REMEDY REALITIES IN BUSINESS-TO-CONSUMER CONTRACTING

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Professor Jean Braucher greatly contributed to the exploration of consumer and contract law by questioning how the law operates in the real world and highlighting the importance of "law in action." In recognition of that contribution, this Article focuses on law in action with respect to consumers' quest to obtain remedies regarding their business-to-consumers ("B2C") contracts. Currently, consumers often have no practical recourse with respect to B2C purchase problems due to the complexity, cost, and inconvenience of the processes for obtaining remedies. Accordingly, stated legal rights become meaningless for individuals living in the real world. This Article, therefore, explores access to consumer remedies and proposes ideas for expanding that access through development of fair and efficient online dispute resolution ("ODR") processes.

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INTRODUCTION

Consumers continually make small-dollar purchases through business-to-consumer ("B2C") contracts, usually without incident. Occasionally, however, the goods and services that consumers purchase do not fulfill their expectations. Purchased products may never arrive or quickly malfunction, and service providers may perform poorly. When this happens, consumers often lack information about their rights and do not know where to turn for assistance regarding their purchase problems. Furthermore, even when consumers understand their rights, they may lack the resources or confidence to pursue processes for obtaining assistance. This is especially true for consumers with lower status, education, or income.

Professor Jean Braucher highlighted this lack of awareness and access with respect to consumer remedies in her consideration of "law in action" and urged that the law should move beyond bravado to provide real relief for all individuals.[1] Professor Braucher emphasized that common-law contract remedies are inadequate to protect consumers' expectation interests, especially in light of litigation costs.[2] Over 30 years ago, Professor Braucher criticized the "legal-rights" framework for understanding consumer warranty claims and the prohibitive costs of related litigation.[3] She emphasized that a majority of product defects go unnoticed and as many as two-thirds of perceived defects go unreported.[4]

In an ideal world, all consumers would understand their rights and have easy access to remedies when they have problems with B2C purchases. Instead, the world is less than ideal. Consumers usually do not realize they have rights. They often feel helpless in seeking remedies even when they realize their rights. Furthermore, businesses have cut back customer service, and have cut off consumer

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1. Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 107–08 (2012).

2. William C. Whitford, *Jean Braucher's Contracts World View*, 58 ARIZ. L. REV. 13, 18 (2016) (noting how Professor Braucher emphasized that the costs of litigation may effectively preclude a consumer from even defending against a collection action initiated by a business).

3. Jean Braucher, *An Informal Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1405–06, 1413–47.

4. *Id.* at 1450–60 (further explaining how few consumers seek remedies and proposing an informal resolution model adopting a warranty disclosure approach that regulates warranties "only to the extent necessary" to make clear disclosure possible).

access to judicial relief through one-sided form contracts with arbitration clauses that preclude class relief of any kind.[5] This often leaves consumers with no practical process for obtaining remedies with respect to small-dollar claims. For example, a consumer generally will not pursue a claim regarding a $500 cell phone if that means she must pay the nonrefundable $200 filing fee required to initiate arbitration with the American Arbitration Association ("AAA"). That is especially true when one considers the consumer's time, travel, and attorney costs.[6]

The U.S. Supreme Court has reinforced strict enforcement of these arbitration and class waiver provisions.[7] Some scholars have argued that this jurisprudence threatens to erode public awareness of their rights and enforcement of substantive consumer-protection law.[8] This is because the Court's endorsement of arbitration clauses ignores whether enforcement will help streamline proceedings or thwart reasonable means for asserting claims.[9] The current interpretation of arbitration and class waiver provisions essentially incentivizes businesses to use procedural provisions to escape the public eye of the courts and class actions.[10]

That is not to say that public litigation is an ideal avenue for the vindication of consumer rights. As Professor Braucher noted, litigation also generally fails to pave an economically practical and satisfying way for consumers to obtain remedies regarding purchases.[11] Any such formalized face-to-face ("F2F") processes for pursuing remedies are usually too complex and expensive for resolving consumers' relatively small claims related to typical household purchases.[12] Most consumers do

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5. Arbitration clauses are not necessarily unfair to consumers and some companies reimburse consumers' arbitration costs. For example, Amazon uses a binding arbitration clause with a class action waiver, but the company allows for a telephonic hearing and will reimburse consumers for all fees on claims of $10,000 or less unless the arbitrator deems the claim "frivolous." *Conditions of Use*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088 (last visited Feb. 28, 2016).

6. According to the AAA, a consumer must pay a nonrefundable filing of $200 in full when filing a claim, unless the parties' agreement provides that the consumer pay less. *Costs of Arbitration (Including AAA Administrative Fees)*, AM. ARB. ASS'N, https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2026862 (last visited Feb. 28, 2016) (also noting that there are additional fees for an in-person hearing ($500 plus room rental), but the AAA says these fees are to be paid by the business).

7. AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743–56 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773–77 (2010); Rent-A-Ctr. W., Inc. v. Jackson, 130 S. Ct. 2772, 2777–80 (2010).

8. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3075–84 (2015).

9. *See id.* at 3070.

10. *Id.* at 3080–82; *see also* Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 94–98 (2012) (noting the prevalence and danger of arbitration clauses in consumer contracts).

11. Braucher, *supra* note 3, at 1410–13.

12. *See id.*

not have the resources, education, confidence, or general inclination to pursue such procedures.[13]

As a result, consumers usually do nothing or occasionally seek a remedy through more informal private processes.[14] As I have argued, this privatization of B2C claims resolution has allowed a "squeaky wheel system" ("SWS") to develop in which only the most sophisticated squeaky wheels are sufficiently proactive in pursuing their complaints to get the limited assistance, remedies, and other benefits that companies are not eager to provide.[15] Meanwhile, the majority of consumers remain silent because they lack the knowledge, experience, or resources to artfully and actively pursue their interests.[16] As a result, the individuals who already enjoy disproportionate bargaining power due to social or economic status are usually the squeaky wheels that receive the benefits—thus perpetuating the divide between the consumer "haves" and "have-nots."[17] Furthermore, privately satisfying the informed squeaky-wheel consumers with rationed remedies may prevent these consumers from leading class actions or otherwise informing the majority about purchase problems.[18]

As Professor Braucher suggested in her work, the costs and complexities of remedy processes create a need for consumer protections that make rights real when viewed in action.[19] This Article builds on this inspiration in highlighting the dysfunctions in consumer-remedy systems and advocating for expanded processes to make rights and remedies real for consumers. Specifically, this Article considers how online dispute resolution ("ODR") systems could provide expanded access to remedies with respect to typical consumer purchase problems. ODR utilizes the Internet and computer-mediated communication ("CMC") to provide cost-effective negotiation, mediation, and arbitration processes for resolving complaints without the need for costly travel or other stresses and complications of F2F or telephonic processes. ODR can ameliorate the negative impacts of the SWS by lowering the

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13. *See* Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, *in* TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112–32 (Pascoe Pleasence et al. eds., 2007) (highlighting how shame, a sense of insufficient power, fear, gratitude, and frustrated resignation stops individuals from asserting their claims).

14. *See id.* at 112–14.

15. Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280 (2012) [hereinafter Schmitz, *Squeaky Wheel System*].

16. *See id.* at 282–83.

17. *See* Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 895–96 (2008) (discussing how businesses may discriminate in favor of sophisticated consumers); *see also* Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Nots,"* 2014 MICH. ST. L. REV. 1411, 1411–74 [hereinafter Schmitz, *Secret Consumer Scores*] (exploring how Big Data has been used by businesses to determine what contracts and benefits to provide to consumers, thereby perpetuating contractual discrimination).

18. Eugene J. Kelley, Jr. et al., *Offers of Judgment in Class Action Cases: Do Defendants Have a Secret Weapon?*, 54 CONSUMER FIN. L. Q. REP. 283, 283 (2000); David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking off Named Plaintiffs*, 53 DUKE L.J. 781, 789 (2003).

19. Braucher, *supra* note 3, at 1405–10.

costs of pursing complaints so that all consumers—regardless of power and resources—feel comfortable and able to seek assistance.

Accordingly, Part I of this Article describes legal limitations consumers face when seeking remedies on their small dollar claims, paying particular attention to the rise of arbitration clauses and class action waivers. Part II then explains "life" limitations that hinder most consumers from pursuing their rights and incentivize businesses to treat consumers differently because of their resources, status, or education. These parts highlight how arbitration clauses and class action waivers converge with the realities of human and business predilections to curtail consumers' access to meaningful remedies. Part III then suggests means for addressing this lack of access to remedies through the development of ODR systems that assist consumers with purchase problems regardless of their wealth, educational, or other social status. Part IV concludes by inviting action in advancing such ODR systems.

I. LEGAL LIMITATIONS ON ACCESS TO REMEDIES

Courts, regulators, and lawmakers generally focus on formalistic contract enforcement and promotion of market efficiency, which weigh against substantive regulations that may interfere with freedom of contract.[20] This has largely limited consumer protections to disclosure rules that preserve businesses' power to dictate contract terms as long as they provide sufficient notice of provisions with particular impact on consumers' rights. Allegiance to freedom of contract also has led to strict enforcement of arbitration clauses that businesses may use to cut off consumers' access to class relief, which may be their only practical means for asserting small-dollar claims. This combination of limited consumer protection regulations and strict enforcement of arbitration has arguably promoted market efficiency by allowing businesses to rely on form contracts and save on dispute resolution costs. This combination, however, is problematic when it precludes consumers from vindicating their rights and jeopardizes enforcement of consumer law.

A. Resistance to Substantive Consumer Protections

Classical contract doctrine prefers formulistic disclosure rules to incentivize individuals to read their contracts and responsibly protect themselves.[21] This doctrine counseled against substantive consumer protections to foster certainty, long-term planning, and an optimal allocation of resources.[22] Adherents to classical

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20. *See, e.g.*, Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1721–25 (1996) (arguing that incorporation of unwritten norms in contracts may foster inefficiency); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000) (proposing that strict enforcement better maximizes parties' value than more flexible relational methodology).

21. *See* Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 619–23 (2000) (discussing courts' strict enforcement of form contracts in rejecting fraud challenges of contracts containing disclaimer clauses).

22. *See* Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QUINNIPIAC L. REV. 715, 717 (2000) (noting law and economics theorists'

contract doctrine assume that buyers and sellers make rational contracts that include efficient and interest-maximizing contract terms. Furthermore, they presuppose healthy competition among sellers that are concerned about their reputations.[23]

Law and economics scholars focus on cost-benefit analysis as promoting market efficiency. They argue that cost-benefit analysis is generally applicable in any purchase context, even B2C contexts.[24] Furthermore, they suggest that cost-benefit analysis is the most effective means for assessing regulations because it relies on available market data and monetary valuations.[25] Law and economics scholars therefore warn that substantive consumer protection reforms based on expert judgments would create market inefficiencies and reduce transparency.[26]

Classical contract theorists and economists who focus on efficiency also worry that substantive consumer protection regulations may lead to an unpredictable enforcement of contracts and may cause merchants to avoid transactions with those likely to challenge adhesive contracts.[27] They also argue that businesses will pass on contract litigation costs to consumers through increased prices and decreased quality of goods and services.[28] They posit that strict enforcement of boilerplate contract terms benefits all consumers regardless of their adhesive nature because standardization of contracts lowers transaction costs and fosters efficiency.[29]

Some law and economics scholars criticize any substantive regulations that arguably impede freedom of contract.[30] They argue that such regulations may require banks and businesses to take on the extra costs of measures, including assessing borrowers' subjective contractual expectations.[31] They also suggest that government enforcement of new substantive regulations results in taxpayer costs that outweigh any benefit that such regulations provide consumers.[32] Such scholars

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suggestion that presumed enforcement of "adhesion contracts" may be in "the long-term interests of those who sign them").

23. *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 79–82 (2006) (discussing formalistic application of contract defenses).

24. Eric A. Posner & E. Glen Weyl, *Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms*, 124 YALE. L.J. FORUM 246, 247 (2015).

25. *Id.*

26. *Id.*

27. *Id.*

28. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 429 (2002).

29. Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1403–04, 1433–55 (2009) (arguing that consumers prefer standardized contracts over spending time negotiating individualized terms, and that standardization allows for innovation); Andrew Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 354–57 (2011).

30. Jeffrey P. Naimon et al., *Caveat Emptor or Caveat Vendor? The Evolution of Unfairness in Federal Consumer Protection Law*, 132 BANKING L.J. 3, 4 (2015).

31. *Id.* at 16 (discussing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5531(a), (d) (2012)).

