Michigan Business & Entrepreneurial Law Review

Volume 6 | Issue 1

2016

Consumer Preferences for Performance Defaults

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CONSUMER PREFERENCES FOR PERFORMANCE DEFAULTS

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Commercial law in the United States is designed to facilitate private transactions, and thus to enforce the presumed intent of the parties, who generally are free to negotiate the terms they choose. But these contracts inevitably have gaps, both because the parties cannot anticipate every situation that might arise from their relationship, and because negotiation is not costless. When courts are faced with these gaps in a litigation context, they supply default terms to fill them. These defaults usually are set to reflect what courts believe similar parties would have agreed to if they had addressed the issue. These "majoritarian" defaults are justified as being most likely to carry out the presumed intentions of the parties.

Despite the frequent assertion that the defaults used by courts reflect the views of most contracting parties, there is remarkably little empirical evidence that they do. Neither the legal scholars who study contract law nor the business scholars who study business transactions seem to have examined whether important default terms really are those that parties actually prefer. Statements by judges and scholars that these defaults are those the parties would presumably have chosen do not appear to rest on anything except the personal opinions of the writers.

This article attempts to remedy that situation by focusing on one very important situation in which default rules are generally relied upon—and then asking which rule the parties actually prefer. In particular, we look at how consumer purchasers of goods and services view the default rules that apply when sellers tender an imperfect performance. Do those purchasers prefer a rule that allows them to insist on getting exactly what they sought (a rule reflected in the Uniform Commercial Code's concept of "perfect tender"), or one that requires them to accept a performance that is reasonably close to, but not exactly, what they wanted (the common law's "substantial performance" rule)? And does purchasers' preference depend on the goods/services nature of the product? The UCC applies a perfect tender standard for goods, and a substantial performance standard for services.

To shed light on consumer preferences, we conducted three studies, reported here. These studies uncover a powerful consumer preference for perfect tender in contracts for both goods and services. Consumers reject the idea that they have any moral or legal obligation to pay for things when they did not receive exactly what was ordered, even where the failure relates to an idiosyncratic preference rather than a difference in economic value between the promised performance and what was tendered.

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These findings are important because they show that one very large group of contracting parties (consumer purchasers) would not choose substantial performance as a default. Because there is already ample historical evidence that commercial buyers and sellers also prefer perfect tender, courts need to reevaluate the claim that substantial performance is a standard that most parties would agree to. While there may be good reasons for courts to impose a substantial performance standard on parties, their presumed preference is not one.

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Introduction

It is axiomatic that the primary purpose of modern contract law is to facilitate and regulate commercial exchanges. One of the chief reasons for enactment of the Uniform Commercial Code—still arguably the most successful uniform law in American history—was to get rid of legal uncertainties and help ordinary business people carry out the process of contracting safely, efficiently, and predictably. Or, as UCC chief architect Karl Llewellyn put it, to aid business people and lawyers in "trouble shooting, trouble evasion and forward planning," and to "promote sound, reasonable, and decent business practices."[1]

For example, American contract law, like that of every other modern commercial law system, provides *default* rules for transactions. Also known as "gap-fillers" and "background rules," these are terms that courts apply to a transaction unless the parties agree otherwise. Some contracts, of course, are heavily negotiated and highly detailed, and attempt to deal with every possible issue that could arise. Most are not. Parties to contracts often do not even discuss some terms that may well be important—place and time of delivery, time for payment, warranties carried by products being sold, or even (on occasion) the price. If the parties have intended to make a contract and have left one or more such terms open, the law simply plugs in a default.[2]

Because contract law is supposed to help contracting parties achieve their goals, drafters and judges have often sought to supply as defaults the rules that, in their view, the "parties would have wanted" if they had spent time discussing and agreeing on them.[3] Such "majoritarian" defaults make the contracting process more efficient by allowing parties to avoid having to bargain over every aspect of their deal. "Ideally," in this view, "the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction."[4] They also further the "freedom of contract" ideal because they increase the chances that a party will get the deal that he sought. Because such defaults, to be valuable, have to be set in advance, this traditionally has meant that they "should generally reflect the contract term that *most* parties would have bargained for at the time of the agreement."[5]

Given that ideal, however, it is remarkable how little study has actually been done of what contracting parties actually want.[6] Although the osten-

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1. *See* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1146-48 (1985).

2. Under the Uniform Commercial Code (2002) (hereinafter "UCC"), for example, if the parties do not specify a price, the time or place of delivery, the time for payment, or the warranty on the products sold, the price will be "reasonable price at the time of delivery" (§ 2-305), delivery will be at seller's place of business (§ 2-308) within a "reasonable time" (§ 2-309), payment must be made at the time and place the buyer gets goods (§ 2-310), and the goods will carry a warranty of title and have no security interests (§ 2-310(1)), and (if the seller is a merchant) a warranty that the goods are merchantable ((§ 2-310(2)).

3. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 90 (1989).

4. Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983).

5. Duncan v. TheraTx, Inc., 775 A.2d 1019, 1021 (Del. 2001) (emphasis added).

6. There have been a few attempts, the best known of which—and still by far the most cited—is a qualitative study of some fifty Wisconsin businesses, nearly all manufacturers, done during the first years of the Kennedy Administration. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Profes-

sible goal of contract law is to help further business transactions, there has been almost no interaction between those in business schools (who study deal-making) and those in law schools (who study default rules). Anecdotal evidence suggests that lawyers and scholars who are drafting default rules often seriously misunderstand what contracting parties actually want,[7] and experience shows that important default rules are so unpopular with most contracting parties that they are routinely overridden.[8] While the legal literature is rich with discussions of appropriate default rules, virtually none of it focuses on asking parties what they want. And while the business literature on deal-making is equally robust, there seems to be a lack of focus on default terms, even though they may have a significant impact on the value of the deal.

This article addresses that gap. Because the universe of default terms is very large, we start this project by focusing on one of the simplest and most ubiquitous: the standard of contract performance that a party must meet to enable it to hold the other party to liability under the contract. We believe this to be a particularly good default to begin with because the standard of performance—how close must a party come to what it promised before it can collect under the contract?—is an issue that is raised in *every* breach of contract case, and because U.S. law provides two distinct defaults depending on the nature of the transaction. As explained in more depth below,[9] the two are (1) "perfect tender," the standard used in domestic sales of goods, and (2) "substantial performance," which is used for (among other things) contracts for services.[10] Note that both of these are default standards. Parties are free to specify substantial performance in contracts for sales of goods, and to specify perfect tender in contracts for services like home construction. In the absence of agreement, however, the defaults apply.

We focus here on the expectations of *consumer* contracting parties: do consumers expect to get *exactly* what they bargain for (perfect tender) when they sign a contract, or do they expect to have to take something less than, but fairly close to, what they ordered (substantial performance)? Does consumer preference depend on the goods/services nature of the product? We focus on consumer contracting parties not because we be-

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sor Macaulay's work was updated, though not extended, in John P. Esser, *Institutionalizing Industry: The Changing Forms of Contract*, 21 Law & Soc. Inquiry 593 (1996).

7. A notable example of this, the battle over the "perfect tender" standard in the UCC, is described in Part II, *infra*.

8. An example is the consequential damages default rule first developed in Hadley v. Baxendale, which held that a party would be liable for all consequential damages that were "foreseeable" from the breach. Parties of any degree of sophistication routinely contract around the rule. *See* Hadley v. Baxendale [1854] EWHC J70 (Exch.),

9. *See* Part II, *infra*.

10. Substantial performance is generally the rule in all types of contracts that do not involve domestic sales of goods, and a similar concept, "material breach," is used in many international sales of goods contracts, but for present purposes we will focus simply on sales of services.

lieve consumer views should be privileged over those of commercial parties, but for four practical reasons. First, the sheer volume of business-to-consumer contracts in the American economy dwarfs the number of business-to-business contracts, and the same contract law applies to both. Thus, expectations of consumers would seem to be entitled to at least as much weight as those of commercial parties. Second, businesses are, because of their expertise and resources, better able to contract around default terms than are consumers, who are much more likely to be stuck with default rules. Third, many of the cases that have articulated substantial performance rule have involved consumer buyers, including Judge Cardozo's famous 1921 opinion in *Jacob & Youngs v. Kent, Inc.*,[11] in which he emphasized that a private homeowner (like the defendant) who was having a house built by a corporation would not really expect perfect tender, but rather would ordinarily be willing to accept some defects. Fourth, consumer surveys are simpler and more straightforward to design and administer than are surveys of business contracting parties, and thus are a good place to begin.

