest that residential tenants mainly—and sometimes solely—rely on their contracts to determine their rights and duties as renters. It is therefore reasonable to infer that unenforceable and misleading terms, when included in contracts, are likely to misinform tenants about their rights and responsibilities.

If read, unenforceable and misleading terms are likely to adversely affect not only tenants' perceptions, but also their decisions, consequently shifting substantial costs and burdens from landlords to tenants. The survey's findings indicate that, notwithstanding the ample evidence that consumers barely read the fine print before signing contracts, in the domain of residential leases tenants are likely to read their contracts—if not prior to signing them, then at least *ex post*, when a problem arises or when seeking to learn about their rights and duties as renters.

Notably, tenants will be misled by unenforceable and misleading terms only to the extent that they are unfamiliar with the legal state of affairs. If they are informed about or acquainted with the mandatory rules that govern their transactions, they will realize that their contractual provisions are unenforceable or misleading when encountering such clauses. Yet, it is doubtful that tenants are typically informed about their rights under the law. In fact, there is increasing evidence that consumers are often ignorant of the various legal rules that govern their transactions and routinely harbor misperceptions about the law (Mueller 1970; Stolle & Slain 1997; Kim 1997; Wilkinson-Ryan & Hoffman 2015; Bar-Gill & Davis 2016, in press). These findings should not come as a surprise: obtaining and processing information about the law can be costly, and the probability that this knowledge will become relevant is relatively low. Therefore, a consumer's decision not to become informed about the multiple legal rules that govern her transactions may be perfectly rational, especially if small stakes are involved. In addition, consumers might fail to see any reason not to trust the content of their contracts as an accurate source of information (see, e.g., Mueller 1970). If they mistakenly believe that their contracts are monitored and pre-approved by the regulator, or assume that sellers are deterred from including unenforceable clauses in light of the expected sanctions involved, they are likely to perceive their contractual terms as enforceable and binding even if they are not.<sup>82</sup>

---

82 A perfectly rational consumer could, however, in circumstances of imperfect and asymmetric information, expect sellers to include unenforceable terms in their contracts in order to enhance their profits, so long as the expected benefit from including such clauses exceeds the expected costs.

Indeed, many state legislatures sanction the use of unenforceable terms in leases. In Massachusetts, for example, the law (as set forth in the State's General Laws, Chapter 93A and the pursuant regulations) sanctions the use of certain unenforceable terms in residential contracts, and determines that such use constitutes an "unfair or deceptive act or practice," entitling the tenant to damages.<sup>83</sup> Yet, these damages—recovery of \$25 or actual damages, whichever is greater (or up to three times such amount if the court finds that the use was a willful or knowing violation of the statute)<sup>84</sup>—seem to be too low to serve as a deterrent to landlords (in particular when taken together with the likelihood of detection, which is presumably rather low). Therefore, even if a landlord does not intend to include unenforceable terms in her lease, she may still lack sufficient incentives to ensure that her contractual provisions comply with the applicable regulation.

Perhaps equally problematic is the fact that the present regulation, even if fully complied with by landlords, fails to guarantee that tenants are adequately informed of their substantive rights and remedies under the law. The disclosure requirements imposed on landlords are minimal, and cover only a small subset of the tenants' mandatory rights and remedies. Therefore, even if a landlord meets these requirements and refrains from disclaiming or restricting tenants' rights and remedies, tenants are still not likely to learn of their existence from reading their leases. This caveat could potentially be overcome by requiring landlords to use one of several pre-approved statutory form leases, and obliging them to insert mandatory provisions, containing information about the tenants' mandatory rights and remedies, into their leases. This solution has been

Rational consumers could expect sellers *not* to include such clauses *only* in cases where the expected costs sufficiently deter them.