32. *Id.* at 17–18 (citing Complaint, Consumer Fin. Prot. Bureau v. Am. Debt Settlement Solutions, No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013), ECF No. 1 (alleging abusive practices in offering debt relief services) and Complaint, Consumer Fin. Prot. Bureau v. CashCall, Inc., No. 1:13-cv-13167 (D. Mass. Dec. 16, 2013), ECF No. 1, 2014

thus conclude that the costs to impose new regulations on businesses exceed the benefit.[33]

Following this logic, both classical and law and economics contract theorists have continued to endorse limited disclosure rules.[34] This is largely because, in their opinion, disclosure bolsters freedom of contract by giving consumers an opportunity to review contract terms before consenting.[35] Proponents of disclosure rules suggest that these rules should bolster contractual consent, thereby adding justification for strict contract enforcement.[36] Such disclosure rules also may help eradicate abusive practices without the costs of more substantive prohibitions on contract terms.

The Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act") is an example of a disclosure-focused law.[37] Although the CARD Act contains some substantive protections, it has gained prominence for requiring simple disclosures to credit card holders that mimic those of the so-called "Schumer Box" that requires lenders to succinctly state key loan terms in credit applications and solicitations under the Truth in Lending Act ("TILA").[38] Specifically, the CARD Act provisions impose disclosure requirements with respect to payment amounts, due dates, rates, and fees.[39] The CARD Act has been somewhat successful in protecting consumers from unwanted fees and interest, but it is unclear whether the disclosure or substantive aspects of the law have been more beneficial.[40]

Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") seeks to increase transparency in the market for consumer financial services by requiring additional disclosures in financial dealings.[41] Dodd-Frank also gives the Consumer Financial Protection Bureau ("CFPB") rulemaking, supervisory, and enforcement powers and allows for dual state and federal

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WL 10321537 (alleging CashCall's attempts to collect on loans that were fully or partially void under state usury laws rose to the level of an abusive practice) as examples of such government enforcement action).

33. *Id.* at 18–20.

34. *See generally* Fairfield, *supra* note 29, at 1422–23.

35. *See generally id.*

36. *See generally id.*

37. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 124 Stat. 1743 (codified in scattered sections of 15 U.S.C.); 15 U.S.C. § 1637(b) (2012); Braucher *supra* note 1, at 117–19 (but noting how CARD Act's substantive protections are promising because businesses tend to avoid violating specific commands).

38. *See, e.g.*, Owen Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967 (2012); Jim Hawkins, *The CARD Act on Campus*, 69 WASH. & LEE L. REV. 1471 (2012); Brandon Mohr, *Who Decides Whether Clarity Is Clear?: An Analysis of TILA's Clarity of Disclosure Requirement in Actions by Consumers Against Creditor Card Companies*, 32 PACE L. REV. 188, 215 (2012) (discussing the requirements of the Schumer Box).

39. 15 U.S.C. § 1637(b) (2012).

40. CONSUMER FIN. PROT. BUREAU, CARD ACT REPORT: A REVIEW OF THE IMPACT OF THE CARD ACT ON THE CONSUMER CREDIT CARD MARKET (2013), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

41. Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 126, 140–41 (2013).

enforcement.[42] This has opened the door to more substantive consumer protection regulations aimed to address "unfair, deceptive, and abusive acts, and practices."[43] For example, the CFPB has promulgated substantive limits on checking account overdraft charges that protect consumers from abusive bank practices.[44]

However, the CFPB has limited resources for enforcement actions and state attorneys general have done little to implement their new powers under Dodd-Frank.[45] Consumers continue to carry the burden to learn about their rights and proactively pursue processes for obtaining remedies. Although enhanced disclosures help justify contract enforcement, they generally do little to advance consumers' access to remedy processes. Current law leaves consumers with traditional tort- and contract-based solutions that are not well suited for small-dollar claims.[46]

B. Proliferation of Arbitration Clauses Precluding Class Proceedings

Adherence to freedom of contract and reluctance by legislatures to enact more substantive consumer protections have hindered movements to bar enforcement of arbitration clauses.[47] Instead, arbitration clauses have become common in B2C contracts, thereby preventing consumers from litigating claims in court.[48] Furthermore, B2C contract clauses generally preclude class relief of any kind, which is often consumers' only economically feasible means for seeking relief on their small-dollar claims.[49]

1. Strict Enforcement of Individualized Arbitration

Arbitration clauses precluding class relief pervade B2C contracts. For example, one study indicates that roughly 75% of financial services and

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42. *Id.* at 127–28.

43. *See id.* at 131–54.

44. Dan Rutherford, *Consumer Advisory: You've Got Options When It Comes to Overdraft*, CFPB BLOG (Apr. 28, 2015), http://www.consumerfinance.gov/blog/consumer-advisory-youve-got-options-when-it-comes-to-overdraft/ (discussing overdraft protections); *see also* Kelley Holland, *CFPB Fines Regions Bank for Illegal Overdraft Fees*, CNBC PERS. FIN. (Apr. 28, 2015), http://www.cnbc.com/2015/04/28/cfpb-fines-regions-bank-for-illegal-overdraft-fees.html (noting CFPB action against illegal overdraft charges).

45. Braucher, *supra* note 1, at 110, 128 (highlighting the importance of CFPB follow-through as a means for protecting consumers from lenders' exploitative marketing and products); Totten, *supra* note 41, at 168–71 (arguing that dual enforcement could: (1) cure federal agency inaction; (2) increase democratic participation and accountability; (3) strengthen federal separation of powers; (4) facilitate the "states as laboratories of democracy" power; and (5) give states power they would not otherwise have under state law).

46. *See* Braucher, *supra* note 1, at 118–25 (noting need for more substantive protections regarding reckless credit extensions).

47. *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 197 (2015) (noting that legislation to save class actions from business-friendly Supreme Court interpretations of federal arbitration law is unlikely to pass).

48. *Id.* at 164–70, 192 (discussing Supreme Court decisions that have upheld the enforceability of class action waivers, and noting that 50% of credit card users and 40% of checking account users were bound by such class action waivers, according to a 2012 CFPB report).

49. *Id.* at 164–97.

telecommunications consumer contracts contain arbitration clauses, and all of these contracts include class action waivers.[50] As one scholar surmised, "Based on studies, anecdotes, and back of the envelope calculations, it seems that reasonable people could agree there are lots and lots of mandatory consumer arbitration contracts in the United States at present."[51]

The growth of arbitration clauses in consumer contracts flows from the U.S. Supreme Court's application of the Federal Arbitration Act ("FAA") to mandate strict enforcement of arbitration clauses. Furthermore, the Court reinforced this mandate in a string of recent decisions including *American Express v. Italian Colors Restaurant*; *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*; *AT&T Mobility, L.L.C. v. Concepcion*; and *Rent-A-Center v. Jackson*.[52] The Court condoned class waivers with respect to statutory rights in *American Express*, and significantly narrowed arbitrators' power to order class arbitration in *Stolt-Nielsen S.A.* and *AT&T Mobility, L.L.C.*[53] Furthermore, the Court in *Rent-A-Center* emphasized that courts may only consider contract challenges that target the enforceability of an arbitration agreement itself, and sanctioned provisions that allow arbitrators to determine the validity and scope of their own jurisdiction.[54]

Prior to these cases, the U.S. Supreme Court had endorsed arbitration of statutory claims unless a statute expressly precludes arbitration or there was strong evidence that arbitration would severely hinder the statute's purpose. It therefore condoned arbitration of a broad range of statutory claims extending to employment discrimination, consumer lending, and securities fraud.[55] Furthermore, courts have uniformly held that arbitration of statutory claims does not constitute state action subject to constitutional due process requirements.[56] Most courts also construe

50. Sternlight, *supra* note 10, at 94–98 (noting a study by other researchers who question the prevalence of arbitration clauses in consumer contracts).

51. *Id.* at 98. *But see* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 8 (2013) (challenging reports of rampant arbitration clauses in B2C contracts).

52. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); Rent-A-Ctr. W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).

53. *See Am. Express Co.*, 133 S. Ct. at 2304–10 (enforcing a class waiver in arbitration clauses with respect to antitrust claims); *AT&T Mobility*, 131 S. Ct at 1748–53 (stating that class-wide arbitration is inconsistent with the FAA); *Stolt-Nielsen S.A.*, 130 S. Ct. at 1773–76 (holding a party cannot be compelled under the FAA to class arbitration unless contractual basis indicating parties agreed to class arbitration).

54. *See Rent-A-Ctr.*, 130 S. Ct. at 2777–80 (holding a clause in an employment contract delegating to the arbitrator exclusive authority to decide enforceability of the arbitration agreement was a valid delegation under the FAA).

55. *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89–92 (2000) (finding TILA claims may be subject to binding arbitration under the FAA); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485–86 (1989) (overruling prior opinion to hold securities claims arbitrable).

56. *See* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714–23, 1745–62 (2006) (arguing that private arbitration does not involve state action with respect to arbitral class actions).

arbitration clauses broadly to cover tort and statutory claims, regardless of whether a clause gives express notice of such broad coverage.[57]

In addition, consumers must overcome a high threshold to satisfy the burden set by the Supreme Court in *Green Tree Fin. Corp. v. Randolph* of proving that arbitration costs effectively prohibit claimants from vindicating their statutory rights.[58] In that case, the Court found that the consumer claimants failed to prove that their inability to pay arbitration costs would preclude them from vindicating their rights under TILA because the claimants had not established their lack of sufficient financial resources to pay the arbitration costs.[59] The Court was persuaded by the arbitrators' discretion to limit or excuse fees for consumers unable to pay costs. Further, a footnote in the opinion seemed to give credence to the lender's offer during oral arguments to pay arbitration costs if they proved prohibitive to the customer.[60] The opinion left claimants in the awkward position of having to shoulder upfront fees to arbitrate in hopes of recouping those costs through an award or post-hoc business offer to pay fees.

This pro-enforcement jurisprudence has since led the Court to deny a similar claim of prohibitive costs in *American Express v. Italian Colors Restaurant*.[61] In that case, a would-be class of small businesses asserted antitrust violations against the credit card company for allegedly charging excessive fees and claimed that the class waiver in their arbitration agreements made it too expensive for them to vindicate their statutory rights. The businesses argued that they could not pay the expert fees and related costs of proving antitrust violations unless they banded together.[62] However, the Court denied the class consolidation, emphasizing that complainants have no right to an economical or streamlined means for asserting

57. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 620, 624–26 (1991) (finding statutory age discrimination claim could be subject to arbitration, explaining that arbitration clauses are little more than specialized forum-selection clauses).

58. *Green Tree*, 531 U.S. at 91–92 (2000) (finding that although Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she would bear these costs and that she could not pay them).

59. *Id.*

60. *See id.*; Transcript of Oral Argument at 21, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235), http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-1235.pdf. Although it is laudable for businesses to offer to pay such costs, such post-hoc offers allow them to avoid changing their contracts ex ante, thus reserving the benefits of such assistance to only those who expend resources and time to challenge cost provisions. *See also* James v. McDonald's Corp., 417 F.3d 672, 675–80 (7th Cir. 2005) (emphasizing that consumers would have to show that arbitration was truly more expensive than litigation in terms of overall costs); Bailey v. Ameriquest Mortg. Co., 346 F.3d 821, 823–24 (8th Cir. 2003) (finding cost challenge of arbitrability was for the arbitrator under the parties' agreement); Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 847–48 (N.D. Ill. 2001) (stating that the court would reconsider its ruling denying enforcement of an arbitration clause due to high costs if the defendants agreed to pay these costs).

61. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2304–10 (2013).

62. *Id.*

antitrust violations.[63] The Court also indicated a distaste for class arbitrations, which it believes frustrate the efficiency goals of the FAA.[64]

Two years earlier, the Court had questioned class arbitration in narrowing arbitrators' power to order class relief in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*[65] In that case, arbitrators ordered class arbitration of customers' antitrust claims against several large shipping companies where the contract between the shipping companies and their customers lacked a class waiver clause.[66] The Court quashed that order, holding that the arbitration panel had "imposed its own conception of sound policy" and exceeded its authority under the FAA by ordering class arbitration.[67] Nonetheless, the Court most recently declined to invalidate the class arbitration in *Oxford Health Plans L.L.C. v. Sutter*, another case in which the arbitration clause was silent on class proceedings.[68]

However, most B2C contracts now expressly preclude class proceedings in the wake of *AT&T Mobility L.L.C. v. Concepcion*, which severely narrowed consumers' power to challenge class waivers based on traditional contract defenses.[69] The *AT&T* court held that the FAA preempts a state court from using unconscionability to condition enforcement of an arbitration clause on preserving consumers' ability to bring class-wide arbitration.[70] Consumers in that case filed a class action lawsuit against AT&T, alleging that it fraudulently advertised free phones despite its inclusion of phone costs and taxes in monthly service charges.[71] The AT&T consumers' standard cellular phone agreements included an arbitration clause that precluded arbitrators from ordering class relief or consolidation, but allowed for small claims court actions, recovery of double attorney fees if an award exceeded the company's settlement offer, and the company's payment for all arbitration costs.[72] The California court struck down the class waiver because the waiver effectively "cheat[ed] large numbers of consumers out of individually small

63. *Id.*

64. *Id.*; *see also* Glover, *supra* note 8, at 3070–84 (arguing that the Court's arbitration jurisprudence has undermined public justice).

65. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

66. *Id.* at 1768–70.

67. *Id.* at 1769–77.

68. Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064, 2065–75 (2013); *see also* Fenterstock v. Educ. Fin. Partners, 611 F.3d 124, 132–39 (2d Cir. 2010) (holding that *Stolt-Nielsen* did not preclude the court from holding the class waiver unconscionable, but it did bar the court from severing the waiver to enforce class arbitration); Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005) (holding class action waiver unenforceable where it targeted small consumer claims); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 18–24 (Mo. 2010) (finding that *Stolt-Nielsen* requires courts to strike arbitration clauses entirely where courts find a class waiver unenforceable under contract law); Gentry v. Super. Ct., 165 P.3d 556 (Cal. 2007) (holding class action waiver in arbitration agreement unenforceable under California law).

69. Rutledge & Drahozal, *supra* note 51, at 38 ("Of the arbitration clauses in the sample [of credit card agreements], forty-four of forty-seven clauses (or 93.6%) (covering 99.9% of the credit card loans outstanding) waived any right to class arbitration.").

70. AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743–56 (2011).

71. *Id.*

72. *Id.*

sums of money."[73] However, the U.S. Supreme Court reversed and admonished California's use of state contract law to hinder enforcement of class waivers.[74]

The U.S. Supreme Court's jurisprudence—reinforcing strict enforcement of arbitration—threatens public justice. Public litigation brings light to policy issues and aids development of the law. However, the Court's decisions shifting away from public dispute resolution toward private arbitration threaten these important functions.[75] Strict enforcement of arbitration clauses allows private entities to define their own dispute resolution processes, thus gaining quasi-lawmaking powers that significantly decrease the compensatory and public deterrent objectives of consumer protection laws.[76]

2. Limited Utility of Arbitration for Consumers

In the years since *AT&T* and *Stolt-Nielsen*, the filings of new class arbitrations have "almost completely dried up" according to one arbitration scholar.[77] Class arbitrations with the AAA reached a high of 57 cases in 2006, but fell to 9 by the first half of 2012.[78] Furthermore, *Stolt-Nielsen* had a particular impact on class arbitration in the eight months following that decision—only one new class action arbitration case appeared on the AAA website, and the parties in that case had filed that case the day before the *Stolt-Nielsen* ruling.[79] Indeed, class arbitrations are rare.[80]

It would not be surprising for businesses to eliminate almost all consumer class actions through use of arbitration clauses and class relief waivers.[81] Many businesses insist upon these clauses in all of their contracts with their customers,

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73. *Id.* at 1747–58.

74. *See id.* at 1748–55 (emphasizing that class action arbitration sacrifices informality, a major advantage of arbitration, and that class action arbitration rules, unlike the Federal Rules of Civil Procedure, are ill-suited to protect defendants in class litigation because they do not provide the same appellate review); *see also* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 481–91 (2011) (highlighting how recent Supreme Court opinions curtail class action relief).

75. Glover, *supra* note 8, at 3052.

76. *Id.* at 3054. Professor Glover thus concluded: "In allowing arbitration to expand with so few restraints, we have arguably privatized both the public realm and the substantive law into oblivion." *Id.* at 3092. *But see* Andrew Schwartz, *Arbitration and the Contract Exchange*, 29 OHIO ST. J. ON DISP. RESOL. 299, 311–14 (2014) (arguing utility of arbitration for exchange-traded contracts).

77. Christopher R. Drahozal, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1157 (2011).

78. Gregory A. Litt & Tina Praprotnik, *After* Stolt-Nielsen*, Circuits Split, but AAA Filings Continue*, MEALEY'S INT'L ARB. REP., July 2012, at 22.

79. *Id.*; *see* Garrett-Scheirer v. Muller Auto. Grp., No. HNT-L-135-10, 2010 WL 1599419 (N.J. Super. Ct. Law Div. Apr. 16, 2010).

80. *See* Claudia Pharaon, *The Extent of Arbitrators' Power to Order Class Arbitration*, 31 ARB. INT'L 589 (2015), http://arbitration.oxfordjournals.org/content/31/4/589.full-text.pdf.

81. Fitzpatrick, *supra* note 47.

employees, and other businesses.[82] They surmise that the streamlined processes in arbitration are more efficient than traditional litigation and prefer to eliminate class actions through pre-dispute contractual terms.[83]

E-contracts in particular have become notorious for incorporating arbitration clauses with class waivers. One recent study analyzed terms of service for the 100 most-visited websites as of October 2013 and found that 30% contained arbitration clauses.[84] Sixty-three percent of arbitration clauses were mandatory; the clauses explained only a limited number of the users' rights, and the average clause appeared near the end of these multi-page click-wrap agreements.[85] Additionally, 40% of the clauses did not mention that the user was waiving other remedies, 67% contained class action waivers, and 70% did not address how to initiate an arbitration proceeding.[86]

Consumers' lack of understanding and comfort with arbitration hinders them from filing arbitration claims when disputes arise.[87] For example, a CFPB report revealed that none of the millions of Wachovia customers who complained about the bank's overdraft fees filed an arbitration claim in accordance with the arbitration clause in their contracts.[88] Instead, most of the customers did nothing about their claims.[89] At most, the more proactive consumers will contact a company's customer service department or post negative reviews on the Internet, but very few will take their grievances beyond this point.[90]

Legal economists may argue that curtailing public legal action is beneficial to the extent that it generates cost savings that companies may pass on to consumers through lower prices and better products and services.[91] Public litigation, however,

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82. *Id.* at 164.

83. *Id.* at 164–74.

84. James R. Bucilla, II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST L. REV. 102, 106 (2014) (citing October 2013 figures from Alexa).

85. *Id*. at 114–20.

86. *Id*. at 120–25. Forty percent did not address responsibility for cost, while another 40% provided that AAA rules govern cost. *Id*. at 126. However, other researchers have found that consumer arbitration clauses often include features that are favorable for consumers. *See* Rutledge & Drahozal, *supra* note 51. These prominent arbitration scholars found in their study of arbitration clauses in 2009–2010 outstanding consumer credit contracts, that nearly 70% contained small claims carve outs—although 98–99% also employed class waivers. *Id.* at 20–45. In addition, they argued that their overall data suggested that arbitration clauses are not more pervasive in B2C contracts than they are in business-to-business ("B2B") contracts. *Id.* at 45–55.

87. Aaron Blumenthall, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 700–14 (2015).

88. *Id.*

89. *See generally id.*

90. *Id*. at 714.

91. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM.

is often necessary to uncover purchase problems.[92] Furthermore, class actions allow consumers to assert their typically small-dollar claims in an economical manner.[93] The class action mechanism also may allow consumers to act as "private attorney generals" in enforcing consumer protections in cases when regulators lack the resources to bring enforcement actions.[94]

C. Cautions on Class Actions and Other Complaint Processes

Class actions aim to efficiently compensate victims, deter bad conduct, and promote judicial economy.[95] Unfortunately, the limited data available suggests that only a small percentage of claimants actually file claims and receive just compensation from class action settlement funds.[96] Additionally, complex class-certification rules and confusing jurisprudence regarding class procedures have hindered the efficiency and deterrence goals of class actions.[97] In addition, as Professor Braucher noted 30 years ago, multistate class actions are often unrealistic in B2C cases because consumers usually do not perceive their purchase problems in legal terms or report them to a lawyer—suggesting a need for more informal remedy mechanisms better suited for resolving common B2C complaints.[98]

At the same time, conflicts of interest between class attorneys and class members threaten the prospect that class members will actually receive the relief they deserve.[99] Attorney's fees and litigation costs may deplete class awards and settlements, leaving little to compensate individual claimants.[100] Furthermore, attorneys may shy away from cases involving many claimants with small claims because the costs of providing notice and administering claims may exhaust any eventual settlement available to pay the attorneys.[101] Moreover, some class attorneys increase these risks of depleted class resources by raising their fees during the litigation process.[102]

ARB. 251, 254–64, 292 (2006) (proposing that pre-dispute arbitration clauses benefit companies and consumers).

92. *See* Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L. Q. 1087, 1093–97 (1999) (noting how public litigation can stimulate legal development and public debate through recorded opinions).

93. *See generally* Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 399–418 (2014).

94. *See* Amy J. Schmitz, *Curing Consumers' Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 635–45 (2008) (discussing functions of class actions).

95. Mullenix, *supra* note 93, at 399–418.

96. *Id.* at 418–27 (also explaining how class notices may disclose the total amount received through settlement but provide no information about payment of individual claims).

97. *Id.* at 419–30.

98. Braucher *supra* note 3, at 1406 n.3, 1450–60 ("This choice of scope [which excludes "cases involving personal injury or damage to property"] reflects the view that class actions do not provide an easy answer.").

99. George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 25–27 (2012).

100. *Id.* at 24–27.

101. *Id.*

102. *Id.*

Meanwhile, current informal complaint portals are insufficient purveyors of consumer justice. For example, consumer complaint websites such as Yelp and online portals for filing complaints like the CFPB's aim to foster public access to remedies and provide information about problems with products and services.[103] However, the number of complaint websites and breadth of reviews on any given site can be overwhelming. Consumers struggle to locate reliable information in this morass of complaints and reviews.[104] The questionable quality and unmanageable quantity of information online is overwhelming.[105] This is especially true in light of the growing prevalence of fake reviews that businesses post under the guise of customer submissions praising the businesses' products and services.[106]

Furthermore, review and complaint websites are not real resolution mechanisms. Rather, they simply allow consumers to vent frustrations. Companies often do not provide any response to complaints on social media and may ignore e-mails or send written replies that provide no real assistance—leading consumers to give up pursuit of their complaints.[107] One study of the Facebook and Twitter accounts of 34 large U.S. companies found that the companies ignored nearly half of the complaints consumers submitted.[108] Furthermore, when companies responded, they left consumers dissatisfied in roughly 60% of the cases.[109]

Even the CFPB's Consumer Complaint Database can be unsatisfying for consumers seeking real remedies.[110] The CFPB's database covers only consumer financial products like mortgages, loans, bank accounts or services, credit cards, and

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103. *See* YELP, http://www.yelp.com/ (last visited Feb. 28, 2016); *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/complaintdatabase/ (last visited Feb. 28, 2016).

104. Adi Ayal & Uri Benoliel, *Revitalizing the Case for Good Cause Statutes: The Role of Review Sites*, 19 STAN. J.L. BUS. & FIN. 331, 332–47 (2014) (discussing credibility issues and information overload with review websites).

105. *Id.* at 346–52 (discussing need for proper sorting, filtering, averaging, ranking and visual graph systems to address information overload, as well as mechanisms aimed to prevent fake reviews).

106. Justin Malbon, *Taking Fake Online Consumer Reviews Seriously*, 35 J. CONSUMER POL'Y 4 (2013) (also noting that consumers are more likely to trust reviews on established websites like Amazon).

107. Judy Strauss & Donna J. Hill, *Consumer Complaints by E-mail: An Exploratory Investigation of Corporate Responses and Customer Reactions*, 15 J. INTERACTIVE MARKETING 63, 63–64 (2001); *Customer Complaint Behaviour*, QUEENSLAND GOV'T, http://www.business.qld.gov.au/business/running/customer-service/managing-customer-complaints/customer-complaint-behaviour (last visited Jan. 2, 2016).

108. Sabine A. Einwiller & Sarah Steilen, *Handling Complaints on Social Network Sites – An Analysis of Complaints and Complaint Responses on Facebook and Twitter Pages of Large US Companies*, 41 PUB. REL. REV. 195, 197–200 (2015) (highlighting results of the study).

109. *Id.* at 198–202 (emphasizing that consumers usually want redress, and more than an apology or a place to "vent").