Thus, we ask consumers two questions. First, which of the two rules do you, as buyers, actually prefer if seller breaches a contract: (a) a regime (perfect tender) in which you are entitled to demand exactly what you want and pay only if you have received it, or (b) one in which you are obliged to accept and pay for a defective performance (substantial performance) so long as it is close enough to what you sought? Second, does consumer preference depend on whether the purchase is of a good or a service, as the current American legal regime suggests?

What we find through a series of experiments detailed below is a strong preference among consumer buyers for the perfect tender rule. We find strong support for this preference not only in situations involving goods (where perfect tender is the default), but also in those involving services (where substantial performance is the default). We believe our findings favoring perfect tender are important, given the ubiquity of substantial performance as a default in many consumer contracts, and the frequent calls in the law literature to extend substantial performance to sales of goods. Our research suggests that while there may be good reason to impose substantial performance as a default term on consumers, the perceived preferences of those consumers is not one of them.

The paper proceeds as follows. First, we provide a brief background on the two default standards and the situations in which they are applied. Second, we outline the methodology and the results of our empirical studies. Third, we draw implications from those findings for the future discussion of default rules in contract law.

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11. *See* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 892 (N.Y. 1921).

I. Background

While many branches of American law *regulate* business transactions, contract law is the one area in which the goal is to *further* business transactions by empowering the parties to set their own terms and have them enforced. Contract law is a tool to be used by contracting parties. Thus, the goal of contract interpretation is to enforce the *intent of the parties* to the transaction.[12] Because agreements, no matter how explicit, can never cover *all* of the possible issues that can arise, the law provides a set of background rules—today often called "default" terms—that supply those contract terms that the parties themselves did not specify.[13] In keeping with the idea that contract law aims to enforce the parties' intentions, these default terms have traditionally been set to reflect what the parties themselves usually would have chosen under the circumstances. Such terms, as noted above, are often called "majoritarian default" terms, because they are assumed to be the ones that most contracting parties would agree to if the matter were discussed and decided.[14]

Not all scholars agree that the law should provide majoritarian defaults. Scholars have argued, for example, that we should penalize people who do not fully negotiate their deals by giving them unfriendly terms; this, it is argued, would encourage parties to reveal undisclosed preferences and information that would allow them to reach better deals.[15] Others have suggested that modern technology could reduce the need for

12. *See*, *e.g.*, Hanover Insurance Co. v. Northern Building Co., 751 F.3d 788, 792 (7th Cir. 2014) ("In Illinois, the main objective in contract interpretation is to give effect to the intent of the parties."), *cert. denied*, 135 S. Ct. 280 (Mem.) (2014); East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., 109 P.3d 969, 974 (Colo. 2005) ("It is axiomatic that a contract must be construed to ascertain and effectuate the intent of the parties as determined primarily from the language of the contract."); Salce v. Wolczek, 104 A.3d 694, 698 (Conn. 2014) ("It is important to underscore that '[a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.'") (*quoting* Murtha v. Hartford, 35 A.3d 177, 182 (Conn. 2011)).

13. *See* Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Wells, 213 F. 3d 398, 402 (7th Cir. 2000) (*quoting* R. Lord, Williston on Contracts § 31:7 (4th ed. 2012)):
Contracts . . . are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' [contrary] intent.

14. *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608, 613-17 (1998).

> The traditional [contract law] analysis concludes that default contract terms should mimic those terms that the majority of contracting parties would agree upon if negotiating and drafting a relevant provision were cost-free. Default rules created according to this process, often referred to as "majoritarian" defaults, minimize the number of occasions in which parties will need to contract around default rules in order to arrive at an efficient outcome. This approach minimizes the two forms of inefficiency that transaction costs can create: inefficient contract terms and the transaction costs themselves.

15. *See, e.g.*, Ayres & Gertner, *supra* note 3 (arguing for a concept of "penalty defaults" that would compel parties to negotiate in situations where negotiation would be economically beneficial).

general defaults by allowing courts to tailor precise terms for individual transactions.[16]

Whatever the merits of majoritarian defaults, it is clear that they are the standard, and that they are justified as being *what the parties themselves would have chosen.*[17] Thus, in this research we ask whether the law does indeed reflect the choices of the parties.

A. *The Standard of Contract Performance*

The standard of performance for judging breaches of contract is a default term. Every contract involves a promise.[18] The promisor's task is to *perform* the promise, or else compensate the promisee in damages.[19] Theoretically, at least, the promisee is supposed to get exactly what was promised. From the seller's perspective the evaluation is usually simple: the buyer's duty is simply to pay money, and usually it is easy to determine when the amount paid is wrong.[20] But from the buyer's perspective, there are many ways that the seller can fail to perform. The bargained-for goods or services may not be delivered at all, or they may be delivered late. There may not be the right number of items, or the items might be the wrong ones. There may be the correct number of the right items, but they might be defective. Any such failure to perform is a breach of contract.[21]

Much of the time, a buyer will accept a defective performance when it is not too serious. People often shy away from controversy and may be reluctant to complain. There is inconvenience in arguing with a seller, and

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16. *See* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 12 MICH. L. REV. 1417 (2014) (arguing for use of technology and "Big Data" to tailor legal default rules to the personal characteristics of individual parties).

17. *See, e.g.*, Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324, 1328 (7th Cir. 1995) (*quoting* Harold Wright Co. v. E.I. Du Pont De Nemours & Co., 49 F.3d 308, 310 (7th Cir. 1995)) (default terms are those that "a court plugs into a contract to fill in a gap in a way the court thinks the parties would have done had they thought about it"); Presidential Capital Corp. v. Reale, 652 A.2d 489, 508 n.7 (Conn. 1994) (terms "are implied not because they are just or reasonable, but rather for the reason that the parties must have intended them and have only failed to express them"); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1631 (2009) ("With a few possible exceptions, contract default rules are best understood as attempts to impute into contracts terms that most similarly situated parties would have wanted to include had they considered them.").

18. *See* RESTATEMENT (SECOND) OF CONTACTS § 1 (AM. LAW INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

19. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").

20. *See, e.g.,* Genesee Fruit Co. v. Barrett, 67 Ill. App. 673, 676 (1893) (stating that paying $7.94 less than the full $500 contract price was a breach of contract).

21. *See* RESTATEMENT OF CONTRACTS § 314 (1932) ("A failure, without justification, to perform all or any part of what is promised in a contract, is a breach thereof."); RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981) ("When performance of a duty under a contract is due any non-performance is a breach.").

the hassle may not be worth the ultimate improvement in performance. The business literature has explored this phenomenon at length.[22] Commercial law scholars generally accept the idea as well.[23]

When a transaction goes bad and the buyer does not want to let it pass, there are at least two things that it can do. The more drastic and least desirable of these is a lawsuit against the breaching party. But the American system for resolving contractual disputes in courts is slow, cumbersome, expensive, and risky. And the process for resolving them in private arbitration, is not exactly simple or inexpensive. Most buyers will not bring a lawsuit or an arbitration action.

By far the most useful and popular remedy is self-help: refusing the good or service and refusing to pay for it—in effect, terminating the contract. This is often a very powerful remedy. But it is also a dangerous one. For the buyer's own refusal to pay can itself be a breach of contract if the seller's breach was not the sort that justified rejection.

It is basic contract law that any failure to meet any obligation under a contract is a breach.[24] And any breach entitles the non-breaching party to actual damages. But not every breach allows a party to withhold its own performance and terminate the contract. In other words, there are some breaches in which the non-breaching buyer must accept the defective performance—reserving a right to sue for damages—or accept liability itself for breach of contract.

