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2006

Foreword [to Boilerplate: Foundations of Market Contracts Symposium]

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Recommended Citation
Ben-Shahar, Omri. Foreword to Boilerplate: Foundations of Market Contracts Symposium. Mich. L. Rev. 104, no. 5 (2006): 821-6.

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FOREWORD

*Omri Ben-Shahar**

It is tempting to open this symposium with yet another "boilerplate" salute to the challenge that standard-form contracts pose for contract law doctrine. You may have seen many tributes to this fundamental problem. If I were to offer my own variation on this familiar introduction, I would have perhaps tried to come up with an original spin to induce you to read forward another paragraph or two. I would probably have talked about a major divide within contract law between the "law of negotiations" and "product regulation." The former is the body of doctrines that determine the legal consequences of bargaining behavior; the latter is the assortment of substantive limitations on terms of bargains, some general to all contracts, others industry- or area-specific. I would then have argued that the study of standard form belongs to the latter, not the former, and that this distinction can help overcome many difficulties in contract law doctrine.

Such would surely be an appropriate overture for a conference on boilerplate. Boilerplate, recall, is the building blocks of standard-form, nonnegotiated contracts. The enforceability of boilerplate is very much the legal locus where the philosophical debate over the regulation of markets hits the road. Boilerplate employment arbitration terms, for example, are the core of one of the most intriguing and fundamental debates in current contract law over the scope of the unconscionability doctrine.[1]

And yet, with boilerplate being the theme of this symposium, there is a looming paradoxical feature with such an introduction: it would be, in and of itself, a boilerplate introduction! It would satisfy all the attributes that introductions-to-symposia are known to have. It would begin with a general reminder of the importance (and timeliness!) of the topic. It would demonstrate that the stakes are more than just conceptual-scholarly clarity, but also that the business world anxiously awaits academia's last word on the topic—here, the academic gospel concerning the efficacy of market contracts. The standard introduction would then maintain that the issues are not yet resolved, cite leading scholars who have acknowledged how difficult the issues are, and posit that this lack of resolution is manifested in inadequate development of the doctrine. And finally, this hypothetical introduction would lay out a set of questions that ought to be addressed and the various ways in which the contributions to the symposium advance the answers to these questions.

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1. Compare the California Supreme Court's holding in Armendariz v. Foundation Health Psychcare Services, Inc., 99 Cal. Rptr. 2d 785 (2000) with the Seventh Circuit's view in Oblix v. Winiecki, 374 F.3d 488 (7th Cir. 2004).

You likely have read, by now, many such introductions-to-symposia, and can recognize their boilerplate structure, their adherence to the how-to-write-an-introduction protocol. But if this hypothetical introduction—the one I eventually decided not to write—is indeed standard and predictable, it does not only introduce the topic of boilerplate; it also embodies that very phenomenon. Thus, ironically, it must satisfy many of the characteristics of boilerplate that the articles in this symposium will describe. Writing an introduction about boilerplate, it turns out, is also producing boilerplate!

Perhaps the most obvious analogy between boilerplate contracts and boilerplate introductions is the following. Like boilerplate contracts, boilerplate introductions-to-symposia are not read by anybody. (Why, then, are they written, you may naïvely wonder. I'll say something about this below.) The "unreadness" property is of course a troubling phenomenon, both for contracts and for symposia introductions. Luckily, some of the contributions to this symposium address this unreadness feature of boilerplate. Robert Hillman, for example, investigates whether advance disclosure mechanisms can help consumers know what's in the contract or whether they would merely backfire against the interests of consumers;[2] Michelle Boardman suggests that in some industries the unreadness (and unreadability) of boilerplate is a perfectly reasonable—in fact, desirable—feature of a system in which contract terms are written not to expropriate value but to stabilize meanings.[3]

Here is a second analogy between boilerplate terms and symposia introductions: they appear objective, but they are often one-sided. You can probably recall some introductions to past symposia that you read (despite their unreadness . . .), in which the introducer put on a mask of neutrality, acknowledged all the relevant and conflicting perspectives, provided broad-as-possible context and normative appeal, and yet planted in all of that objectivity his or her own controversial agenda, building upon a set of selective assumptions and skewed observations. I am sure I can recall some such introductions, and I'm pretty sure I even wrote one.[4] Similar to introductions, this buried one-sidedness is also a very familiar feature of boilerplate contracts. Disguised by "legalese," they are often unbalanced, favoring their drafter. But while the one-sidedness of consumer contracts is hardly a discovery, several contributions to the symposium offer a new understanding of this phenomenon. Lucian Bebchuk and Richard Posner in one article,[5] and

2. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

3. Michelle E. Boardman, Contra Proferentem: *The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006).

4. Omri Ben-Shahar, *Forward—Freedom from Contract*, in Symposium on *Freedom from Contract*, 2004 WISC. L. REV. 261.

5. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

Jason Johnston in another article,[6] argue that self-serving boilerplate terms may not be as bad as they seem. They argue that one-sided terms are a general feature of contracts written by firms who care about their reputations and who do not intend to strictly enforce such terms. These two articles argue that firms write one-sided terms in order to have the option to enforce them selectively to fend off consumer opportunism, but otherwise let their honest clients off. Johnston nicely calls it "tailored forgiveness"; Bebchuk and Posner attribute this feature to the observability but nonverifiability of opportunism—that is, to the difficulty of proving it in court. Both these articles portray a reality in which one-sidedness poses less of a concern than previously thought. In contrast, Ronald Mann examines one-sided boilerplate in credit card contracts and concludes that they continue to burden debtors.[7] He suggests that contract law doctrine may be inadequate in dealing with this problem and explores the case for prohibitions against some such terms or even a regulatory promulgation of more balanced mandatory clauses.

There is another, more subtle feature of introductions-to-symposia, which they again share with boilerplate terms. In a typical introduction, the collection of articles in the symposium being introduced is not a result of a tournament or competition between able scholars. The list is solicited and tailored, and the writer of the introduction is usually the person who put together this list and shaped it to correspond with what he or she perceives to be the ideal agenda. In the same way that the introduction describes a substance that is not negotiated but rather unilaterally tailored, the boilerplate contract stipulates a substance of a transaction that is not negotiated or bilaterally dickered but rather dictated—unilaterally drafted. Of course, this raises difficult questions about the relationship between boilerplate and the power to dictate. Douglas Baird demonstrates in this symposium some of the fallacies that have become all too common in addressing this relationship.[8] He argues that the evils of concentrated economic power have nothing to do with boilerplate. Revisiting some of the classic cases from the folklore of contract law, he shows that it is not the fine print that makes some clauses troublesome. But in a rich and original article, David Gilo and Ariel Porat show a variety of previously unrecognized ways in which boilerplate terms do operate in an anticompetitive fashion, such as to price-discriminate, facilitate collusion among sellers, and deter entry by new sellers.[9] The unilateral drafting of boilerplate is also studied by Jim White and me in a merchant-to-merchant context. We examine the contracts between automotive companies

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6. Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006).

7. Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899 (2006).

8. Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006).

9. David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006).

and their suppliers, one of the most important form contracts (in terms of economic stakes) ever drafted.[10] They uncover several ways in which the drafters of these contracts prevent negotiations and tailoring from ever occurring to bolster their economic rents.

If there is a significant boilerplate element to the craft of writing an introduction—if introductions are indeed standard and predictable—this raises the question: why bother writing them? Similarly, if a form contract is boilerplate to be used and replicated by many similarly situated parties, why would any single individual have the incentive to draft it? A boilerplate contract is a public good—an item that is copied freely by others—and we should therefore expect a problem of underproduction. This question is studied directly by Kevin Davis, who identifies the production paradox and looks at the role of nonprofit organizations in generating boilerplate contracts.[11] It is also studied by Stephen Choi and Mitu Gulati, who look at the incentives of boilerplate drafters and define their crucial role in giving interpretive meaning to boilerplate.[12] Choi and Gulati's study is even more ambitious: it suggests that a better way to understand the emergence of boilerplate—and to interpret it when ambiguous—is to conceive of it as *statute* and apply statutory interpretation techniques to dispute resolutions.