110. RICHARD CORDRAY, DISCLOSURE OF CONSUMER COMPLAINT NARRATIVE DATA, CONSUMER FIN. PROT. BUREAU, at 2–3 (Mar. 12, 2015), http://files.consumerfinance.gov/f/201503_cfpb_disclosure-of-consumer-complaint-narrative-data.pdf (explaining the CFPB's policy but not promising any real results after consumers file complaints).

prepaid cards.[111] Additionally, the database does not purport to resolve complaints.[112] The CFPB's website states that companies *should* reply and provide resolutions with respect to consumer complaints, but the website provides no legally enforceable mechanism nor does the Bureau actually follow up on individual complaints.[113]

The CFPB has worked to improve the functionality of the complaint portal by including narratives if consumers consent to share their stories.[114] After scrubbing personally identifiable information, the CFPB publishes the narratives

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111. *See id.*

112. As Richard Cordray notes:

> Screened complaints are sent via a secure web portal to the appropriate company. The company reviews the information, communicates with the consumer as needed, and determines what action to take in response. The company then reports to the consumer and the CFPB via the secure company portal, and the [CFPB] invites the consumer to review the response and provide feedback. Consumer Response reviews the feedback consumers provide about company responses, using this information along with other information such as the timeliness of the company's response, for example, to help prioritize complaints for investigation. Consumers who have submitted complaints with the [CFPB] can log onto the secure consumer portal available on the CFPB's website or call a toll-free number to receive status updates, provide additional information, and review responses provided to the consumer by the company.

RICHARD CORDRAY, CONSUMER RESPONSE TO ANNUAL REPORT JANUARY 1 – DECEMBER 31, 2014, CONSUMER FIN. PROT. BUREAU, at 11–12 (2015), http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf.

113. *See id.*

114. The press release states:

> Consumer Response screens all complaints submitted by consumers based on several criteria, including whether the complaint should be routed to another regulator and whether the complaint is complete. Screened complaints are forwarded via a secure web portal to the appropriate company. The company then has 15 calendar days to provide an initial response and up to 60 calendar days to provide a final response. Companies have the ability within these timeframes to respond administratively to the [CFPB], e.g., responding that no commercial relationship exists between the complaining consumer and the company in question. Typically, the company reviews the complaint, communicates with the consumer as needed, and determines what action to take in response. After the company responds to the consumer and the [CFPB] via the secure company portal, the [CFPB] invites the consumer to review the response and provide feedback. Consumer Response investigations staff individually review some complaints. All complaints are subject to follow-up and further investigation by Consumer Response and other parts of the [CFPB].

However, there is no assurance that the CFPB will follow-up or investigate. CORDRAY, *supra* note 110, at 2–3.

separately after the company responds, or in the absence of a response, 60 days after the customer submits the narrative.[115] Nonetheless, adding narratives to the CFPB's complaints database may further frustrate a consumer searching for reliable information about financial services.[116] For example, the CFPB complaint database provides no easy way for consumers to search by company name or find the frequency of complaints by product listing.[117] Even law professors and news reporters have had difficulty using the database.[118]

Real-world consumers need real-world remedies and the current web of arbitration clauses, class action waivers, and uncertain class action rules have left consumers without satisfactory processes for obtaining these remedies. Travel, lost time, and other costs—along with the stresses of in-person interactions and F2F processes—make litigation or F2F arbitration unappealing for most consumers with small claims. In addition, commentators have argued for more robust government action against wrongdoers on behalf of consumers, but it is unclear how much litigation activity would occur and how related costs would be covered.[119] Accordingly, consumers need new means to access remedies on small-dollar claims.

Formalistic contract enforcement and reluctance against substantive consumer protections have contributed to the strict enforcement and consequent proliferation of arbitration clauses in B2C contracts. These clauses are significant because they preclude consumers from bringing light to consumer issues by asserting claims in court. Moreover, a class action waiver generally accompanies these arbitration clauses, which is often the only economically feasible means for seeking relief on small-dollar claims.

II. "LIFE" LIMITATIONS AND BUSINESS BEHAVIORS THAT HINDER CONSUMER ACTION

Substantive consumer protections and disclosure rules, such as those in Dodd-Frank and other consumer protection laws, assist consumers only to a limited extent. However, such consumer protection measures are often meaningless for the majority of consumers who lack awareness, experience, or the resources necessary to navigate traditional F2F processes for obtaining remedies.[120] Consumers' inability and inaptitude for pursuing these processes prevents most from pursuing complaints, thereby allowing businesses to escape wrongdoing and privately control

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115. Press Release, Consumer Fin. Prot. Bureau, CFPB Publishes Over 7,700 Consumer Complaint Narratives About Financial Companies (June 25, 2015), http://www.consumerfinance.gov/newsroom/cfpb-publishes-over-7700-consumer-complaint-narratives-about-financial-companies.

116. CORDRAY, *supra* note 110, at 4–5.

117. *See* E-mail from Alex Gano, Research Assistant, to Amy J. Schmitz, Professor of Law, Univ. of Colo. Sch. of Law (July 7, 2015) (on file with author) (noting the difficulty of searching the morass of complaints on the CFPB portal).

118. *See* E-mail from Pamela Foohey, Assoc. Professor of Law, Ind. Univ. Maurer Sch. of Law, to Amy J. Schmitz, Professor of Law, Univ. of Colo. Sch. of Law (Aug. 3, 2015) (on file with author) (noting her difficulties in gathering information from the CFPB database, as well as the difficulties a newspaper reporter experienced with the site).

119. Fitzpatrick, *supra* note 47, at 197–98.

120. Schmitz, *Squeaky Wheel System*, *supra* note 15, at 279–366.

the resolution of persistent consumers' claims.[121] As discussed elsewhere, behavioral propensities and business predilections converge to create a SWS that perpetuates contractual discrimination.[122]

A. Consumers' Predisposition Against Pro-action

Consumers are predisposed to forego their B2C claims. Individuals are inert by nature, and lack the time and resources to digest long and complex form contracts.[123] Individuals are also prone toward over-optimism, cognitive dissonance, and confirmation bias with respect to their purchases.[124] Accordingly, businesses know that consumers rarely realize their rights because they largely ignore contract terms, especially in e-contracts that require consumers to click a link or scroll endlessly through terms.[125] This allows businesses to avoid consumer claims and ration remedies to the few sophisticated consumers with resources and sufficient savvy to pursue their claims.[126]

These tendencies converge to hinder consumers from bringing their claims to the courts, regulators, or third parties such as a local chamber of commerce or the Better Business Bureau ("BBB").[127] Shame, a sense of insufficient power, fear, gratitude, and frustrated resignation can overshadow costs in explaining individuals' reluctance to assert complaints.[128] This is especially true for low- to moderate-income individuals.[129] For example, consumers may forego complaints against

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121. *Id.*

122. *Id.*

123. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204–06, 1222–25, 1243–44 (2003) (discussing law-and-economics' assumptions regarding consumer rationality); Debra Pogrund Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL'Y & L. 85, 98–99 (2010) (discussing normally overlooked terms, including adjustable rates versus fixed rates on loan agreements).

124. *See* Star & Choplin, *supra* note 123, at 100–01 (discussing "anchoring effects"); *see also* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 122–24 (2007) (explaining behavioral law and economics basics); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1605–09, 1627 (1998) (noting individuals' "tunnel vision" skewed by their biases). *But see* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559–75 (1998) (criticizing behavioral law and economics as merely a psychological and sociological account of human behavior that "confuse[s] explanation and prediction" and lacks "theoretical ambition").

125. *See* Korobkin, *supra* note 123, at 1268–69.

126. Again, full discussion of these behavioral propensities and the SWS is beyond the scope of this Article, as it has been discussed elsewhere. *See* Schmitz, *Squeaky Wheel System*, *supra* note 15, at 279–366.

127. Sandefur, *supra* note 13, at 112–32.

128. *Id.* at 112.

129. *Id.* at 117 ("The implication of this body of research is that people whose social position is near the bottom of an unequal structure will be less likely to take actions that might protect or further their own interests, whether those actions involve seeking information or

cellular phone companies due to the companies' power to determine prices and deny complaints.[130] Furthermore, women may be reluctant to assert complaints or pursue their needs due to fear of appearing "pushy."[131] Women also are less likely than men to negotiate or use assertive language when they do pursue negotiations.[132] Similarly, research shows that black consumers are less likely than white consumers to complain about their purchases.[133] This often results in black consumers receiving fewer deals regardless of education or income.[134]

Moreover, the proactive consumers who obtain remedies tend to be of higher incomes and education.[135] For example, one study indicated, "[F]or every 1,000 purchases, households in the highest status category voice complaints concerning 98.9 purchases, while households in the lowest status category voice complaints concerning 60.7 purchases."[136] Consumers in lower socioeconomic status groups generally have fewer resources, expect poor treatment, and are sometimes hindered by limited English proficiency.[137] They also may lack confidence in their ability to obtain remedies if problems arise.[138]

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advice, pressing claims with others seen as causing a problem, or attempting to mobilize third parties in the furtherance of their goals.").

130. *See* Adi Ayal, *Harmful Freedom of Choice: Lessons from the Cellphone Market*, 74 L. & CONTEMP. PROBS. 91, 91–100 (2011) (discussing how cell-phone companies use complexity to take advantage of the consumer); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J.L. & TECH. 49, 118 (2009) (noting how power plays a role in cellular service contracts "designed to exploit the cognitive biases of many consumers").

131. *See* Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 629–30 (1998) (explaining societal expectations that women should be less confrontational); Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653, 656 (1999).

132. *See* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 20 (2003) (noting gender in contracting); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 309–10 (1999) (discussing gender in negotiations).

133. Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701, 707, 723–24 (1977) (reporting study findings).

134. *Id.* at 707.

135. *See* Bård Tronvoll, *Complainer Characteristics When Exit Is Closed*, 18 INT'L J. SERV. INDUSTRY MGMT. 25 (2007), http://www.emeraldinsight.com/doi/pdfplus/10.1108/09564230710732885 (discussing research regarding characteristics of consumers who complain about their purchases).

136. Schmitz, *Squeaky Wheel System*, *supra* note 15, at 313 (quoting Best & Andreasen, *supra* note 133, at 723).

137. Tronvoll, *supra* note 135, at 25–36; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-518, FACTORS AFFECTING THE FINANCIAL LITERACY OF INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY 9–10 (2010) (reporting how limited English proficiency, income, and education impact financial education, and the ability to take effective actions regarding contracts and money management).

138. Tronvoll, *supra* note 135, at 33–34.

Moreover, consumers may not take action on their claims because they simply do not think of them as a legal issue.[139] Instead, they may focus on social and psychological considerations.[140] Consumers are therefore apt to drop purchase complaints if pursuit requires them to hire an attorney, file a claim in court or with an arbitrator, or attend F2F meetings. Additionally, overly optimistic consumers do not want to believe they made bad purchases and confirmation bias may lead them to ignore problems in hopes of confirming that they made wise decisions.[141] Businesses also may harness captology, or persuasive technology, to further hinder consumers from asserting complaints.[142]

In addition, F2F processes are usually infeasible simply because individuals lack the time, knowledge, or patience to pursue small-claims court proceedings.[143] For example, the CFPB found in its recent study of cases involving financial institutions that consumers rarely bring actions against the institutions in small-claims court.[144] Rather, statewide data for 14 jurisdictions and countywide data from 17 urban areas indicated that it was much more likely for the financial institutions to use small-claims court to pursue collections against the consumers.[145] In searching the small-claims docket for cases involving the 10 largest credit-card issuers, representing 85% of credit-card contracts, the CFPB estimated that consumers sued a credit-card issuer only 870 times in 2012, whereas the credit-card companies brought suit against consumers an estimated 41,303 times.[146]

F2F complaint and claims procedures generally cost too much and take too much time to effectively vindicate small-dollar claims. People busy with work and family obligations are likely to give up pursuit of complaints when companies ignore their initial requests for assistance.[147] Anger may fuel a consumer's initial e-mail, phone call, or negative online review, but consumers generally do not follow up

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139. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117–20 (quoting Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 233 (Michael Trebilock et al. eds., 2012)).

140. *Id.* at 118.

141. *See generally* Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987) (discussing confirmation bias).

142. *See What is Captology?*, STAN. PERSUASIVE TECH. LAB, http://captology.stanford.edu/about/what-is-captology.html (last visited Jan. 14, 2016).

143. *See generally* Albiston & Sandefur, *supra* note 139, at 104.

144. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 307–20 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (questioning whether consumers sue companies in small-claims courts).

145. *Id.*

146. *Id.* (also stating that there is "a dearth of empirical data and academic literature on the topic—or why such studies tend to look at fragmentary data").