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22. *See, e.g.*, John W. Huppertz, *The Effort Model of Consumer Complaining Behavior: An Update and New Research Directions*, 27 J. Consumer Satisfaction, Dissatisfaction & Complaining Behav. 2 (2014) ("In order for someone to initiate a complaint, the level of dissatisfaction must be sufficiently high, the problem must be consequential, and the consumer must believe that a reasonable probability of success will result. Otherwise it is not worth the substantial amount of effort required to complain, and consequently the number of complaints received by companies is low relative to the number of dissatisfied customers.") While customers may be reluctant to complain, many firms prefer to hear the complaints so that they can respond appropriately. Customers who feel their complaints were dealt with fairly tend to become quite loyal to the firm. Lea Dunn & Darren W. Dahl, *Self-Threat and Product Failure: How Internal Attributions of Blame Affect Consumer Complaining Behavior*. 49 J. Marketing Res. 670 (2012).

23. This is usually analyzed as a "waiver" (using the legal term) of strict performance, or even as a "favor" (the transactional business term) to the other party. *See, e.g.*, Jack W. Graves, *Course of Performance as Evidence of Intent or Waiver: A Meaningful Preference for the Latter and Implications for Newly Broadened Use Under Revised UCC Section 1-303*, 52 Drake L. Rev. 235, 258-62 (2004) (explaining Karl Llewellyn's analysis of contracting party behavior). The vast array of potential consumer responses to defects and the subsequent responses of merchants is explored in two 1980 articles that had a substantial influence on modern scholarship. *See* William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 Law & Soc'y Rev. 261 (1980); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525 (1980). Modern theories of "relational contracting" rely on the fact that parties routinely do not insist on the technical details of performance. *See generally* David Campbell, *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 Tex. Wesleyan. L. Rev. 455 (2005).

24. *See* Restatement (Second) of Contracts § 235(2) (1981).

Thus, the question of *which* breaches allow the buyer to rescind is critical. That leads to the next key question: what *standard* do we apply to determine whether the particular breach allows a party to refuse payment and terminate the agreement?

B. *Evolution of Two Standards of Performance*

There are, as we noted above, two distinct default standards for contract performance. The reasons for the two standards are, in our view, largely historical rather than policy-based.

At very early common law, virtually *no* breach by a seller—including complete and deliberate failure to deliver the required performance—would allow a buyer to withhold payment. The buyer was required to pay whether it had received anything or not, and its remedy was to sue the seller for damages.[25] This rule changed in the English courts in the last years before the American Revolution, with the decision in *Kingston v. Preston*.[26] In that case, the Court of King's Bench held that a party could suspend its own performance and rescind if the other party failed to perform.[27] The doctrine spread rapidly through the young United States.[28] The ordinary rule thus became that a significant failure by the seller to perform allowed the buyer to refuse to pay and walk away from the deal.

But from a very early date courts held that not every breach would justify that remedy. Thus, an English court held in the 1777 case of *Boone v. Eyre*[29] that where a seller had promised to sell a West Indies plantation and several slaves to the buyer, the fact that the seller did not convey the slaves along with the land did not release the buyer from his payment. Similar court decisions, often citing *Boone*, became common in the United States.[30] By the end of the 19th century, a leading practitioner text noted, "[e]very breach of contract confers the right of action upon the injured

25. *See* Nichols v. Raynbred, Hobart 88, 80 Eng. Rep. 238 (K.B. 1615) (plaintiff sold a cow to defendant for 50 shillings; plaintiff did not deliver the cow, but sued for the 50 shillings anyway; the court held he was entitled to recover the money without any showing he had delivered the cow).

26. Kingston v. Preston (1773) 99 Eng. Rep. 437; 2 Doug. 689.

27. *Id*.

28. *See* Johnson v. Applegate, 1 N.J.L. 271, 273 n. a (N.J. Sup. Ct. 1794) ("Where two acts are to be done at the same time . . . neither [party] can maintain an action without showing performance of, or an offer to perform his part. . . ."); *see, e.g.,* Ackley v. Richman, 10 N.J.L. 304, 310 (N.J. Sup. Ct. 1829) ("no person shall call upon another to perform his part of the contract, until he himself has performed all that he has stipulated to do as the consideration of the other's promises."); Green v. Reynolds, 2 Johns. 207, 208 (N.Y. Sup. Ct. 1807); *see also* Leonard v. Bates, 1 Blackf. 172, 173 (Ind. 1822) (holding that seller who "could not, or would not" convey property had no right to sue for the purchase money he was promised); JOSEPH CHITTY, JR., A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 741 (Tompson Chitty ed., G. and C. Merriam 5th Am. ed. 1842).

29. Boone v. Eyre, (1777) 126 Eng. Rep. 160(a); 3 Geo. 17.

30. *See*, *e.g.*, Hill v. Bishop, 2 Ala. 320, 322-23 (1841) (lessee of hotel was not excused from performance even though lessor failed to make repairs that had been promised in the lease); Bryan v. Fisher, 3 Blackf. 316, 319-20 (Ind. 1833) (same); Leonard v. Dyer, 26 Conn.

party, but every breach does not necessarily discharge him from doing what he has undertaken to do under the contract."[31] The line, however, is not clear—the author simply notes philosophically that "[i]t is often very difficult to determine whether or not a breach of one of the terms of a contract discharges the party injured" from its own performance.[32]

Meanwhile, however, a parallel line of cases also developed, in which courts instituted a rule that virtually *any* breach would justify rescission. These cases involved contracts by merchants, primarily for the sale of goods. The principle shows up in some early cases,[33] but it took deep root in the latter part of the 19th century. In *Bowes v. Shand*,[34] another English case, the court held that loading rice on a ship between February 24 and March 3 did not meet the contractual requirement to load it "in March and/or April," and thus the buyer was not required to accept the rice. Merchants, said Lord Chairs, the Lord Chancellor, "are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." Concurring, Lord Gordon noted:

> The question is a very simple one . . . . Now, the terms which are used in these contracts are naturally the result of the intelligence of the merchants who are engaged in making them and we may rely upon this, that they have considered well the terms of the contract before they entered into it. . . . .
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> That being the case we must construe the contract itself, according to its reasonable and literal sense, and I think we have no difficulty whatever in doing so. The safest rule in all these cases is to allow the parties who were interested in making the contract to explain themselves. It is our duty to adhere to the terms they have used . . . .[35]

These two lines of cases, which often seem to have passed each other like ships in the night, are the ancestors of our two performance default rules: substantial performance, and perfect tender. Judge Cardozo's *Jacob & Youngs*[36] opinion, archetype of the modern substantial performance standard, relied heavily on many cases from the former category, most of

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172, 178 (1857) (shipper was required to pay carrier who had failed to transport all of the lumber specified under the contract).

31. William L. Clark, Jr., Hand-Book of the Law of Contracts § 268, at 643 (1894) (St. Paul, West Publ'g Co. 1894).

32. *Id*. § 268.

33. *See* Mitsubishi Goshi Kaisha v. J. Aron & Co., 16 F.2d 185, 186 (2d Cir. 1926) (L. Hand, J.) ("There is no room in commercial contracts for the doctrine of substantial performance."); *see, e.g.*, Filley v. Pope, 115 U.S. 213 (1885) (American buyer of steel supposed to be shipped from Glasgow not required to pay when conforming steel was actually shipped from Leith, fifty miles away); Farrar v. Gaillard's Administrator, 1 Miss. 269 (1827) (buyer who contracted for ten slaves was not required to accept the nine tendered when one was missing); Dauchey v. Drake, 85 N.Y. 407 (1881) (agent who was supposed to insert ad into 1,075 newspapers could not recover when it only inserted ad in 1,022 and there were minor variations in the ads).

34. 2 App. Cas. 455, 463 (H.L. 1877).

35. *Id*.

36. Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921).

which involved consumer buyers.[37] In such cases the buyer must accept and pay for the performance unless the departure from the contract is willful or is so "dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract."[38] And Cardozo specifically noted that a mere knowing failing to follow the contract requirements was not necessarily "willful."