- 83 Mass. Code Regs. §3.17 determines that "it shall be unfair or deceptive act or practice for an owner to include in any rental agreement" the following terms: a term that "violates any law"; "fails to state clearly and conspicuously in the rental agreement the conditions upon which an automatic increase in rent shall be determined"; "a penalty clause not in conformity with the provisions of M.G.L. c. 186, § 15B"; or "a tax escalator clause not in conformity with the provisions of M.G.L. c. 186, § 15C.
- 84 See Mass. Gen. Laws ch. 93A, §9(3) (stipulating that "if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two"). However, if the proceedings are initiated by the Attorney General on behalf of the Commonwealth, the Court may require a landlord to pay to the commonwealth a civil penalty of not more than \$5,000 for each violation, if the court finds that the landlord "knew or should have known to be in violation" of the consumer protection regulations (see, Mass. Gen. Laws ch. 93A, §4). See also *Commonwealth v. Chatham Development Co.*, 731 N.E.2d 89 (Mass. App. Ct. 2000) (deciding that the landlord is liable for including deceptive terms in his leases, and awarding \$2,000 in civil penalties and \$8,000 in legal fees).

proposed in the past (e.g., Bentley 1974; Kirby 1976; Olafsen 1978) and should be seriously considered, as it could enhance the protection of tenants' rights at a relatively low administrative cost.<sup>85</sup>

Admittedly, disclosure can be—and often is—too burdensome and complex (e.g., Ben-Shahar & Schneider 2014), and may lead to information overload or simply deter tenants from reading the statutory form lease.<sup>86</sup> This problem could be at least partially solved through thoughtful design. Regulators could focus on statutory form leases containing *simple disclosure* that highlights only the most important rights and remedies granted to tenants under applicable law. This list could be informed by this study's findings to include first and foremost those issues that have been identified as prone to high rates of unenforceability and deceptiveness. For example, the regulator might require that landlords include a notice in their leases that states the following:

- (1) Your landlord cannot disclaim her liability for loss or damage caused to you or to a third party as a result of the landlord's negligence.
- (2) If your lease requires you to pay attorney's fees, you are entitled to receive attorney's fees if you prevail in trial.
- (3) Your landlord bears most of the maintenance and repair duties (except for damage beyond reasonable wear and tear resulting from your negligence or misconduct), as set forth in the State's Sanitary Code, and those cannot be disclaimed by any lease agreement.

In order to differentiate the disclosed information from the fine print and increase the likelihood that the tenants will read it, regulators could require landlords to display the information in a salient format, such as the "warning box" proposed by Ayres and Schwartz (2014).

It is important to keep in mind that, as the article's findings suggest, any regulatory solution is doomed to failure if it is not adequately enforced. Since a solution that relies on tenants to bring landlords' violations to court is destined to fail, it is essential to complement private enforcement mechanisms with effective public enforcement. In Massachusetts, the Attorney General is authorized by law to bring claims against any landlord suspected to be engaging in unfair or deceptive acts or practices.<sup>87</sup> Additionally, the Consumer Protection

---

85 Precedent for statutory form contracts can be found in statutes that regulate insurance policy forms. See, e.g., Schwarcz (2011).

86 It seems, however, that this argument especially holds with respect to *ex ante* readership, and applies to a lesser extent to readership *ex post*, when a problem arises and the consumer reads the contract in order to ascertain her rights and remedies.

87 See Mass. Gen. Laws ch. 93A, §4: "Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that

Division in Massachusetts is authorized to take investigative and enforcement powers to protect consumers from fraud, deception, and other unfair business practices. In a similar vein, it will be desirable to authorize the Attorney General, the Consumer Protection Division, or an equivalent agency to file claims against landlords who fail to use the required statutory form leases so as to ensure that landlords comply with the proposed regulation.

## 7. CONCLUSION

This empirical inquiry sheds light on the prevalence of unenforceable and misleading clauses in residential rental agreements. Although preliminary, the findings suggest that residential leases frequently contain unenforceable and misleading terms, and systematically fail to disclose the vast majority of the mandatory rights that the law confers upon tenants. The article offers some hypotheses as to what may explain these drafting patterns and proposes some possible policy recommendations to address this issue.