147. *See* Best & Andreasen, *supra* note 133, at 715 (arguing the likelihood that a consumer will complain relates to the complexity in the consumer complaint process).

after receiving no reply or facing long hold times on customer service phone lines.[148] Customer service representatives also may lack authority to provide remedies or make it stressful for consumers to obtain any redress.[149]

B. Business Behaviors Hindering Consumer Action

Businesses consciously or subconsciously capitalize on consumers' behavioral propensities to deter individuals from pursuing claims and obtaining remedies. As an initial matter, businesses have been curtailing or eliminating telephone assistance. Businesses with current telephone assistance numbers exhaust consumers with long telephone wait times, endless voicemail menus, or rerouting calls to various departments.[150] Businesses may also staff email reply centers with individuals who lack training or the authority to provide meaningful remedies in response to consumers' complaints.[151]

Reports of declining customer service are rampant. In a 2001 customer service study, researchers found that e-mail complaints garnered a response rate of only 67%, of which only 56% of responses were considered satisfactory.[152] Meanwhile, telephone complaints obtained a 74% response rate, but customers considered only 48% of the responses satisfactory.[153] Businesses were even less responsive to written complaints. Letters garnered only a 43% response rate, of which only 26% were satisfactory.[154] Similarly, another researcher found that only 60 out of 240 upper-class New York restaurants responded to his complaint letters.[155] This was true "even when [the researcher] threatened [the restaurant] with a bad report to the Better Business Bureau[,] and even when [the restaurants were] threatened with a health condition that could completely close their business."[156]

Businesses also have been slow to respond to negative online reviews and postings. Businesses should respond effectively to negative electronic word-of-mouth, or "eWOM," due to its importance in gaining and retaining customer loyalty.[157] However, one study in 2011 revealed a complaint response rate on

148. *See* Sheri Carder & Larry Gunter, *Can You Hear Me? Corporate America's Communication with Dissatisfied Customers*, 24 J. AM. & COMP. CULTURES 109, 109–10 (2001).

149. *See How to Get What You Want from Customer Service*, NBC 9NEWS (NBC 9News television broadcast July 16, 2014), http://www.9news.com/story/money/business/2014/07/16/tips-for-getting-what-you-want-from-customer-service/12765815/ (reporting a consumer's laborious attempt to obtain assistance from a Comcast customer service representative).

150. *See generally* Carder & Gunter, *supra* note 148, at 109–10 (reporting study results showing businesses' low response rates to consumer complaints).

151. *See id.* at 109–11 (discussing study).

152. *Id.*

153. *Id.*

154. *Id.* at 110–11. Furthermore, the response time for letters averaged 20.5 days. *Id.*

155. *Id.* at 109.

156. *Id.* (leading one commentator to describe this nonresponse strategy as "ignore [complaints] and hope the angry customers go away").

157. Einwiller & Steilen, *supra* note 108.

Twitter of only 33%.[158] Interestingly, companies are even less responsive to complaints voiced on their own corporate sites.[159] Moreover, "full financial or material compensation is hardly ever offered by companies" on their social media sites.[160] As one commentator noted:

> Here, the evidence is scathing. Andreasen (1988) reported that one third of complaints ended with an unsatisfactory resolution. We have not gotten any better over the last thirty years. Kelly, Hoffman and Davis (1993) reported that over one third of retail recovery strategies were unacceptable to customers. Oliver (1997) found it reasonable to conclude that 50% (plus or minus 15%) of all complainers will remain dissatisfied even after receipt of redress from the firm. Broetzmann (2013) found that 56% of complainers felt that the organization did nothing to handle their complaint, up from 50% in 2003.[161]

There is a need for more research on what consumers expect to obtain from posting negative reviews online. Similarly, additional research is needed to explain why businesses only occasionally respond. It may be that customers expect no response and simply seek the satisfaction of airing their grievances.[162]

Nonetheless, consumers must be careful in posting negative reviews. Businesses have become bolder in filing or threatening lawsuits against those who post negative reviews online. In the past five years, merchants have frequently sued customers who post negative reviews on sites such as Angie's List, Amazon, and Yelp. For example, a hotel and wedding venue in New York maintained a contract policy that allowed the venue to deduct $500 from a customer's deposit "for every negative review of [the venue] placed on any Internet site by anyone in [the customer's] party and/or attending [his] wedding or event."[163] Although the hotel never actually filed a lawsuit, the clause went viral after a wedding guest posted a negative review and the hotel threatened to charge the wedding party.[164]

Similarly, an internet provider sued one of its customers for posting negative reviews on several review sites regarding the speed and price of its service.[165] Although the provider later dropped the claim, the suit caused the

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158. *Id.* at 196–98.

159. *Id.*

160. *Id.* at 199–202.

161. Moshe Davidow, *The A-Craft Model of Organizational Responses to Customer Complaints and Their Impact on Post-complaint Customer Behavior*, 27 J. CONSUMER SATISFACTION, DISSATISFACTION & COMPLAINING BEHAV. 70, 71 (2014).

162. John W. Huppertz, *The Effort Model of Consumer Complaining Behavior: An Update and New Research Directions*, 27 J. CONSUMER SATISFACTION, DISSATISFACTION & COMPLAINING BEHAV. 2, 2–5 (2014).

163. Amy Langfield, *Hotel Apologizes After 3,000 Bad Reviews*, CNBC (Aug. 5, 2014), http://www.cnbc.com/id/101895483.

164. *Id.*

165. As Tim Cushing notes:

> Beware: This company advertises fast internet speeds, but in reality rarely provides those speeds. . . . I order the 20Mbps plan. I ran speed tests and

customer to suffer considerable costs and angst.[166] In another case, a car repair shop sued a woman in Arizona for posting and refusing to delete a negative review of her service experience.[167] Additionally, a Virginia court ordered a woman to pay $750,000 for posting negative reviews about a contractor who performed work on her home.[168] The contractor ultimately collected nothing after a court found that both

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> monitored the line for a full week after install, and these were the results: Speeds to Peak Internet hosted servers: 90% to 100% of capacity. This is useful in determining that there is not an issue between the transmitter on my house and the tower. Speeds to any other speed test server, CDN, website, regular download server: 50% or less of capacity. I tested to multiple types of servers at multiple locations across the USA. My average speed was 7Mbps. My max speed was 12Mbps. I never once went above 12. When I contacted Peak Internet about this issue and provided them the documentation of the tests I had been running they refused to acknowledge the issue. They said I was getting above their guaranteed minimum (4Mbps) and that I should actually be happy that I was getting 12Mbps. . . . They didn't have any desire to provide good service. They just wanted to make their money and not deal with people who call them out on their false advertising. I feel sorry for somebody less technologically savvy that is paying for their higher packages but getting slow speeds. . . .

Tim Cushing, *ISP Sues Former Customer Over Reviews Claiming His Internet Speed Was Less Than A Third of What Was Advertised*, TECHDIRT (July 30, 2014), http://www.techdirt.com/articles/20140730/05412628052/isp-sues-former-customer-over-reviews-claiming-his-internet-speed-was-less-than-third-what-was-advertised.shtml.

166. Complaint at ¶¶ 5–21, Fundamental Holdings, Corp. v. Petrick, (2014), https://assets.documentcloud.org/documents/1237569/complaint-teller-county.txt; Tim Cushing, *Peak Internet Dismisses Defamation Suit Against Former Customer Who Complained About Its Lousy Connection Speeds*, TECHDIRT (Aug. 1, 2014), https://www.techdirt.com/articles/20140731/21540728081/peak-internet-dismisses-defamation-suit-against-former-customer-who-complained-about-its-lousy-connection-speeds.shtml.

167. Dave Cherry, *Company Sues AZ Woman Over Negative Online Review*, CBS (Mar. 21, 2013), http://www.cbs5az.com/story/21201698/company-sues-az-woman-over-negative-online-review. The woman posted a review stating that the repair shop did a poor job and refused her phone calls after performing service. The company sued the reviewer for allegedly posting a review that was not truthful, which the reviewer refused to delete. Copies of court records in this matter were not publically available at the time of this draft. *See also* Josh Smith, *Woman Sued Over Online Review: 3 Tips to Avoid a Lawsuit*, DAILY FIN. (June 30, 2010), http://www.dailyfinance.com/2010/06/30/woman-sued-over-online-review-3-tips-to-avoid-a-lawsuit; *Woman Sued For Slamming Company on Angie's List*, CBS NEWS (June 29, 2010), http://www.cbsnews.com/news/woman-sued-for-slamming-company-on-angies-list/ (discussing another similar lawsuit).

168. Perez v. Dietz Dev., LLC, No. 122157, 2012 WL 6761997 (Va. Dec. 28, 2012); Justin Jouvenal, *Fairfax Jury Declares a Draw in Closely Watched Case Over 'Yelp' Reviews*, WASH. POST (Feb. 1, 2014), http://www.washingtonpost.com/local/in-closely-watched-yelp-case-jury-finds-dual-victory/2014/01/31/2d174580-8ae5-11e3-a5bd-844629433ba3_story.html.

parties had defamed each other. The case, however, exemplifies the new class of lawsuits against those who post negative reviews online.[169]

Businesses have also sued review websites like Yelp directly. For instance, in 2014, a carpet cleaning company doubted the authenticity of reviews posted on Yelp and filed a lawsuit against it.[170] The company issued a subpoena *duces tecum* to Yelp to produce documents with information about the authors of the online reviews at issue.[171] After a series of motions and appeals, the circuit court ordered Yelp to produce the documents, and the appeals court found that the plaintiff presented sufficient evidence to show that the statements, if false, may be defamatory in nature.[172] Nonetheless, the Virginia Supreme Court reversed and held that the court lacked power to order Yelp to produce documents identifying the reviewers.[173]

To be fair, businesses have a right to bring lawsuits against customers who harm the business's reputation by posting improper or unfounded complaints.[174] This was arguably the scenario behind a dog trainer's lawsuit against a former customer, who voiced her complaints against the trainer on Yelp and Angie's List.[175] The customer posted complaints stating that she enrolled her puppy in an obedience class at the dog trainer's school, hoping that the dog would be trained as a therapy dog for sick children and the elderly.[176] She further said that the trainer kept the puppy in an area away from other animals.[177] The dog trainer responded to the customer's review by offering several solutions, including private sessions, and then

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169. *See* Adam Cohen, *Online Reviewers Beware: You Can Get Sued*, TIME (Jan. 7, 2013), http://ideas.time.com/2013/01/07/yelp-reviewers-beware-you-can-get-sued/.

170. Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 752 S.E.2d 554, 558 (Va. Ct. App. 2014).

171. *Id.* at 557–58.

172. *Id.* at 556–57.

173. The Virginia Supreme Court ultimately reversed the subpoena order, stating:

> [Virginia law did not empower] the circuit court . . . to enforce the non-party subpoena duces tecum directing Yelp to produce documents located in California in connection with Hadeed's underlying defamation action against the John Doe defendants in the Virginia circuit court. The information sought by Hadeed is stored by Yelp in the usual course of its business on administrative databases within the custody or control of only specified Yelp employees located in San Francisco, and thus, beyond the reach of the circuit court.

Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 445–47 (Va. 2015).

174. *See generally Libel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

175. Complaint, Dog Tranquility, LLC v. Ujimori, No. 2015-002851 (Va. Cir. Ct. Feb. 3, 2015).

176. *See* Erik Sherman, *Dog Trainer Says 'Bad Customer,' Sues for $65K Over Reviews*, DAILY FIN. (Mar. 27, 2015), http://www.dailyfinance.com/2015/03/27/dog-trainer-says-bad-customer-sues-for-65k-over-reviews/; *see also* Mark Hansen, *Negative Reviews of Dog Obedience School on Yelp, Angie's List Lead to Defamation Lawsuit*, AM. BAR ASS'N J., (Mar. 26, 2015), http://www.abajournal.com/news/article/negative_reviews_lead_to_lawsuit.

177. *Id.*

refunded the defendant's payment for the classes.[178] However, the customer continued to post negative reviews even after the dog trainer sent a demand letter asking the customer to delete her false statements.[179] The trainer finally sued seeking damages for defamation and breach of contract.[180]

Most businesses are not so proactive and may ignore consumer complaints, believing that they save money by curtailing customer service and ignoring complaining customers.[181] However, one study suggests that it is roughly five times harder to attract new customers than to retain current ones. This translates into 25–85% higher profits by merely retaining an additional 5% of current customers.[182] Furthermore, satisfied complainers become especially loyal customers,[183] while dissatisfied complainers are prone to share their negative experiences on social media and review sites.[184] Because the success of a company largely depends on its reputation, negative social media campaigns can provide a dangerous liability for corporations and a successful alternative to litigation for consumers.[185] However, the overall lack of pressure on businesses from consumers and businesses' focus on cost-savings may explain why businesses generally ignore the majority of customer complaints.

C. Market Failures and Information Frailties

As noted above, online complaint websites and regulatory actions should help spread information about purchase problems, and thus assist market regulation.[186] However, budget limitations have hindered regulators' capacity to

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178. Complaint at ¶¶ 35–40, Dog Tranquility, LLC v. Ujimori, No. 2015-002851 (Va. Cir. Ct. Feb. 3, 2015) (restating the long and somewhat confusing complaint posting); *Id.* at ¶ 25 (noting remedies provided).

179. *Id.* at ¶¶ 42–75.

180. *Id.* at ¶¶ 50–75.