The latter line of merchant perfect tender cases reached its apotheosis with the drafting and promulgation of the Uniform Commercial Code in the 1940s and 1950s. Although many of the Code's drafters, including Karl Llewellyn, strongly favored a substantial performance standard for sales of goods, the merchants and their counsel who participated in the drafting process strongly favored perfect tender. The latter group won. Section 2-601 of the Code specifically states that a buyer may refuse to perform under the contract "if the goods or the tender of delivery fail in any respect to conform to the contract."[39] From the first, many commentators opposed the perfect tender standard, arguing that buyers should be required to accept goods that had what the writers considered to be "trivial" defects, because a bad-faith buyer might be tempted to reject goods for alleged defects even when the real reason was that the buyer no longer wanted the goods.[40] On the other hand, some commentators defended the perfect tender rule on the ground that it was just as likely that bad-faith sellers would use a substantial performance standard to pass off defective goods to buyers whose only remedy would be to sue for damages.[41]

Thus, we see that the law has developed two different standards of performance—each of which is justified because it reflects the presumed desires of the parties. Merchants who contract for goods are supposed to desired perfect tender, while those buying services and involved in other non-goods transactions are supposed to prefer substantial performance.

C. *Consumer Expectations for Performance*

At first glance, the intrinsic differences between goods and services may lend some support for the distinct remedies for performance breach. Compared to goods, services tend to be more vulnerable to variations in quality. Services are performances. Just as theater performances change

37. *See* Spence v. Ham, 163 N.Y. 220, 57 N.E. 412 (N.Y. 1900) (homeowner having a house built); Foeller v. Heintz, 137 Wis. 169, 118 N.W. 543 (Wis. 1908) (same); Woodward v. Fuller, 80 N.Y. 312 (1880) (homeowner having construction work done to home); Glacius v. Black, 67 N.Y. 563 (1876) (homeowner also having construction work done to home).

38. Jacob & Youngs, Inc. v. Kent, 129 N.E. at 891 (N.Y. 1921).

39. U.C.C. § 2-601. There is one exception to this, which involves deliveries under installment contracts, where rejection can be made only if the defect "substantially impairs" the value of the shipment or the contract as a whole. *Id.* § 2-612.

40. Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 205-06 (1968).

41. A good roundup of the warring authorities and a defense of the perfect tender standard is Jeffrey M. Dressler, Note, *Good Faith Rejection of Goods in a Falling Market*, 42 CONN. L. REV. 611 (2009).

slightly from one show to another, so do services. Your hair stylist may not replicate last month's amazing cut on your next visit or with her next customer. Part of the variability is because services typically involve interaction between the customer and the service provider. The patient who can articulately explain her aches and pains to the physician may get a more meaningful diagnosis. Similarly, the enthusiastic customer who digs into the whitewater on a rafting trip is likely to have a different experience than a customer who is along for the ride.[42] And the physical setting influences customers' perceptions of service quality. Service customers are in the service "factory" and necessarily pick up cues that influence their quality evaluations.[43]

While service quality may be challenging to deliver, it is not clear that consumers are willing to tolerate inferior performance. As Leonard L. Berry, arguably the father of service marketing, writes, "Consumers enter a market for a reason – to be fed, to be entertained and to be transported. An unreliable service fails to fulfill the customer's need."[44] Emphasizing service customers' fundamental expectations of getting what they ordered, Professor Berry continues, "Whereas poor reliability undermines customers' confidence in the organization, consistent reliability is not enough to exceed their expectations. *Service organizations are supposed to be competent and reliable.*"[45] In other words, consumers expect service providers to deliver on performance promises. Moreover, consumers generally expect that the value they get (benefits less price and hassle) should be comparable to the value enjoyed by the seller (profits).[46] Consumers think that service providers' prices and profit margins, compared to manufacturers' at least, provide ample cushion to finance quality performance.[47] In sum-

42. *See* Eric J. Arnould & Linda L. Price, *River Magic: Extraordinary Experience and the Extended Service Encounter*, 20 J. CONSUMER RES. 24 (1993).

43. *See* Mary Jo Bitner, *Servicescapes: The Impact of Physical Surroundings on Customers and Employee*s, 56 J. MARKETING 57 (1992) ("The ability of the physical environment to influence behaviors and to create an image is particularly apparent for service businesses such as hotels, restaurants, professional offices, banks, retail stores, and hospitals.").

44. Leonard L. Berry, *Revisiting Big Ideas in Services Marketing 30 Years Later*, 30 J. SERVICES MARKETING 1 3, 4 (2016).

45. *Id.* (emphasis added).

46. *See* Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986); Marielza Martins & Kent B. Monroe, *Perceived Price Fairness: A New Look at an Old Construct*, 21 ADVANCES IN CONSUMER RES. 75 (1994) (Consumers, guided by the ideal of equitable distribution of gains and losses, expect their net gain (benefits less hassle) to be comparable to sellers' profits (prices less costs)).

47. *See* Lisa E. Bolton, Luk Warlop & Joseph W. Alba, *Consumer Perceptions of Price (Un)Fairness*, 29 J. CONSUMER RES. 4 474 (2003). ("Consumers are inclined to believe that the selling price of a good or service is substantially higher than its fair price . . . [and] overattribute price differences to profit."); *see also* Lisa E. Bolton & Joseph W. Alba, *Price Fairness: Good and Service Differences and the Role of Vendor Costs*, 33 J. CONSUMER RES. 258 (2006) ("Consumers are rarely cognizant of the full array of a vendor's nonmaterial costs and are unwilling to subsidize those costs even when made salient.").

mary, consumers are likely to think it is unfair to be required to pay a service provider for delivering a service that is different than that promised.

Thus, while the law has developed two different standards of performance, it is not at all clear that consumers share that perception. This is the subject of the study reported in this paper.

II. Experimental Findings

To understand consumers' reactions to remedies when contracts are breached, we used a scenario-based experimental design in which we presented study participants with a purchase situation involving defective performance and then asked a series of questions about the buyer's duty to pay for the purchase. We predicted that consumers would prefer perfect tender, regardless of whether the purchase involved a good or a service.[48] To test this prediction, we conducted a series of three experiments. The first involved the purchase of what the law considers to be a "good"—a smartphone case. The second involved the purchase of what the law treats as a pure service—a concert ticket. And the third involved a mixed transaction involving goods and services—a restaurant meal.[49] The experiments were designed so that the seller's defective performance did not significantly affect the functionality or objective value of the goods, but related primarily to the personal preference of the buyer.

We were interested in ways the scenarios shaped respondents' perceptions of three primary variables: the consumer's legal obligation to pay, the consumer's moral obligation to pay, and the consumer's opinion of what the ideal law on the subject should be. In addition to these primary variables, we tested several secondary variables including age, gender, education, and income. These variables were intended to rule out any systematic demographic influences on attitudes. We also asked whether the respondent or the respondent's immediate family currently owned or had in the past owned a business. This was to understand whether the respon-

48. While our prediction was based largely on the service quality literature, we also considered anecdotal evidence, chiefly the usual reactions of first-year law students to similar hypotheticals posed to them in law school Contracts classes. The reactions of these students, who had not yet become fully immersed in the legal field, mirrored anecdotal reports relating to merchant preferences for perfect tender. *See*, *e.g.*, Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 Harv. L. Rev. 465, 526 (1987) (explaining strong preference of merchants for perfect tender during drafting of the UCC). Professor Wiseman quotes the reaction of an officer of Macy's department store to the idea of substantial performance: "My Lord, what a chance for sellers to unload all their shopworn and defective goods and then let a jury decide whether they can't do it. It's wonderful." *Id.*

49. While many ordinary consumers may view preparing and serving meals in restaurants as quintessential "services," restaurant meals are treated as goods for many purposes under the UCC. *See* UCC § 2-314 (2012) (for purposes of the warranty of merchantability, "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale"); *Webster v. Blue Ship Tea Room*, 198 N.E.2d 309, 312 (Mass. 1964) (holding that sale of bowl of chowder was a UCC transaction).

dent's real world role—strictly consumer or business owner and consumer—influenced perceptions. We found no evidence that either demographic factors or business ownership influenced results, and so we do not discuss those factors further. Finally, we asked about how consumers and sellers normally handled these conflicts to understand the influence of prevailing norms on respondents' evaluations.