The article hopefully contributes to the literature on consumer protection and regulation. Its findings indicate that even if effectively designed, absent adequate monitoring and enforcement mechanisms, regulation might fail because sellers might neglect to comply with it, misinforming consumers about the law through their standard form contracts. The findings therefore highlight the importance of enforcement and monitoring mechanisms to ensure compliance.

This study aims to pave the way for future research targeted at providing a broader picture of the use of unenforceable and misleading terms in different types of consumer contracts and markets. Other than expanding the scope of this research to more types of contracts, markets, and countries, three directions for future analysis are especially warranted: (i) uncovering the reasons behind the use of unenforceable and misleading clauses in consumer contracts; (ii) investigating the impact of this drafting practice on consumers' perceptions, decisions, and behavior; and (iii) Devising guidelines for regulatory solutions. Future studies in these directions may enhance our understanding of a largely underexplored yet plausibly prevailing contracting behavior, and enable us to better assess what should be done about this practice.

proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice"). This public enforcement mechanism complements private enforcement by the injured tenants, and therefore partially mitigates this problem.

## SUPPLEMENTARY MATERIAL

Supplementary material is available at *JLA* online.

## REFERENCES

- Abbott, Samuel B. 1976. Housing Policy, Housing Codes and Tenant Remedies: An Integration. **56**, *B.U. L. Rev.* 1.
- Ayres, Ian & Alan Schwartz. 2014. The No-Reading Problem in Consumer Law. **66**, *Stan. L. Rev.* 545–609.
- Bakos, Yannis, Florencia Marotta-Wurgler & David R. Trossen. 2014. Does anyone read the fine print? Consumer attention to standard-form contracts. **43.1**, *The Journal of Legal Studies* 1–35.
- Bar-Gill, Oren. 2012. *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets*. Oxford: Oxford University Press.
- Bar-Gill, Oren & Kevin E. Davis. 2016. (Mis)perceptions of Law in Consumer Markets. *Am. Law & Econ. Rev.* In press.
- Bebchuk, Lucian A., & Richard A. Posner. 2006. One-sided contracts in competitive consumer markets. **104.5**, *Michigan Law Review*. 827–835.
- Ben-Shahar, Omri. 2010. One-Way Contracts: Consumer Protection without Law. **6.3**, *European Review of Contract Law*. 221–249.
- Ben-Shahar, Omri & Carl E. Schneider. 2014. *More Than You Wanted to Know: The Failure of Mandated Disclosure*. Princeton, NJ: Princeton University Press.
- Bentley, Allen R. 1974. An Alternative Residential Lease. **74.5**, *Columbia Law Review* 836–883.
- Berger, Curtis J. 1974. Hard Leases Make Bad Law. **74.5**, *Columbia Law Review* 791–835.
- Biernacki, Patrick & Dan Waldorf. 1981. Snowball sampling: Problems and techniques of chain referral sampling. **10.2**, *Sociological methods & research* 141–163.
- Blake, Harlan M. 1960. Employee agreements not to compete. *Harvard Law Review* 625–691.
- Blaszczak-Boxe, A. 2014. *Give Up Firstborn for Free Wi-Fi? Some Click ‘I Agree,’* CNET (September 30, 2014). <http://www.cnet.com/news/give-up-firstborn-for-free-wi-fi-some-click-i-agree/>.
- Braucher, Jean. 2012. Form and Substance in Consumer Financial Protection. **7**, *Brook. J. Corp. Fin. & Com. L.* 107–129.
- Bresnick, Mara J. 1982. Note, Knight v. Hallsthammar: The Implied Warranty of Habitability Revisited. **15**, *Loy. L. A. L. Rev.* 353–380.