181. *The Problem With Customer Service*, CONSUMER REP., Sept. 2015, at 10–11.

182. WOLF J. RINKE, DON'T OIL THE SQUEAKY WHEEL: AND 19 OTHER CONTRARIAN WAYS TO IMPROVE YOUR LEADERSHIP EFFECTIVENESS 133–38 (2004).

183. *See* Tibbett L. Speer, *They Complain Because They Care*, 18 AM. DEMOGRAPHICS 13 (1996) (noting "grousers are likely to remain loyal" if they are happy with the resolution of their complaints); Lenden Webb, *Brainstorming Meets Online Dispute Resolution*, 15 AM. REV. INT'L ARB. 337, 357–58 (2004) (citing studies).

184. *See generally* PETE BLACKSHAW, SATISFIED CUSTOMERS TELL THREE FRIENDS, ANGRY CUSTOMERS TELL 3,000: RUNNING A BUSINESS IN TODAY'S CONSUMER-DRIVEN WORLD 4–6 (2008) (noting how an upset consumer spread his complaint to at least 62,827 others online); *New Ways to Complain*, CONSUMERREPORTS.ORG, http://www.consumerreports.org/cro/money/consumer-protection/new-ways-to-complain/overview/index.htm (last updated Aug. 2011).

185. Tristan Morales, *Social Media Campaigns as an Emerging Alternative to Litigation*, 38 RUTGERS COMPUTER & TECH. L.J. 35, 50–71 (2012) (noting the example of how an individual consumer blogged about his dissatisfaction with his Dell computer and Dell customer service, sparking articles from *New York Times* and *Businessweek*).

186. *See* Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 750–55, 800–04 (2009) (proposing reforms); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474–80, 1546–47 (1998) (also indicating hope that economists and lawyers would incorporate empirical findings into their assumptions);

bring enforcement actions. Furthermore, the largely unregulated and unwieldy morass of online complaint portals has created "noise" that drowns out any "informed minority." Market theorists propose that an informed minority of individuals could inform the masses about purchase problems, which would in turn prompt consumers to pressure businesses to improve their practices or face lawsuits, negative publicity, and lost customers.[187] The problem is that it is tough to have an informed minority when consumers cannot identify who and what to believe online due to the maze of not only more mainstream review sites, such as Yelp, but also individualized gripe sites, such as homedepotsucks.com and u-hell.[188]

Meanwhile, studies continue to cast doubt on the existence of a true informed minority. Researchers who studied consumers' internet-browsing behavior on 66 online software companies' websites found that only 1 or 2 out of 1,000 shoppers on these sites even accessed the companies' standard form contracts.[189] Furthermore, the shoppers rarely investigated products, or terms and conditions of their purchases.[190] Moreover, consumers are especially unlikely to investigate remedy terms related to smaller purchases.[191] It is therefore unsurprising that they also forego bringing claims.[192] For example, one European study found that only 7% of consumer cases ended with a resolution in court or an alternative proceeding,[193] while 45% of launched complaints ended without resolution.[194]

As noted above, such foregone consumer complaints generally leave companies free to ration remedies by assisting only the best-informed and most persistent consumers who artfully submit complaints.[195] These consumers then have little to no incentive to expend additional time and resources to alert the majority about available remedies. Moreover, consumers are especially prone to keep quiet

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Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1325–26 (1993) (calling courts to consider what the consumer actually knew or should have known in assessing enforcement of form contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1230–43 (1983) (discussing enforcement of adhesion contracts).

187. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 635–39 (1979) (discussing this theory); *see* R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 646 (1996).

188. *See* Morales, *supra* note 185, at 65–71.

189. *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 15–17, 33–37 (2014).

190. *Id.* at 34.

191. Royce De R. Barondes, *Frictions and the Persistence of Inferior Contract Terms*, 9 VA. L. & BUS. REV. 257, 259–77 (2015).

192. *See* Marco B.M. Loos, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe* 5–14 (Ctr. for the Study of Eur. Contract Law, Working Paper Series, Paper No. 2010/01, 2010), http://ssrn.com/abstract=1535819 (discussing the need for reform to increase consumers' private enforcement of European contract regulations).

193. *Id.* at 4.

194. *Id.* This suggested that consumers who took initial action on their complaints gave up their pursuit along the way, and that even initially proactive consumers are unlikely to continue a fight to the benefit of themselves, let alone all consumers. *Id.* at 3–4.

195. *See supra* text accompanying notes 14–18.

about the remedies they obtain when they know companies will cut back assistance to persistent individuals like them if the companies have to provide the same assistance for everyone else.[196]

Merchants also may escape the responsibility to provide consumers with quality products by severely limiting warranties or making them practically useless. For example, a manufacturer's warranty for a roughly $12.50 curling iron states a "Limited 24-Month Warranty" covers "defects in material or workmanship."[197] However, the warranty limits the consumer's remedy after 30 days to a "replacement" process that requires the purchaser to send back the defective curling iron, postage prepaid, along with an additional $6, and proof of purchase.[198] This means that the consumer would essentially have to pay for two curling irons to enjoy one working iron—making the remedy uneconomical. However, the manufacturer may at least cover the $6 to send a replacement product to the rare squeaky wheel consumer who is persistent in seeking a remedy.[199]

These business practices may allow discriminatory treatment. Differential pricing is not new, but a recent government report highlighted how it has become even more common with the growth of Big Data.[200] Businesses now gather large volumes of data regarding consumers and their behavior and use it to make predictions about individual customers.[201] Smartphones and other technological platforms have allowed businesses to collect not only basic income, debt, and demographic information, but also individuals' locations, search histories, browsing habits, "likes," songs and videos, retail purchase histories, online reviews, and blog posts.[202] This allows businesses to gather and aggregate information for targeted advertising, steering, and personalized pricing.[203]

This fuels efficient marketing for businesses, and benefits consumers who are happy to trade their privacy for what they see as good deals. Indeed, the most highly valued consumers may happily reap the best deals and assistance. However,

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196. Alces & Hopkins, *supra* note 17, at 890.

197. Product Papers for Rose Gold Curling Irons, Revlon (purchased in June 2015) (on file with author).

198. *Id.*

199. E-mails between retail_consumer-services@hotus.com, Customer Serv. for Revlon, and Amy J. Schmitz, Professor of Law, Univ. of Colo. Sch. of Law (June 22–24, 2015) (on file with author). This Author tested the SWS by sending multiple e-mails to ask how the warranty would work and to request that the company pay all shipping. Eventually, the customer service representative said they would cover the cost to send the new product, but this Author would still be responsible for costs to ship the curling iron from Colorado to Texas.

200. WHITE HOUSE COUNCIL OF ECON. ADVISERS, BIG DATA AND DIFFERENTIAL PRICING 3–5 (2015) [hereinafter WHITE HOUSE, BIG DATA REPORT], https://www.whitehouse.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf (accompanying progress report on the overall big data effort launched by President Obama in 2014).

201. *Id.* at 3; *see also* Schmitz, *Secret Consumer Scores*, *supra* note 17, at 1411–33 (exploring how data brokers have used gathered information to provide consumers with different deals and remedies).

202. *See* WHITE HOUSE, BIG DATA REPORT, *supra* note 200, at 4–9.

203. *Id.* at 9–13.

they may not fully comprehend their loss of privacy.[204] Additionally, this use of data analytics leads to lesser deals and product degradation such as versioning for those who already have lower income and status.[205] Furthermore, businesses often implement versioning and price differentials through opaque terms that disproportionately harm unsophisticated buyers.[206] I have therefore questioned how such data practices have augmented the divide between consumer "haves" and "have-nots."[207]

Furthermore, conscious or subconscious biases in F2F dealings may lead company representatives to offer the least advantageous prices to racial minorities.[208] For example, in December 2013, the CFPB and the Department of Justice ("DOJ") found that more than 12,000 car dealerships that participated in Ally Financial's indirect financing program charged higher interest rates to approximately 235,000 African-American, Hispanic, and Asian/Pacific Islander borrowers than they charged to non-Hispanic white borrowers with similar financial profiles.[209] Customer service associates' conscious and subconscious biases also may affect how they treat women and other identifiable groups.[210] In addition, consumers may perpetuate their own low-power status by assuming that customer service representatives will unfairly brush them aside.[211]

Consumers' and companies' behaviors and predilections combine to hinder consumers from obtaining remedies on their B2C claims, thereby impeding market fairness regulation and allowing arguable contractual discrimination to persist. Individuals are typically inert, and lack the legal understanding and resources to pursue their claims. The costs of pursuing claims also impede consumers in obtaining remedies.[212] Furthermore, businesses have curbed customer service and may ration remedies to the most persistent, sophisticated, and highly valued

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204. *Id.* at 13–19.

205. *Id.* at 4–6.

206. *Id.* at 6.

207. *See* Schmitz, *Secret Consumer Scores*, *supra* note 17, at 1411–33 (noting how Big Data has been used to foster discrimination that defies easy detection).

208. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819–43 (1991) (discussing theories of discrimination and providing further detail regarding his study of Chicago car sales; also finding that black consumers had to pay over twice the markup paid by all other customers, regardless of market competition that should have eliminated such discrimination).

209. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB and DOJ Order Ally to Pay $80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013), http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing (discussing action against Ally related to this discrimination against loan applicants in credit transactions on the basis of characteristics such as race and national origin).

210. *See also* LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY 7–8 (2007) (noting works in this area by Professor Blake Morant).

211. *Cf.* Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 107–12 (2000) (discussing how minority employees may refrain from complaining due to stereotype concerns).

212. Schmitz, *Squeaky Wheel System*, *supra* note 15.

customers.[213] This combines with data analytics to result in consumers receiving different deals and assistance based on status, income, and other improper data points.[214] Accordingly, more accessible and low-cost remedy processes are essential to assist consumers in obtaining real remedies on typical B2C claims.

III. Substantive Reforms Aimed to Make Remedies Real

Professor Braucher highlighted "law in action" and the need for substantive reforms to make consumer protections real for common consumers.[215] Professor Braucher noted the CFPB's attention to the substance of consumer contracts and she considered how businesses exploited consumers with abusive practices and bad crediting tactics.[216] She therefore suggested that tort- and contract-based solutions are insufficient to combat lenders' "sweatbox model" that profits from luring customers with low initial rates and then "cranking up the heat on 'sweaters' by charging late payment fees and penalty rates, reaping profits before they eventually default."[217] Building on Professor Braucher's call for real solutions, this Article suggests substantive changes in consumer dispute resolution processes through development of ODR. These ODR processes will address a different sort of "sweatbox"—a model that businesses will use to push consumers to drop complaints instead of "sweating it out" to obtain remedies regarding their claims. This Article also builds on Professor Braucher's depiction of the "cowboy contract" in proposing ideas for ODR fairness standards aimed to inspire the same sort of trust and sense of responsibility as the handshake of yore.[218]

A. ODR Attributes

Various substantive reforms may assist consumers in obtaining remedies on their small-dollar B2C purchases. Some ideas include increased penalty damages and collection of attorney's fees, as well as rules that make harmful business practices unlawful. However, this Article focuses on need for cheap, convenient, and efficient processes for actually obtaining relief on small-dollar B2C claims. Specifically, it focuses on the development of ODR processes because they use technology to provide an accessible and low-cost complaint mechanism, and on review websites that provide real remedies.

ODR processes go beyond merely providing portals for consumers to post complaints. They use online processes to end disputes without need for the travel, stress, inconveniences, and other costs of traditional F2F or telephonic dispute

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213. *Id.* at 281.
214. *Id.* at 315.
215. *See* Braucher, *supra* note 1, at 109–15.
216. *Id.* at 109.
217. *Id.* at 120–21.
218. Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 192–98 (2008) (explaining how relational sanctions provided sufficient leverage to get ranchers in the first half of the twentieth century to comply with their agreements without need for formalities or litigation).

resolution measures.[219] ODR systems may utilize automated negotiation processes, as well as online mediation and arbitration, aimed to end disputes and resolve complaints.[220] These systems are generally user-friendly because they allow consumers to quickly fill out standard forms and upload related documents to obtain timely resolutions. They also may use real-time and asynchronous communications for maximum convenience and efficiency.[221]

ODR systems are distinct from the traditional F2F processes for asserting consumer disputes in the United States in that they are not necessarily legal in nature. The American system for resolving disputes is largely legal, even for consumer complaints.[222] As one scholar notes, "If Americans do not go to law, they face relatively few alternative means of *remedy*, and the availability of any alternatives depends largely upon where they live."[223] However, most consumers do not perceive purchase problems as legal matters. Rather, consumers simply want easy access to assistance without needing to consult lawyers or courts.[224] ODR would therefore provide this sort of remedy process.