The survey was administered via the Internet with 279 business students at a major southwestern university. Slightly more than half (53.4%) of the respondents were male, and almost all (92.1%) were between 20 and 44 years. Nearly half (45.5%) had personal or familial experience as business owners.

We randomly assigned respondents to one of six conditions (3 *contexts*: smartphone case, concert ticket, restaurant meal; and 2 *treatments*: baseline no-breach, seller-caused breach). Each of our study respondents saw only one condition. In other words, a respondent saw the smartphone case or the concert ticket or the restaurant meal scenario, not all three. And within that study context, the respondent saw either the baseline no-breach of contract scenario or the seller-created breach scenario, not both. We compared responses between groups.[50]

A. *Experiment One: Buying a Good – A Smartphone Case*

1. Method

Respondents were asked to carefully read the scenario and indicate the buyer's obligation for payment. All respondents read the following:

> A smartphone owner needs a new phone case before going on vacation. He goes online and selects an expensive case. The case is available in several colors including hot pink, lime green, ocean blue, and jet black. He selects a color and orders the case.

Respondents in the baseline, no-breach condition also read:

> When the case arrives, the customer discovers that the color is what he ordered. He leaves for his vacation tonight.

Respondents in the seller-caused breach condition also read:

> When the case arrives, the customer discovers that the color is different than what he ordered. He leaves for his vacation tonight.
>
> The customer calls the store to request a refund, and explains that he received the wrong color and that he will not use the case in this color. He explains that

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50. In statistical parlance, this is a between-subject experimental design with random assignment. It is considered to be a strong experimental design. Because subjects were randomly assigned to the condition, it is unlikely that the raters in one condition hold different attitudes than the raters in another condition. And because respondents were treated exactly the same except for specific wording in the scenario they read, any difference in ratings between conditions may be attributed to the treatments themselves. The between-subject experimental design is stronger than alternative designs. For example, we could have shown a single group of respondents all six conditions and then compared their answers to each condition. That is called a within-subject design. But within-subject designs carry the risk that results may be contaminated by "carryover effects" such that responses to one condition are influenced by thinking about another condition.

> the case is unused and is in the original packaging. The customer service representative says it is against policy to accept returns.

We then asked respondents about payment obligations. Respondents indicated their response by sliding a lever along a continuum.

> Do you think the customer is *morally obliged* to pay for the phone case? [Slider scale of 0 to 10 anchored by Definitely not morally obliged/Definitely morally obliged]
>
> Do you think the customer is *legally obliged* to pay for the phone case? [Slider scale of 0 to 10 anchored by Definitely not legally obliged/Definitely legally obliged]
>
> Ideally, in situations like this, what should the law be? [Slider scale of 0 to 10 anchored by Require the seller to accept returns/Allow the seller to prohibit returns]

2. Results

Recall that two groups of respondents read two different scenarios involving the purchase of a smartphone case. The group of respondents who read the scenario in which the transaction was completed as expected, with the smartphone case arriving in the color requested (baseline, no-breach condition) believed the buyer had both a high moral and a high legal obligation to pay.[51] On a ten-point scale, the legal obligation was rated 8.3 and the moral 8.2; the difference is not statistically significant, meaning that the difference is likely due to chance. However, when the seller caused the breach by sending the wrong item, the perceived obligation to pay dropped significantly. On a ten-point scale, the legal obligation was rated 5.4 and the moral significantly lower at 3.0. In other words, people feel little moral compunction to pay when the seller creates the error, but they believe the law might protect the seller's behavior (Figure 1a).

Respondents across both treatments judged an ideal law as one that would require the seller to accept returns, and the group who read the seller-breach scenario were adamant about it. On a ten-point scale with zero requiring the seller to take returns and 10 permitting the seller to decide on a return policy, the no-breach group gave a rating of 3.3 and the seller-breach just 2.0. In both cases, the ratings were statistically less than 5, indicating preference for a law that requires sellers to accept returns (Figure 1b).

51. Analyses were conducted with univariate ANOVA using SPSS v. 21. The threshold for statistical significance was set at .05; p-values (probability density function values) are omitted from the narrative for ease of exposition.

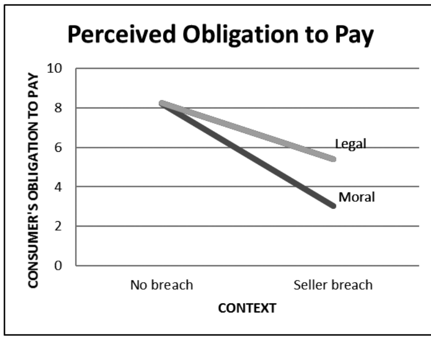


Figure 1a. In the event of a breach, consumers feel some legal but little moral oblgation to pay for the smartphone case.

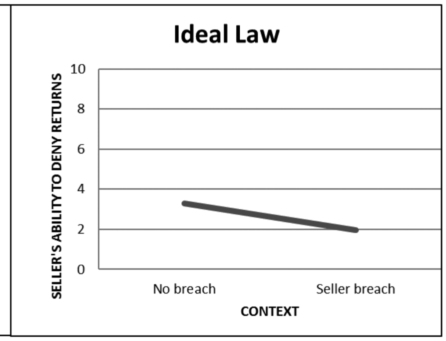


Figure 1b. Both groups favor a law mandating the seller to accept returns.

Thus we find consumers examining the purchase of a smartphone case perceive a legal and moral obligation to pay for uneventful transactions. When the seller breaches the contract, consumers anticipate a legal obligation to pay but feel little moral obligation. Consumers favor a law that requires seller to accept returns. While this is particularly true in a seller-breach situation, consumers facing no breach also prefer the opportunity to costlessly back out of the transaction.

Consumers' insistence on being able to return the product in the event of a seller-breach is consistent with default contract rules that require perfect tender in the sale of goods. The default rule is different for purchases of services: service buyers are required to accept a close substitute. And so the next two experiments address consumer perceptions of faulty service transactions.

B. *Experiment Two: Buying a Service– A Concert Ticket*

1. Method

Experiment 2 explored consumer perceptions about the purchase of a concert ticket, a pure service. Respondents were asked to carefully read the scenario and indicate obligation for payment. All respondents read the following:

> A music fan wanted to go to a concert by a popular band. He had friends who planned to go. He ordered a single ticket using the concert hall's website.
>
> He specifically asked for a ticket in the 12th row center LEFT section, because that seat was where his friends would be sitting. The concert was not sold out.
>
> He received an email confirming the sale of one ticket in the 12th row center left section. The ticket was delivered by mail two days later.

Respondents in the no-breach condition received no additional information.

Respondents in the seller-caused breach condition also read:

> When he opened the envelope, he discovered it was actually for twelfth row center RIGHT—nowhere near his friends. He immediately contacted the

ticket office and pointed out that this was the wrong ticket and asked for the seat he was originally promised. The box office refused.

The fan did not use the ticket.

We then asked respondents about payment obligations under the circumstances. Respondents indicated their response by sliding a lever along a continuum.

Do you think the fan is *morally obliged* to pay for the ticket? [Slider scale of 0 to 10 anchored by Definitely not morally obliged/ Definitely morally obliged]

Do you think the fan is *legally obliged* to pay for the ticket? [Slider scale of 0 to 10 anchored by Definitely not legally obliged/ Definitely legally obliged]

Ideally, in situations like this, what should the law be? [Slider scale of 0 to 10 anchored by Allow the fan to exchange the ticket/Allow the box office to prohibit exchanges]

2. Results

As expected, the group of respondents who read the baseline scenario in which the buyer got the ticket requested believed the buyer had both a high moral and a high legal obligation to pay for the ticket. On a ten-point scale, the legal obligation was rated 8.5 and the moral 8.2; the difference is not significant. However, when the seller caused the breach by issuing the wrong ticket and failing to correct the error, the perceived obligation to pay dropped significantly. On a ten-point scale, the legal obligation was rated 4.6 and the moral significantly lower at 2.8. In other words, people feel little moral compunction to pay when the seller creates the error, but they believe the law probably sanctions the seller's behavior (Figure 2a).