I have noticed another thing about published symposia: readers rarely sit down to read an entire symposium from the introduction to the last article. Rather, most readers may bump into one or a small subset of individual symposium articles that are of particular interest to them. This suggests that, other than for the participants in the conference, there is really no audience for introductions. Summarizing to the hypothetical symposium reader what the articles of the symposium are about is a service that future readers don't really need and of which very few would make use. In other words, symposia introductions are a wasteful—*inefficient*?—scholarly effort. This conclusion is every bit as unorthodox as the idea that boilerplate contracts may also be inefficient. And yet the claim that boilerplate could be inefficient is a more difficult proposition to defend. There is a long tradition in law and economics arguing for the efficiency of standard-form contracts. Several of the contributions in this symposium, however, suggest otherwise and provide either evidence or new theoretical underpinnings for the inefficiency conjecture.[13] Stephen Choi and Mitu Gulati, studying the evolution of boilerplate in sophisticated transactions, show why it is often unlikely that boilerplate converges to the most efficient terms.[14]

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10. Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006).

11. Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075 (2006).

12. Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006).

13. Gilo and Porat, *supra* note 9, show various ways in which boilerplate reduces competition and thus reduces total welfare; Ben-Shahar and White, *supra* note 10, suggest that standard-form purchase orders in the automotive business exhibit various inefficient terms.

14. Choi & Gulati, *supra* note 12.

If I somehow got you to read thus far, you may recognize that this introduction includes two types of information. The first type is specific to the forthcoming symposium and conveys its particular context (for instance, my references to the specific articles and to the prior standard-form contracts literature). The second type of stuff you read is more general and can be used, with almost no changes, to introduce other symposia on a variety of topics. This distinction roughly corresponds to what Henry Smith, in his important contribution to this symposium, calls intensive and extensive communications.[15] Contracts, when drafted ad hoc, are highly intensive information-rich rights. Property, in contrast, is less context dependent, less information specific, and therefore more extensive. Smith suggests that boilerplate represents a shift of contractual rights toward the status of property. He argues that the *modularity* feature of boilerplate is what allows it to have its extensive appeal.

Finally, in many contracts that are otherwise skewed in favor of their drafters, we nevertheless find boilerplate terms that appear to accord some balance. For example, one of the "hidden roles" of boilerplate that Gilo and Porat discover in their article is the provision of true and accessible benefits—but only to those who labor to read the unreadable contract.[16] Likewise, two contributions to this conference are aimed at providing more balance—and more fairness?—to the otherwise dominant law-and-economics presence, but, like boilerplate, can be accessible mainly to readers who will labor to read through most of the other articles. I have asked two of the more influential scholars that have studied standard-form contracts using other approaches to comment on the ideas that are advanced in the symposium. Accordingly, Margaret Jane Radin, whose recent work identifies new challenges posed by standardization of contract in the digital age,[17] and Todd Rakoff, whose seminal work on contracts of adhesion continues to provide a baseline for the study of form contracts,[18] responded to this challenge.[19] Note that these commentaries are anything but the boilerplate commentaries that sometimes are affixed to symposium articles. Rather, this symposium provides a platform for Radin and for Rakoff to examine the emerging inventory of new ideas about boilerplate—an inventory

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15. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006).

16. Gilo and Porat, *supra* note 9, at 996.

17. Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L. J. 1125 (2000); Margaret Jane Radin, *Regime Change in Intellectual Property Law: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA L. & TECH. J. 173 (2003–2004).

18. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

19. Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006).

that is hopefully richer after this symposium—and to reevaluate their own thinking on the topic.

As occasional market transactors, you surely know that many important details of transactions you are about to enter are buried in boilerplate, but you often prefer to read sellers' pamphlets to figure out the big picture—what the bargain is about. What, then, is the big picture coming out of this symposium? What can we write on our pamphlet? I think we can safely say this symposium is breaking new ground in the study of boilerplate and standard forms beyond the general claims about market power, competition for terms, and network externalities. On a theoretical level, boilerplate is shown to be a legal phenomenon different from contract. Is it a statute? Is it property? Is it a product? On an empirical level, boilerplate is studied in specific contexts, including insurance, credit cards, auto manufacturing, debt financing, and electronic commerce. The contributions to the symposium reveal subtle and previously unrecognized ways in which boilerplate clauses encourage information flow—but also dampen it; increase competition—but also reduce it; how new boilerplate terms are produced—and how innovation in boilerplate is stifled; how negotiation happens in the shadow of boilerplate—and how it is subdued; and offer new explanations as to why boilerplate is so often one-sided. With emphasis on empiricism and economic thinking, this symposium provides a more nuanced understanding of the DNA of market contracts—the boilerplate terms.