Much of ODR's popularity in Europe and elsewhere stems from its speed and low cost.[225] These systems are more convenient and cost-efficient than F2F dispute resolution processes because they eliminate travel costs and diminish the need for legal assistance.[226] Furthermore, ODR is expanding globally and gaining international acceptance due to its ability to transcend borders and escape the legal constraints of other processes for the resolution of international disputes.[227]

At the same time, as noted above, companies are shrinking or eliminating telephone or F2F customer service, while increasingly suggesting that consumers should reach them online by e-mail or live chat to obtain redress.[228] Consumers also

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219. AM. BAR ASS'N, TASK FORCE ON ELEC. COMMERCE & ALT. DISPUTE RESOLUTION TASK FORCE, WHAT IS ONLINE DISPUTE RESOLUTION? A GUIDE FOR CONSUMERS (2002), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf.

220. *Id.*

221. *See, e.g.*, *How It Works*, MODRIA, http://modria.com/how-it-works/ (last visited Dec. 27, 2015).

222. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 950–54 (2009).

223. *Id.* at 966 (emphasis added).

224. *See* Braucher, *supra* note 3, at 1406, 1449–50.

225. *See* Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 308–15 (2008) (noting use for consumer small claims).

226. *See id.*; *see also* Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts, 66 Fed. Reg. 7491–03 (Jan. 23, 2001); Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, 65 Fed. Reg. 7831–01 (Feb. 16, 2000).

227. *See, e.g.*, *More More More: CPR Meeting Highlights*, 27 ALTERNATIVES TO HIGH COST LITIG. 125, 127–28 (2009) (highlighting technology and ODR as key elements in the future of dispute resolution).

228. As noted, many companies are more responsive to complaints posted on social media and requests sent through e-mails or website chat systems than they are to phone calls or letters. *See* Strauss & Hill, *supra* note 107, at 63–64; QUEENSLAND GOV'T, *supra* note 107.

are moving their complaints online to social media, as well as review and complaint portals, as mentioned above.[229] Again, however, it has become nearly impossible to navigate the largely unmonitored review and complaint websites, and even government complaint portals do not promise any resolution of consumer disputes.[230] ODR would thus build on the ease of online access to include an end game for consumers who do not receive adequate assistance through these less formal processes.

Asynchronous communications and translation programs also give ODR the advantage of allowing for multilingual processes involving parties from other countries and cultures.[231] Added due process guidelines also could enhance the fairness of these processes by imposing accreditation rules for systems designers and the neutrals who may facilitate online mediations and arbitrations.[232] Furthermore, companies that provide for such user-friendly ODR could post a "trust mark" on their websites. For example, the BBB provides an online complaint resolution mechanism that has gained credibility from consumers, industry, and government in part due to its connection with the BBB's recognizable "trust mark" or seal.[233]

Online case management also benefits businesses by enabling them to prioritize cases and respond en masse to certain issues, thereby significantly improving communication efficiencies. It also helps businesses avoid costly consumer class claims and government enforcement actions. By addressing consumer complaints quickly, businesses also may hinder consumers from spreading negative publicity on social media. At the same time, ODR allows businesses to efficiently gather information to improve their products and service—thus enhancing customer loyalty and gaining new customers along the way.

That said, online communications do come with dangers.[234] Some commentators warn that the anonymity of computer-mediation communication allows for "cyber bullying" and use of abusive or combative language one would

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229. *See* Einwiller & Steilen, *supra* note 108, at 195–98 (noting the trend toward posting complaints online, including "any positive or negative statement made by customers and other stakeholders about the organization, or one of its products or services via the internet").

230. *See supra* Section II.B. (discussing complaint sites and portals).

231. Melissa Conley Tyler, *115 and Counting: The State of ODR 2004*, MEDIATE.COM 9, www.mediate.com/odrresources/docs/ODR%202004.doc (last visited Jan. 15, 2016) (noting that as early as 2004, 11% of ODR providers had multilingual capabilities).

232. Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. ARK. LITTLE ROCK L. REV. 779, 779–95 (2012) [hereinafter Schmitz, *Building Bridges*]; Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR*, 62 BAYLOR L. REV. 178, 178–244 (2010) [hereinafter Schmitz, *Drive-Thru*].

233. Stephen J. Cole & Charles I. Underhill, *Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program*, 43 UCC L.J. 443, 446–57 (2010).

234. JARON LANIER, YOU ARE NOT A GADGET: A MANIFESTO 60–63 (2010) (noting the anti-human approach fostered by the expansion of internet life).

not feel comfortable using in person or on the phone.[235] CMC also may diminish empathy and create misinterpretations in online negotiations.[236] However, individuals have become increasingly adept at expressing themselves through standardized textual cues and emotive characters.[237] CMC has become less sterile as individuals have developed means for virtually building rapport over the Internet.[238]

Furthermore, the relative anonymity and comfort of communicating through a computer or smartphone may ease some of the social and power pressures of F2F communications.[239] This is especially true for consumers who fear stereotypes or biases.[240] For example, a woman with a strong Hispanic accent may worry that customer service representatives will not understand her and ignore her complaints over the telephone. In addition, some individuals are less adversarial online than in-person when the asynchronous nature gives them time to digest thoughts and dissipate anger before replying.[241] Individuals also may be more cautious in composing e-mails due to awareness that their messages are easily retrievable.[242]

In sum, most consumers know that the Internet can be effective for researching purchases and sharing information about products and services.[243] Ideally, however, these sites also would link consumers with means for obtaining remedies through formalized ODR, such as online mediation, arbitration, and

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235. Jan Hoffman, *Poisoned Web: Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 28, 2010, at A1 ("'It's easier to fight online, because you feel more brave and in control.'").

236. *Id.* (discussing dehumanizing impacts of the Internet). For example, "LOL" can be interpreted as "lots of love" or "lots of laughs," which could make for awkward interactions if used in reply to news that a friend's loved one passed away.

237. *See, e.g.*, Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLINICAL L. REV. 115, 118–26 (2003) (detailing the trends of increased use of CMC).

238. David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution and the Deaf Community*, 3 HEALTH L. & POL'Y BRIEF 15, 18 (2009), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1091&context=hlp (noting benefits and drawbacks of CMC).

239. *See* Paul Stylianou, Note, *Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-commerce Disputes*, 36 SYRACUSE J. INT'L L. & COM. 117, 125 (2008) (recognizing emotion involved with F2F communications).

240. *See id.* at 125–26 (noting benefits and drawbacks of online dispute resolution processes).

241. *See* Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (2002).

242. *See id.*; David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System: The Deaf Community Is Well Prepared and Can Lead by Example*, 10 CARDOZO J. CONFLICT RESOL. 131, 140–41 (2008) (explaining evidence that less bullying occurs through online communication than F2F).

243. For example, Utility Consumers' Action Network ("UCAN") provides an online forum for consumers to alert others regarding contract dangers and to offer suggestions for avoiding or responding to consumer issues. *See* UTILITY CONSUMERS' ACTION NETWORK, http://www.ucan.org (last visited Jan. 15, 2016).

negotiation.[244] There also should be a central ODR portal with companies' ODR policies, which could link to a nonprofit institution like the BBB or to a regulator like the CFPB.[245] Full exploration of precisely how the ODR systems would work and its applicable guidelines are beyond the scope of this Article.[246] However, these are initial ideas to advance the possibilities for expanding consumer justice through ODR.

B. ODR Examples

ODR systems already exist, and their use is growing as companies, consumers, and policymakers embrace their efficiencies and other attributes. For example, the retail website eBay has been at the forefront in providing ODR free of charge for its consumers.[247] The eBay "Money Back Guarantee" which applies when a buyer does not receive an item or the item is not as promised, gives the buyer the right to file an online complaint within 30 days after the latest estimated delivery date.[248] The seller then has three business days to respond in the "Resolution Center."[249] If the seller does not respond or provide an adequate remedy, the buyer may ask eBay to assign an ODR neutral to consider the facts and make a determination.[250] If necessary, eBay may enforce ODR determinations via PayPal, eBay's payment system provider, by setting aside a seller's funds.[251]

EBay also provides an "Unpaid Item Policy," which allows sellers to submit claims through the online Resolution Center against buyers who do not pay for purchased items within two days.[252] If a buyer fails to provide proof of payment or a valid reason for not paying, eBay may grant the seller a final value fee credit and refund the fee for the relisting of the item.[253]

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244. Am. Bar Ass'n Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419 (2002) (defining ODR broadly).

245. The federal government established the CFPB to regulate consumer financial products. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 § 1031, 12 U.S.C. § 5531 (2012).

246. For further discussion of ODR ideas, see, for example Schmitz, *Building Bridges*, *supra* note 232, at 779–95; Schmitz, *Drive-Thru*, *supra* note 232, at 178–244; Amy J. Schmitz, *Introducing the "New Handshake" to Expand Remedies and Revive Responsibility in eCommerce*, 26 SAINT THOMAS L. REV. 522, 522–50 (2014).

247. Colin Rule, *Making Peace on eBay: Resolving Disputes in the World's Largest Marketplace*, ACRESOLUTION: Q. MAG. OF ASS'N FOR CONFLICT RESOL., Fall 2008, at 8–11, http://colinrule.com/writing/acr2008.pdf.

248. *eBay Money Back Guarantee*, EBAY, http://pages.ebay.com/help/policies/money-back-guarantee.html (last visited Jan. 15, 2016).

249. *Id.*

250. *Id.*

251. *Id.* (giving both parties 30 days to appeal any determinations).

252. *Unpaid Item Policy*, EBAY, http://pages.ebay.com/help/policies/unpaid-item.html (last visited Jan. 15, 2016).

253. Valid reasons for not paying include improper price changes or shipping costs, seller suspensions, or account hacking. *Id.* (noting that accumulated unpaid items on the buyer's account may result in a loss of buying privileges, although either party may appeal any determinations).

Similarly, eBay provides a "Verified Rights Owner Program" ("VeRO") that allows intellectual property rights holders to submit a "Notice of Claimed Infringement" online with respect to items sold on eBay.[254] Such Notice prompts eBay to remove an item listing that arguably infringes intellectual property rights.[255] The seller then may file a counter notice to have the item reinstated in ten days unless the holder of the intellectual property rights informs eBay that it is seeking a court order to restrain the relisting of the item in accordance with the Digital Millennium Copyright Act.[256]

At the same time, eBay recognizes the importance of reviews posted on its site for sellers' businesses. Accordingly, under eBay's "Independent Feedback Review" policy, a seller may challenge a review posting within 30 days after its posting.[257] EBay will then have an impartial third-party reviewer from a professional dispute resolution service examine the challenged posting and determine whether to affirm, withdraw, or take no action regarding the review.[258] Additionally, under eBay's "Vehicle Purchase Protection" program, eBay offers up to $50,000 to cover payment for a vehicle that is not as promised or received by the customer.[259]

Despite these ODR programs, however, eBay also has a binding arbitration clause in its user agreement.[260] Consequently, if parties cannot resolve their disputes online, their only recourse is to initiate binding F2F arbitration.[261] The only way for an eBay user to avoid this arbitration policy and retain the right to judicial action is for the user to file an opt-out form with eBay within 30 days after the date of accepting eBay's user agreement.[262] Arbitration therefore is the default for practical purposes, considering that next to no consumers will be sufficiently proactive to file the opt-out form in that time frame.

PayPal has a nearly identical arbitration policy. However, it also offers free ODR programs similar to eBay's, which generally make arbitration unnecessary. For example, PayPal offers ODR for claims related to items not received and for

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254. *How eBay Protects Intellectual Property (VeRO)*, EBAY, http://pages.ebay.com/help/policies/programs-vero-ov.html (last visited Jan. 15, 2016) (noting how the right for an eBay member to file a counter notice to reinstate a listing after a notice of claims infringement is rooted in the DMCA).

255. *Id.*

256. *Id.*

257. *Resolving Feedback Problems*, EBAY, http://pages.ebay.com/help/feedback/feedback-disputes.html (last visited Jan. 15, 2016).

258. *Independent Feedback Review*, EBAY, http://pages.ebay.com/help/feedback/feedback-review.html (last visited Jan. 15, 2016).

259. If the buyer cannot resolve the issue with the seller, the buyer must request reimbursement no later than 45 days after the listing end date. An independent service provider (the "VPP Administrator") unaffiliated with eBay administers this program. *Vehicle Purchase Protection*, EBAY, http://pages.motors.ebay.com/buy/purchase-protection/ (last visited Jan. 15, 2016).

260. *eBay User Agreement*, EBAY, http://pages.ebay.com/help/policies/user-agreement.html?rt=nc#17 (last visited Feb. 28, 2016).