We then queried our respondents about the ideal law addressing these circumstances. Both groups favored a law that would require the seller to accept returns, and the group who read the seller-breach scenario was again more adamant. On a ten-point scale with zero requiring the seller to take returns and 10 permitting the seller to set the return policy, the no-breach group gave a rating of 3.4 and the seller-breach just 1.3. In both cases, the ratings were statistically less than 5, indicating preference for a law that requires sellers to accept returns (Figure 2b).

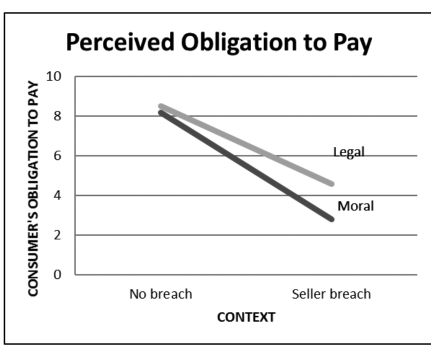


Figure 2a. In the event of a breach, consumers feel some legal but little moral oblgation to pay for the concert ticket.

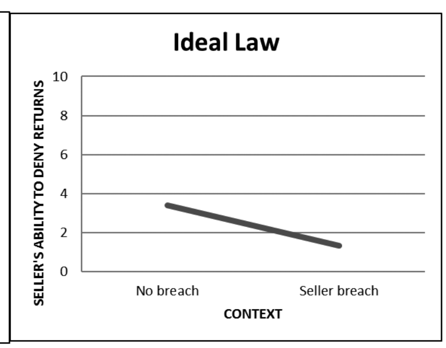


Figure 2b. Both groups favor a law mandating the seller to accept ticket exchanges.

Thus, as with the first experiment, we find consumers perceive a legal and moral obligation to pay for uneventful transactions. When the transaction is disrupted, consumers expect the breaching seller to make good on the original promise. Consumers generally favor a law that requires seller to accept returns. While this is particularly true in the event of a seller breach, consumers facing no breach also prefer the opportunity to back out of the transaction.

Under the default rule governing service transactions, buyers must accept the product as long as it is close to what was originally bargained for. We find, to the contrary, that buyers feel no moral commitment to pay for a service that is close to, but not exactly, what was ordered. Our results indicate buyers believe the law should require the seller to deliver what was originally ordered. Thus we have a gap between default rules and consumer preferences. We further explore the gap with a third experiment governing a mixed goods-service transaction.

C. *Experiment Three: Buying a Service– A Restaurant Meal*

1. Method

Our second experiment uncovered a gap between consumer beliefs and legal default rules when it comes to service performance, and so we conducted a third experiment to amass further evidence about consumers' preferences. In this experiment, we explore consumer perceptions about the purchase of a restaurant meal, an apparent service that is treated at least to some extent as a good under the UCC.

Respondents were asked to carefully read the scenario and indicate obligation for payment. All respondents read the following:

> A diner entered a restaurant and was shown to a table by a waiter. After looking at the menu, the diner ordered a sirloin steak with a baked potato and green beans.

Respondents in the baseline, no-breach condition continued to read.

> The waiter brought the meal.
>
> The waiter later presents him with the bill.

Respondents in the seller-caused breach condition also read:

> When the waiter brought the meal, however, it had French fries instead of the baked potato that the diner had ordered. The diner asked again for the baked potato. The waiter explained that the restaurant had run out of baking potatoes and only fries were available.
>
> The diner didn't want the steak with fries, and got up to walk out of the restaurant.
>
> The waiter presents him with the bill. He refuses to pay, saying that he did not receive what he ordered and did not eat the meal.

We then asked respondents about payment obligations under the circumstances. Respondents indicated their response by sliding a lever along a continuum.

Do you think the diner is *morally obliged* to pay for the dinner? [Slider scale of 0 to 10 anchored by Definitely not morally obliged/ Definitely morally obliged]

Do you think the diner is *legally obliged* to pay for the dinner? [Slider scale of 0 to 10 anchored by Definitely not legally obliged/ Definitely legally obliged]

Ideally, in situations like this, what should the law be? [Slider scale of 0 to 10 anchored by Allow the diner to leave without paying/ Require that the diner pay for the meal]

2. Results

Once again, the group of respondents who read the baseline scenario in which the meal was served as expected believed the buyer had both a high legal and a high moral obligation to pay. On a ten-point scale, the legal obligation was rated 9.1 and the moral 9.4; the difference is not statistically significant. However, when the seller caused the breach by failing to serve the baked potato, the perceived obligation to pay dropped significantly. On a ten-point scale, the legal obligation was rated 4.6 and the moral significantly lower at 3.8. In other words, as with our other two scenarios, people feel little legal or moral compunction to pay when the seller creates the error (Figure 3a).

Perceptions of an ideal law were influenced by the prime. Groups that read the no-breach condition construed an ideal law as requiring the diner to pay for a meal, whereas the group that read the seller-breach scenario were adamant that the diner should not have to pay. On a ten-point scale with zero permitting the diner to leave without paying and 10 requiring the diner to pay for the meal, the no-breach group gave a rating of 9.6 while the seller-breach group offered a rating of just 3.6 (Figure 3b).

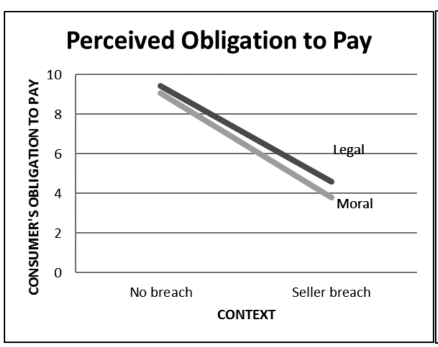


Figure 3a. In the event of a breach, consumers feel some legal but little moral oblgation to pay for the restaurant meal.

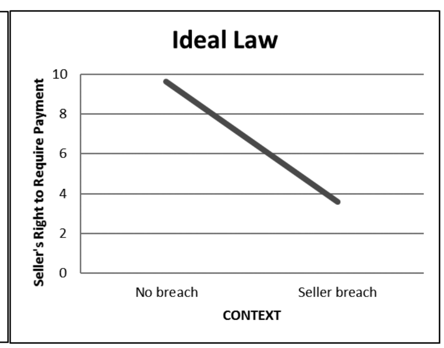


Figure 3b. The seller-breach group favors a law waiving payment from diners served the wrong item.