- Cunningham, Roger A. 1979. The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status. **16**, *Urb. L. Ann.* 3–154.
- Delaney, Brian J. 2004. Landlord-Tenant Law: Protecting the Small Landlord's Rights During Summary Process. **37**, *Suffolk U. L. Rev.* 1109–1127.
- DeLuca, Nick. *Ultimate Moving Guide: Comparing the Average Rental Prices of Boston Apartments by Neighborhoods*, in *City News* (May 15, 2014). <http://bostinno.streetwise.co/2014/05/15/renting-in-boston-average-rent-prices-by-boston-neighborhood/>.
- Djurovic, Mateja. 2013. The Apple Case: The Commencement of Pan-European Battle against Unfair Commercial Practices, **9**, *ERCL* 253–266.
- Fisk, Catherine L. 2002. Reflections on the New Psychological Contract and the Ownership of Human Capital. **34**, *Conn. L. Rev.* 765–785.
- Gillette, Clayton P. 2005. Pre-Approved Contracts for Internet Commerce, **42**, *Hous. L. Rev.* 975–1013.
- Glendon, Mary A. 1982. The Transformation of American Landlord-Tenant Law. **23**, *B.C. L. Rev.* 503–575.
- Grubb, Michael D. 2009. Selling to Overconfident Consumers. **99**, *Am. Econ. Rev.* 1770–1807.
- Hanson, Jon D. & Douglas A. Kysar. 1999. Taking Behavioralism Seriously: The Problem of Market Manipulation. **74**, *N.Y.U. L. Rev.* 630–749.
- Heidues, Paul & Botond Koszegi. 2010. Exploiting Naivete about Self-control in the Credit Market. **100**, *Am. Econ. Rev.* 2279–2303.
- Hoffman, David A. 2016. From Promise to Form: How Contracting Online Changes Consumers. **91**, *N.Y.U. L. Rev.* 1595–1650.
- Johnston, Jason S. 2007. *Cooperative Negotiations in the Shadow of Boilerplate*. In Omri Ben-Shahar, ed., *Boilerplate: The Foundation of Market Contracts*, 12–28.
- Kessler, Friedrich. 1943. Contracts of Adhesion: Some Thoughts about Freedom of Contract. **43**, *Colum. L. Rev.* 629–642.
- Kim, Pauline T. 1997. Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-will World. **83**, *Cornell L. Rev.* 105–160.
- Kirby, David V. 1976. Contract Law and the Form Lease: Can Contract Law Provide the Answer. **71**, *Nw. U. L. Rev.* 204–237.
- Korobkin, Russell. 2003. Bounded Rationality, Standard Form Contracts, and Unconscionability. **70**, *U. Chi. L. Rev.* 1203–1295.
- Kuklin, Bailey. 1988. On the Knowing Inclusion of Unenforceable Contract and Lease Terms. **56**, *U. Cin. L. Rev.* 845–918.
- L'Abbate, Francis S. 1981. Note, Recovery under the Implied Warranty of Habitability. **10**, *Fordham L. Rev.* 285–321.



