

AALS Mid-Year, Montreal June, 2005: “Guerilla Terms”

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I. Consider the “guerilla term,” a provision inserted in a form contract that takes advantage of so-called “rational ignorance,” the irrationality of reading forms. Though the use of the word “guerilla” may be ironic (we usually think of the politically weak resorting to guerilla tactics) maybe the irony makes more stark precisely what is going on: The more powerful market actors, those who draft the forms we “sign” or to which we otherwise “agree,” use guerilla terms to exploit naive consumers, and have every incentive to maintain or even increase the pool of the naive – Barnum’s competitor (not Barnum) was right. Further, the sophisticated (Pogo’s “us”), are complicit, or should be if we are rational economic actors:

A. Proliferation of Contract

B. Ease of Contracting: buying real estate on line (?)

C. Accommodated by Technological Developments; e.g.

1. “Rolling Contract” – goods and terms arrive after initial contract formation
2. “Clickwrap,” “brousewrap” and the like
3. difference between a 25 page paper contract and contract of same length in electronic form; easier “to agree” to latter, because you can avoid seeing its heft.

D. “Hidden Disclosures”; e.g.

1. Arbitration (even if in plain sight: what does “arbitration” entail, like “warranty of merchantability”)
2. Balance transfer options
3. *Carnival Cruise* “choice” of venue
4. Forms generally as well it is rational not to read: “rational ignorance”

E. But it is a matter of fact; *not* terms about which there is competition, with regard to which sellers/providers would rationally advertise:

1. credit card subsidies generally: “cash back”
2. warranty, quality

II. “Shrouding”: Gabaix & Laibson in a 2004 paper, “Shrouded Attributes and Information

Suppression in Competitive Markets,” demonstrate that even when advertising is costless, sellers of goods and providers of services will sell their base good or service at a loss leader price and charge a monopoly price for necessary add-ons:

We show that information revelation breaks down when some naive consumers do not anticipate shrouded attributes. Firms will not compete by publicly undercutting their competitors’ add-on prices if (i) add-ons have close substitutes that are only exploited by sophisticated consumers, or (ii) many consumers drop out of the market altogether when the add-on market is made salient. We show that informational shrouding flourishes even in highly competitive markets, even in markets with costless advertising and even when the shrouding generates allocational inefficiencies. In equilibrium, two kinds of exploitation coexist. Optimizing firms exploit naive consumers through marketing schemes that shroud negative product information. In turn, sophisticated consumers exploit these marketing schemes. It is not profitable to try and lure either of them to non-exploitive firms. As a result, the distortions due to consumer biases persist across a wide range of markets.

A. Examples of “add-ons” and “guerilla terms” e.g.,

1. printer cartridges (sophisticated shop around for best per page cost)
2. checking account fees (sophisticated get overdraft protection)
3. hotel room charges (mini-bar, safe, phone, service) (sophisticated bring cell phone)

B. It is in sellers/providers’ interest to take advantage of the cross subsidy enjoyed by sophisticated buyers at the expense of naive consumers. That is, it is economically rational *not to advertise* even when advertising is costless.

C. Herein too of “Situationalism” – “marketing schemes – the “Marlboro Man” – that exploit naive consumers”; Hanson & Yosifon, Penn and Gtown; Contract doctrine is based on “dispositional” conceptions of the human agent.

III. I extend the Gabaix & Laibson conclusion to the case of forms containing “guerilla terms,” form provisions that, by shifting risk to naive consumers provide sophisticated consumers a cross-subsidy and enable sellers/providers to charge a higher price, at equilibrium, than they could were all consumers sophisticated. That is the basis of the market in misinformation that I believe both explains guerilla terms in form contracts and provides a means to police them without relying on ephemeral unconscionability conceptions or other even less reliable (tort-based, e.g., misrepresentation) deal policing mechanisms. So indicia of a guerilla term:

A. a form – something it is irrational to read (so that drafter can exploit that irrationality)

B. cross subsidy (would probably exclude term in *Carnival Cruise* but for a better reason than the USSC came up with)

C. market equilibrium where form drafter would not advertise for fear of making too many consumers sophisticated or driving the naive out of the market altogether.

IV. But doctrine (particularly the focus on “bargain” and “agreement”) incongruously treats deception, failure to apprise, as the aberrational case (and relies on deal policing mechanisms, i.e., unconscionability to redress imbalances); my analysis reveals that in a world of “rational ignorance” (the definition of a form) deception is market driven; it is the paradigmatic not the aberrational case.

V. Solution: Expose form contracts to fora in which risk of shrouding may be exposed, where guerilla terms may not hide behind doctrine; courts make “justice” determination and refuse to enforce guerilla terms:

A. We need the CL of Contract more than ever and arbitration denies us common law development of Contract doctrine in new transactional settings presented by e-commerce.

B. Does Contract doctrine really work anymore? And what would it mean for it “to work”?

VI. But what to do about “certainty and predictability”?

A. In “actuarial sense” sufficient – can calculate how many of your terms will be guerilla and therefore avoidable (or maybe reformable)

B. Certainty and predictability just another constituent of the contract calculus, not the “goal” of contract.