D. *Analysis*

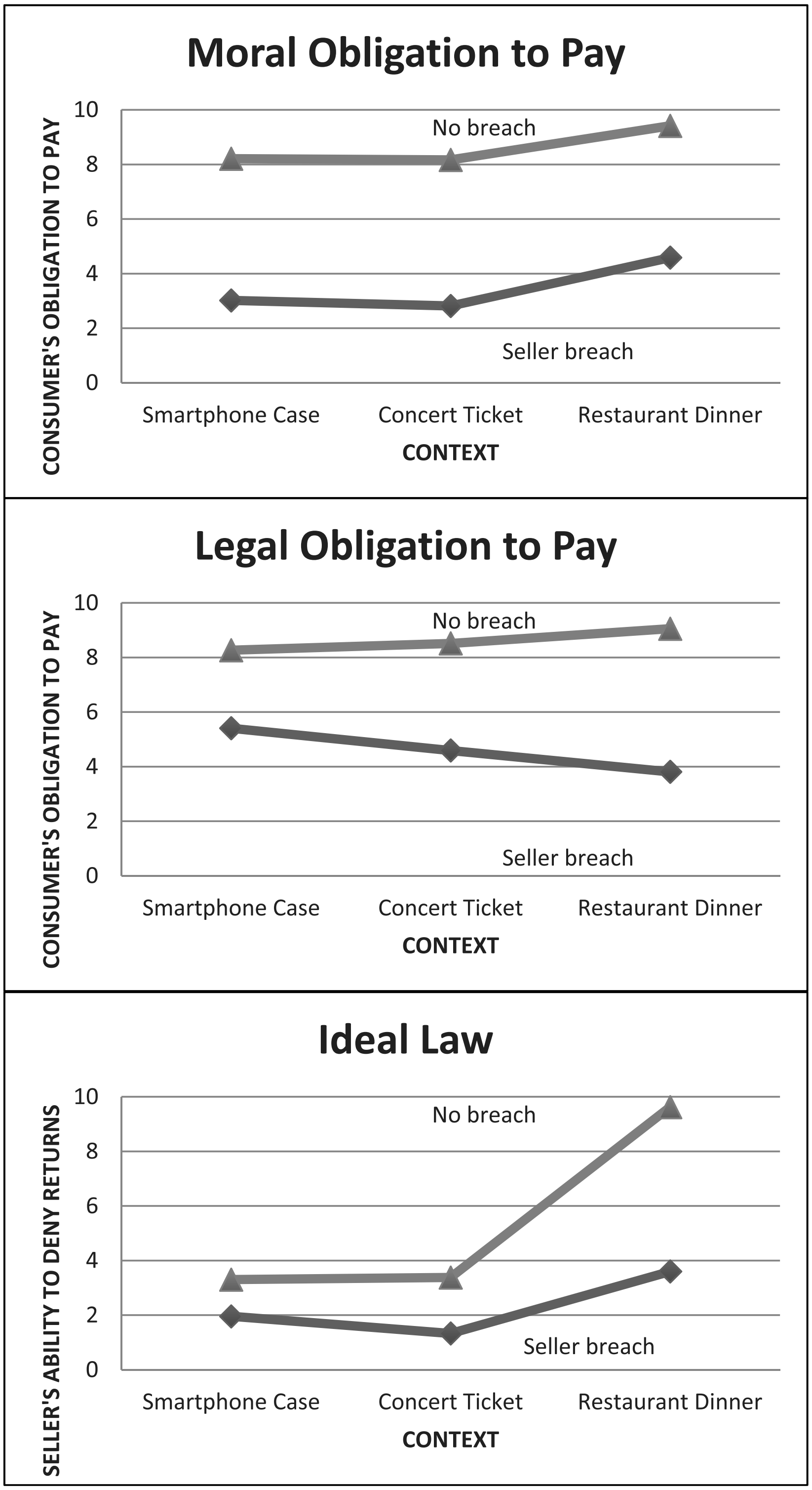
1. Summary of Findings

In each of the three scenarios involving a seller breach, the products tendered by the seller were the functional and economic equivalent of what the buyer ordered. In each case, the buyer's specification was based on idiosyncratic preference that had no effect on the utility of the product tendered—a different colored smartphone case, a less-preferred concert seat (though of equal value), and French fries instead of a baked potato. If the current legal default rules for performance in non-goods transactions are truly majoritarian, we would expect to see that breached buyers should face strong legal and moral obligations to pay in our first scenario (the smartphone case) and much-reduced legal and moral obligations in situations involving pure services (the concert ticket) and the mixed goods-services transaction (the steak dinner). The findings, however, do not support the current legal default rules.

Across all three contexts, respondents perceived a substantial moral obligation to pay for products during uneventful transactions (overall average = 8.6; smartphone case = 8.2; concert ticket = 8.2; restaurant = 9.4; the three ratings are statistically identical). In the event of a performance breach, however, the perceived moral obligation to pay dropped sharply (overall average = 3.5; smartphone case = 3.0; concert ticket = 2.8; restaurant = 4.6; the smartphone case and the concert ticket were statistically identical, and lower than the restaurant meal) (Figure 4, top panel).

Similarly, respondents perceived substantial legal obligation to pay for products during uneventful transactions (overall average = 8.6; smartphone case = 8.3; concert ticket = 8.5; restaurant = 9.1; all were statistically identical). In the event of a performance breach, however, the perceived legal obligation to pay dropped sharply (overall average = 4.6; smartphone case = 5.4; concert ticket = 4.6; restaurant = 3.8; the smartphone case and the concert ticket were statistically identical, and the restaurant meal and the concert ticket were also statistically identical) (Figure 4, middle panel).

Perspectives on the ideal law depended on the context. Respondents facing uneventful transactions believed buyers should not be able to back out of paying for a restaurant meal (9.6) but favored requiring exchange privileges for the concert ticket (3.4) and the smartphone case (3.2; statistically identical to the concert ticket). Across all three contexts, however, respondents exposed to the breach scenarios favored return privileges (restaurant = 3.6; smartphone case = 2.0; concert ticket =1.3, with the latter two statistically identical) (Figure 4, bottom panel.)


Moral Obligation to Pay
CONSUMER'S OBLIGATION TO PAY
10
8
6
4
2
0
No breach
Seller breach
Smartphone Case
Concert Ticket
Restaurant Dinner
CONTEXT
Legal Obligation to Pay
CONSUMER'S OBLIGATION TO PAY
10
8
6
4
2
0
No breach
Seller breach
Smartphone Case
Concert Ticket
Restaurant Dinner
CONTEXT
Ideal Law
SELLER'S ABILITY TO DENY RETURNS
10
8
6
4
2
0
No breach
Seller breach
Smartphone Case
Concert Ticket
Restaurant Dinner
CONTEXT

Thus the differences in consumers' views of their obligation to pay are not consistent with the current default rules allowing substantial performance standards for services and perfect tender standards for goods. Essentially, consumers experiencing a seller breach see little moral or legal obligation to pay for either goods or services and favor legal protection from such obligations.

2. Replication

To evaluate the generalizability of the findings, we replicated the experiments with a second group of research participants. The research was again conducted online, but with a larger and more diverse panel. We tapped 406 respondents from the MTurk[52] panel. Participation was restricted to adults living in the U.S. Approximately half (47.8%) of the respondents were between 25 and 34 years, and 84 percent were between 20 and 44 years. Participants were well-educated, with nearly half holding a 4-year college degree or more (49.3% compared to 32.7% for U.S. as a whole) and another 9.6% (compared to 28.4% U.S.) completing at least some college. Median household income was between $40,000 and $50,000, somewhat lower than the U.S. median household income.[53] Participants skewed male (60.2%).

Responses were consistent with those from our first sample, and so details will not be presented here. This consistency offers some evidence of the generalizability of the findings.

III. Discussion

A. *Findings*

Our goal is to understand the acceptability of the current standards for contract performance that prevail when parties do not otherwise specify: perfect tender for sales of goods and substantial performances for service contracts. Our research addresses two questions:

1. Which rules do consumer buyers prefer in the event a seller breaches a contract that does not specify a performance standard: perfect tender or substantial performance?

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52. Amazon's Mechanical Turk (MTurk) is an online marketplace that connects researchers with a pool of individuals (known as MTurkers or workers) willing to participate in research surveys. MTurk workers earn a modest financial award for their efforts (here, fifty cents) but many workers are principally motivated by the enjoyment and satisfaction of completing the research surveys. The MTurk workers are more diverse than the group traditionally tapped for academic research, namely, college students. Because of the greater diversity and the large pool, MTurk has become increasingly popular with academic researchers. Moreover, responses from MTurkers are consistent with responses from more traditional research samples, pointing to the validity of MTurk data. *See* Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?* 6 Persp. on Psychol. Sci. 3, 3-5 (2011).

53. *See* Bureau of the Census, Bureau of Labor Statistics, Current Population Survey: Annual Social and Economic Supplement (2014).

2. Does that preference depend on whether the contract involves goods or services?

We conducted a series of experiments using hypothetical scenarios to gain deeper insights into consumer preferences. Our experimental method offers advantages over a simple consumer poll. First, scenarios are stories. Consumers engage more deeply with stories than with abstract questions, and so we may expect more veridical responses. Second, experiments give insight into cause-and-effect rather than simple correlation. Because our respondents were exposed to a single condition (for example, a seller-breach of a concert ticket transaction), we can isolate the effects of product form (good or service) from cause of the breach (no-breach or seller-breach).