- Marotta-Wurgler, Florencia M. 2007. What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements. **4**, *J. Empirical Legal Stud.* 677–713.
- . 2008. Competition and the Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements. **5**, *J. Empirical Legal Stud.* 447–275.
- . 2011. Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts." **78**, *U. Chi. L. Rev.* 165–186.
- Mueller, Warren. 1970. Residential Tenants and their Leases: An Empirical Study. **69**, *Mich. L. Rev.* 247–298.
- Obrinsky, Mark. 2015. *Shake, Rally, and Roll*, in NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), NHMC 50: A SPECIAL ADVERTISING SECTION TO MULTIFAMILY EXECUTIVE 8 (2015; updated October 2016). [https://nmhc.org/uploadedFiles/Landing\\_Page/NMHC50\\_2014.pdf](https://nmhc.org/uploadedFiles/Landing_Page/NMHC50_2014.pdf) (last accessed December 29, 2016).
- Office of Attorney General. 2015. Commonwealth of Massachusetts, Guide to Landlord/Tenant Rights (August 2015). <http://www.mass.gov/ago/docs/consumer/landlord-tenant-guide.pdf>.
- Olafsen, Kurt E. 1978. Note, Preventing the Use of Unenforceable Provisions in Residential Leases. **64**, *Cornell L. Rev.* 522–527.
- Priest George L. 1981. A Theory of the Consumer Product Warranty. **90**, *Yale L. J.* 1297–1352.
- Rabin, Edward H. 1984. Revolution in Residential Landlord-Tenant Law: Causes and Consequences. **69**, *Cornell L. Rev.* 517–521.
- Radin, Margaret J. 2013. *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*. Princeton, NJ: Princeton University Press.
- Rakoff, Todd D. 1984. Contracts of Adhesion: An Essay in Reconstruction. **96**, *Harv. L. Rev.* 1173–1284.
- Schoshinsky, Robert S. 1980. *American Law of Landlord and Tenant*. Rochester, N.Y.: Lawyers Co-operative Pub. Co.; San Francisco, Calif.: Bancroft-Whitney Co.
- Schwarcz, Daniel. 2011. Reevaluating Standardized Insurance Policies. **78**, *U. Chi. L. Rev.* 1263–1348.
- Soshkin, Maksim. 2016. *IBISWorld Industry Report 53111: Apartment Rental in the U.S.* <http://clients1.ibisworld.com/reports/us/industry/default.aspx?entid=1349> (last accessed December 29, 2016).
- Speidel, Richard E. 1995. Afterword: The Shifting Domain of Contract. **90**, *Nw. U. L. Rev.* 254–266.
- Spiegler, Ran. 2011. *Bounded Rationality and Industrial Organization*. Oxford: Oxford University Press.

- Sterk, Stewart E. 1993. Restraints on the Alienation of Human Capital. **79**, *Va. L. Rev.* 383–460.
- Stolle, Dennis P. & Andrew J. Slain. 1997. Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue. **15**, *Behav. Sci. L.* 83–94.
- Sullivan, Charles A. 1977. Revisiting the “Neglected Stepchild”: Antitrust Treatment of Postemployment Restraints of Trade. *III. L.F.* 621–677.
- . 2009. Puzzling Persistence of Unenforceable Contract Terms, *The. 70*, *Ohio St. L. J.* 1127–1177.
- Warshaw, George. 2015. *Massachusetts Landlord-Tenant Law*, vol. 11. 2nd edn. Newark, NJ: LexisNexis.
- Werner, Raleigh. 2015. *Average Rent in Boston, MA: Median Prices and Trends*. <https://www.jumpshell.com/posts/average-rent-in-boston>).
- Whittaker, Zack. 2013. *EU Plans Stronger Consumer Law Enforcement after Apple Warranty Case*, In: *Between the Lines*. <http://www.zdnet.com/article/eu-plans-stronger-consumer-law-enforcement-after-apple-warranty-case/> (last accessed June 26, 2016).
- Wilkinson-Ryan, Tess & David Hoffman. 2015. The Common Sense of Contract Formation. **67**, *Stan. L. Rev.* 1269–1301.
- Wilkinson - Ryan, Tess. 2017. The Behavioral Paradox of Boilerplate. **103**, *Cornell L. Rev.* Available at SSRN: <https://ssrn.com/abstract=2738567> or <http://dx.doi.org/10.2139/ssrn.2738567>
- Wisdom, Michael J. 1979. An Empirical Study of the Magnuson-Moss Warranty Act. **31**, *Stan. L. Rev.* 1117–1146.
- Zamir, Eyal. 2014. *Law, Psychology, and Morality: The Role of Loss Aversion*. New York: Oxford University Press.
- Zamir, Eyal & Yuval Farkash. 2015. Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship. **12**, *Jrslm. Rev. Legal Stud.* 137–170.