B. *Is Close Enough Good Enough? No!*

The line of substantial performance cases rests on the notion that contracting parties prefer a default rule in which buyers do not expect to be able to demand exactly what they ordered from sellers, but are willing, absent specific agreement otherwise, to be forced to take products that differ in minor ways from what was ordered. We found, however, that 21st century consumers, at least, strongly favor perfect tender. In our seller-breach scenarios, consumers rejected a moral obligation to pay for a product that was close to—but not exactly—what was ordered. This preference, contrary to existing rules, does not depend on whether the thing being purchased is a good or a service. While some differences appeared across contexts, there was no evidence of systematic differences attributable to the goods-service nature of the products. To the contrary, in the event of a seller-caused disruption, consumers treated the smartphone case, a good, and the concert ticket, a service, alike. It is not clear why they held somewhat different expectations for the restaurant meal, but the key point for our present purposes is that even in this transaction there was still strong support for a perfect tender rule.

We suspect that consumers' observed preference for perfect tender is influenced by several factors. Dealing with these at length is beyond the scope of this paper, but we sketch them here as a guide to what we hope will be further research.

1. Consumers in the modern world have little need to tolerate products that fail to perform. It is possible that in the days before mass standardization and the total quality management revolution, consumers were used to goods of variable quality. In service fields like construction, pre-modern building practices may have made customers more accepting of deviations and defects, while modern construction techniques allow for much better quality control. Today's consumers may simply expect, in a way their pred-

ecessors did not, to be able to get exactly what they ordered and have the goods or services perform flawlessly.[54]

2. More fundamentally, consumers may have developed a more pronounced sense of entitlement over the past several decades. In a commercial context, entitlement refers to the idea that certain consumers feel deserving of special treatment.[55] Consumer entitlement may be fueled by a secular increase in entitlement in the society at large. Younger consumers born between 1970 and 2000 and reared in a culture emphasizing self-worth, self-esteem, and trophies for all, have been criticized as "more egotistical, entitled, and overconfident than previous generations."[56] Consumer entitlement may also be fueled by standard business practices in the 21st century, which emphasize putting customers first. Consumers have come to expect that honest businesses will always strive to make sure the customer is pleased with what is delivered, and therefore there may be a strong expectation that if there is *any* problem, the seller will make things right. The widespread practice of accepting returns for any reason may well contribute to consumer beliefs. In general, entitled consumers focus on their expectations from a service encounter, whereas less entitled customers focus on the acceptability of service delivery.[57] In terms of our experiments, it may be that entitled customers focus on the baked potato they ordered, whereas less entitled customers accept the French fries as a suitable substitute.

3. The consumer movement that arose in the 1960s has emphasized the primacy of consumers over producers. Rules from strict liability in tort to

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54. Although beyond the scope of this paper, we note that the business world has become much less tolerant of variations from contract specifications. Such innovations as lean production and just-in-time manufacturing have made defects far more troublesome than they were fifty years ago. *See generally* Paul Myerson, Supply Chain and Logistics Management 11-40, 77-104 (2012); Shoshanah Cohen & Joseph Roussel, Strategic Supply Chain Management 41-116 (2d ed. 2013). A standard overall introduction to the field is Ronald G. Askin & Jeffrey B. Goldberg, Design and Analysis of Lean Production Systems (2001).

55. Henry C. Boyd III & Janet E. Helms, *Consumer Entitlement Theory and Measurement*, 22 Psychol. & Marketing 271 (2005).

56. Kali H. Trzesniewski, M. Brent Donnellan & Richard W. Robins, *Do Today's Young People Really Think They Are So Extraordinary? An Examination of Secular Trends in Narcissism and Self-Enhancement*, 19 Ass'n Psychol. Sci. 181, 181 (2008) (citation omitted). There is a popular belief that entitlement is on the rise. Newspapers' use of "sense of entitlement" increased sixfold from 1996 to 2006. Ellen Greenberger et al., *Self-Entitled College Students: Contributions of Personality, Parenting, and Motivational Factors*, 37 J. Youth & Adolescence 1193, 1193 (2008). The empirical evidence for increased entitlement levels is mixed, however. Trzesniewski and colleagues found no change in narcissism scores on standardized tests, whereas Twenge asserts, "[a]ll evidence suggests that narcissism is much more common in recent generations." Jean M. Twenge. Generation Me: Why Today's Young Americans Are More Confident, Assertive, Entitled – and More Miserable than ever Before 69 (2006).

57. *See* James J. Zboja, Mary Dana Laird & Adrien Bouchet, *The Moderating Role of Consumer Entitlement on the Relationship of Value with Customer Satisfaction,* 15 J. Consumer Behav. 216, 217 (2016).

detailed consumer protection laws have shifted the law from being pro-producer (that is, developing rules that protect businesses against liability to consumers for harm suffered by the latter)[58] to pro-consumer. Where once the law might have favored sellers who failed to do what they promised, modern law tends very much to favor consumers.

4. Consumers may intuitively understand the concepts that contract law calls "relationship-preserving" and "end-game" norms.[59] In most cases of relatively minor breach, both consumers and businesses tend to simply accept the defective performance, either because it is not a significant issue (*e.g.*, the hamburger arrived with pickles when it was not supposed to) or the parties have an ongoing regular contractual relationship in which there is some give-and-take in performance (*e.g.*, a gardener who this time forgot to edge the yard but who will be back next week). In this latter example, each party may be willing to put up with some slack from the other (the homeowner might need to put off payment for a few days sometime in the future) and insisting on the precise performance might damage the relationship. But in single-shot transactions such as the ones we surveyed, there are no relationships to be preserved and the respondents are told that the consumer in fact does not want to accept the performance, in which case an "end game" norm—reliance on legal rights—kicks in. Thus, consumers may often be *willing* to accept defective performance, but they may not be willing to be *compelled* to accept it.

IV. Conclusion

The current approach to contract default terms—taken both by courts and by most legal scholars—accepts that defaults should ordinarily be set to mimic what contracting parties would prefer if they had taken the time to discuss the issue. Anecdotal evidence, as noted above,[60] is that merchants like the perfect tender rule because they believe (a) they themselves will deliver what they promise, but (b) their counterparties may not be so scrupulous, and they may be stuck with inferior products.

Our study shows that ordinary consumers strongly prefer the perfect tender rule in contracts for both goods and services. The preference is strong in both contracts for goods (where it is currently the rule) and for services (where it is not). Where the good or service tendered meets the buyer's precise specifications, consumers recognize (as expected) a powerful moral and legal obligation requiring them to pay. But when the specifi-

58. *See generally* Morton J. Horowitz, The Transformation of American Law, 1780-1860 (1977) (The most canonical treatment of the notion that judges worked hand-in-hand with mercantile interests to make the law more favorable to large businesses).; Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. Leg. Stud. 249 (1975).

59. *See generally* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996).

60. Wiseman *supra* note 48, at 526.

cations are not met—*even when there is no economic difference between the values of the two performances*—they feel no obligation to pay.

We are not suggesting that the perfect tender rule is a desirable default. Although well beyond the scope of this paper, we can imagine that there are reasons a substantial performance rule might be a preferable default.[61] Our point is, rather, that judges and scholars who have justified substantial performance as "what the parties want" are mistaken. Our study strongly suggests that consumers want the right of rejection for any defect in the performance. The standard justification for the substantial performance standard is misplaced.

61. For example, imposing a substantial performance default might be viewed as a penalty default to compel parties who really do want perfect performance to reveal their preferences so that the counterparty can adjust the price accordingly if there is any doubt about its ability to perform perfectly. *See* Ayres & Gertner, *supra* note 3, at 91. Substantial performance might also be justified on ideas of judicial economy, by limiting contract litigation to situations where the defects are trivial—perhaps as an analogy to the old maxim, *de minimis non curat lex* ("the law does not concern itself with trifles"). *See also* Skaff v. Meridien N. Am. Beverly Hills, L.L.C., 506 F.3d 832, 839-40 (9th Cir. 2007) (holding that initially providing a handicapped hotel guest with a room lacking a roll-in shower caused no cognizable damage because the mistake was immediately corrected). On the other hand, of course, it can be argued that the perfect tender rule is also a penalty default in that it forces one who is not sure of its ability to perform to make that information know in advance so that the other party is aware of the potential problem. And it is also possible that abandoning a bright-line perfect-tender rule would increase, rather than reduce, potential litigation, due to the larger number of matters in which one who fails to perform would be tempted to take its chances in court rather than settle.