261. The arbitration will begin after a dispute remains unresolved after 30 days of the Notice of Claim under eBay's User Agreement. *Id.*

262. *Id.*

items significantly not as described.[263] The PayPal policy allows parties to first attempt to settle their disputes through PayPal's online "Resolution Center," and then to escalate unresolvable disputes for determination by a third-party neutral.[264] The ODR neutral will then determine refund eligibility and administer any necessary consequences to the losing party.[265]

Additionally, PayPal protects sellers from claims, chargebacks, or reversals based on unauthorized transactions or items not received.[266] Under this policy, sellers may submit a notification to PayPal regarding the unauthorized transactions or other errors.[267] PayPal will then investigate and issue a determination. Depending on its findings, PayPal may credit the seller's account for the suspected error.[268] Nonetheless, any resolution sought through PayPal precludes a purchaser's ability to contact a credit card company for chargeback rights.[269] This essentially precludes a buyer from "double-dipping" and obtaining the same remedy twice.

PayPal's and eBay's ODR programs have garnered customer support because these programs allow customers to efficiently obtain remedies without the costs and hassles of traditional claims processes. Nonetheless, other websites also have ODR policies for limited types of claims, but they often go unused due to their limitations and ambiguous terms. For example, Facebook's terms of service seem to indicate that users' only alternative is to submit all claims to litigation in California courts.[270] However, a closer reading of the terms reveals that Facebook does offer an ODR mechanism through TRUSTe, an internet privacy management service, for resolution of certain privacy disputes.[271]

Through TRUSTe's ODR program, Facebook customers can submit privacy-specific complaints, subject to important exceptions for any complaint that "seeks only monetary damages," "alleges fraud or other violations of statutory or regulatory law," or "has been resolved under a previous court action, arbitration, or

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263. *PayPal User Agreement*, PAYPAL, § 14, https://www.paypal.com/us/webapps/mpp/ua/useragreement-full#14 (last visited Feb. 28, 2016).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Terms of Service*, FACEBOOK, https://www.facebook.com/legal/terms (last visited July 15, 2015) (ostensibly stating that consumers will resolve their disputes through litigation in California). Notably, Facebook dropped its binding arbitration program in 2009. Greg Beck, *Facebook Dumps Binding Arbitration*, CONSUMER L. & POL'Y BLOG (Feb. 26, 2009), http://pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html.

271. *Dispute Resolution FAQ's*, TRUSTE, https://www.truste.com/consumer-resources/dispute-resolution/dispute-resolution-faqs/ (last visited July 15, 2015); *see also* John Gamble, *Facebook & TRUSTe*, TRUSTE BLOG (May 12, 2010), http://www.truste.com/blog/2010/05/12/facebook-truste/ (noting Facebook and TRUSTe's business relationship).

other form of dispute resolution."[272] Any determinations on the privacy claims through this ODR program do not bar an individual's right to seek other legal action.[273] However, parties must comply with TRUSTe's determination or face removal from the TRUSTe program and possibly enforcement action by an appropriate law-enforcement body.[274]

A global view nonetheless suggests that ODR is the wave of the future. Merchants outside of the United States have embraced ODR, especially due to its ability to transcend borders and jurisdictional tensions. For example, the large online retailer Alibaba uses an ODR mechanism for resolution of buyer and seller disputes.[275] Under the program, either party may submit a complaint to Alibaba, and if parties do not resolve it within ten days, then the parties may refer the dispute to Alibaba's online "Dispute Resolution Team."[276] Alibaba will then make a determination based on evidence provided by both parties.[277] Penalties for noncompliance with determinations can be severe. Alibaba may terminate parties from the site if they fail to abide by determinations on claims over $300, and for claims of less than $300, Alibaba publishes a complaint case record on the recalcitrant party's page on Alibaba.com for 90 days.[278]

C. ODR Crafted to Overcome Obstacles

Given the benefits of ODR, it seems surprising that it has not become the norm for resolving consumers' B2C disputes. Developing ODR systems, however, comes with challenges and costs, and any use of technology can be problematic due

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272. *Dispute Resolution FAQ's: What Constitutes an Ineligible Complaint?*, TRUSTE, https://www.truste.com/consumer-resources/dispute-resolution/dispute-resolution-faqs/ (last visited July 23, 2015).

273. *Id.*

274. *Id.* Parties must first make a good faith attempt to resolve the privacy issue directly, and if that fails, then TRUSTe will facilitate settlement through email communications. *Id*.

> Based upon the facts of a particular complaint, TRUSTe may do any or all of the following: require the Client to either correct or modify personally identifiable information, or change user preferences; require the Client to change its privacy statement or privacy practice; require the Client to submit to a third-party audit of its privacy practices to ensure both the validity of its privacy statement and that it has implemented the corrective action that TRUSTe required.

Id. If TRUSTe makes a determination on the issue, then it can require the party deemed to have violated privacy rights to take corrective actions. If that party does not comply, TRUSTe may refer the matter to an appropriate government agency, remove it from the TRUSTe program, and/or sue the party for breach of its License Agreement with TRUSTe. *Dispute Resolution FAQ's: What Remedies Are Available to Me as a Complainant?*, TRUSTE, https://www.truste.com/consumer-resources/dispute-resolution/dispute-resolution-faqs/ (last visited July 23, 2015).

275. *Definitions of Dispute and Resolution by Alibaba.com*, ALIBABA, http://rule.alibaba.com/rule/detail/2060.htm (last visited July 26, 2015).

276. *Id.*

277. *Id.*

278. *Id.*

to system glitches and security hazards.[279] Creating and maintaining robust and fair ODR systems is not entirely free. Moreover, consumers and companies are slow to embrace change, and emerging algorithmic and other ODR techniques raise new ethical dilemmas for dispute resolution designers, providers, and practitioners.

1. No Truly Free Ride

ODR provides clear cost and efficiency benefits, but is not entirely "free" with respect to its development and maintenance, or the time required to understand and utilize the process. Adopting sound ODR systems requires businesses and ODR developers to invest time and money in creating and maintaining these systems. For example, companies seeking to adopt ODR programs must hire design professionals and outside providers to create and implement programs geared for their businesses.[280] This is an investment and it may take time before companies see the positive returns on their ODR systems. For example, eBay did not immediately see the financial benefits of its investment in ODR; it had to trust that the investment would pay off—easier said than done.[281]

Some companies also may increase prices, lower product quality, or otherwise pass on any costs of the ODR systems. They may even use ODR systems to further ration remedies. For example, a company that once allowed for automatic returns based on a "customer is always right" mentality may use an ODR procedure to filter attempted returns to assure their legitimacy. That may anger those consumers who are unable to make returns, but it could benefit consumers more broadly by curbing costs of fraudulent returns. Instead of the squeakiest wheels

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279. For example, one consumer shared his frustrations with eBay's ODR process:

> On March 7, 2015, I ordered a power window regulator for my 1977 Mercedes from an outfit down in Tampa, Florida. I attempted to install it the following weekend only to find that they sent me the wrong item. I emailed the vendor with a picture on March 18 describing the issue and kindly asking them to send me the correct item. They did not respond. On March 19, I initiated a return with eBay. eBay's return policy asks customers to wait for a response for five days before 'ask[ing] us to step in and help,' so I waited five days. The next step requires the customer to ship the item back to the vendor (at cost to the consumer, which was about $20), which I did, and submit the shipping tracking number to eBay. The problem came at this step. I had the USPS tracking number but every time I entered it on eBay, I received the same message saying, 'Invalid parameter input.' I tried the shipping number with spaces, without spaces, etc. Finally I had to call eBay's customer service number, which is almost impossible to find, and I gave the tracking number to the customer service representative over the phone. I finally received my refund of $79.99 on March 31.

E-mail from Alex Gano, Research Assistant, to Amy J. Schmitz, Professor of Law, Univ. of Colo. Sch. of Law (July 14, 2015) (on file with author) (adding that this led him to eschew the process).

280. *See* Schmitz, *Drive-Thru*, *supra* note 232, at 180–240.

281. Rule, *supra* note 247, at 1–10; Louis F. Del Duca et al., *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ON ARB. & MEDIATION 204 (2014).

getting what they want by leveraging their power, the most deserving consumers would have added access to remedies on their proper complaints.

The costs of creating an ODR process also may seem wasted in certain cases. There has been considerable backlash against pre-dispute clauses that preclude litigation in consumer contracts, as a recent CFPB report indicates.[282] Businesses may therefore opt to create nonbinding ODR systems. This means that companies could continue to pay the costs associated with class actions or other final resolution processes when nonbinding ODR does not succeed in ending a dispute. Furthermore, they will still need to shoulder costs of staffing customer service call centers—at least while they aim to transition to use of an efficient ODR process. However, as noted earlier, development of such ODR systems will ultimately benefit businesses by garnering goodwill and building solid customer bases.

2. Changing a Norm and Addressing the Digital Divide

Again, individuals are inert and slow to adopt new behaviors. This is especially true when it requires people to learn something new. Consider the last time you drove a new route to work or learned a new language. The urge to cling to the familiar is even stronger when it comes to what we consider "justice." The reigning business strategy regarding consumer claims has been to clamp down class actions and halt complaints from reaching the public eye. This has led to the use of arbitration clauses and reduced consumer access to remedies, as noted above.[283]

Businesses, nonetheless, aim to garner customer loyalty and fend off government enforcement actions and fines. As noted, businesses build goodwill by providing customer assistance. Furthermore, regulators such as the CFPB and Federal Trade Commission ("FTC") have stepped up enforcement actions against businesses that defy consumer protection laws and fail to provide consumers with relief regarding B2C dealings.[284] It is, therefore, wise for businesses to invest in development and implementation of ODR systems built to provide better customer assistance. As mentioned above, most consumers do not conceive of their purchase problems in legal terms; they simply want assistance.[285]

Nonetheless, new ODR systems must be transparent and fair to attract consumers and convince them of ODR's efficacy. Consumers also may resist ODR systems out of fear that businesses have an advantage in any processes that they create and in which they act as repeat players. In addition, new technologies involved in ODR systems may intimidate consumers, especially seniors and other groups that did not grow up using computers, cell phones, and other similar technologies.[286]

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282. CONSUMER FIN. PROT. BUREAU, *supra* note 144.

283. *See supra* text accompanying notes 1–19.

284. *See supra* text accompanying notes 34–46.

285. *See supra* text accompanying notes 139–40 (noting research indicating how consumers do not think of their contract issues as legal, and thus refrain from taking legal action although it may be their only means for a remedy).

286. *See* KATHRYN ZICKUHR & AARON SMITH, PEW RESEARCH CTR., DIGITAL DIFFERENCES 14–21 (Apr. 13, 2012), http://www.pewinternet.org/files/old-

It is therefore important to ensure neutrality of ODR programs and educate consumers on the ODR programs. This will require ODR providers, government regulators, and companies that implement ODR to collaborate in spreading the word about ODR and providing user-friendly tutorials. To date, lack of consumer awareness and understanding regarding ODR has stymied public support.[287] For example, ODR initiatives, such as the Virtual Magistrate Project or the Online Mediation Project were unable to survive due to a general lack of public awareness.[288] It is therefore essential to provide clear and straightforward information about ODR.[289] An ODR process should be fast, easy, and unintimidating.

ODR reforms also must account for the "digital divide" in terms of consumers' differential access to the Internet. Despite an increase in the number of individuals and households who have internet access, the digital divide persists based primarily on educational attainment, age, and household income.[290] Smartphone use has offered an alternative means to access and has helped narrow the divide, especially with respect to race and ethnicity.[291] Nonetheless, age and educational attainment still create a noticeable divide among smartphone users, and access to data usage depends on economic means.[292]

For example, the Pew Research Center ("PRC") found, in its 2013 study of broadband use, that approximately 70% of adults had a high-speed broadband connection to the Internet, while 3% had a home dial-up connection.[293] Home broadband use broke down as follows:[294]

<u>Race/Ethnicity</u>

White, Non-Hispanic	74%
Black, Non-Hispanic	64%
Hispanic	53%

<u>Age</u>

18–29	80%
30–49	78%
50–64	69%
65+	43%

media//Files/Reports/2012/PIP_Digital_differences_041312.pdf (noting the digital divide among certain demographic groups including age, education, and socioeconomic status).

287. Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 458–59 (2002).

288. *Id.*

289. *Id.* (noting how lack of awareness hindered eBay's success of a pilot ODR project using voluntary online mediation through the "Online Ombuds Office").

290. THOM FILE, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES 4 (2013), https://www.census.gov/prod/2013pubs/p20-569.pdf.

291. KATHRYN ZICKUHR & AARON SMITH, PEW RESEARCH CTR., HOME BROADBAND 2013, at 4–5 (2013), http://www.pewinternet.org/files/old-media//Files/Reports/2013/PIP_Broadband%202013_082613.pdf.

292. *Id.*

293. *Id.* at 2.

294. *Id.* at 2–3.

Education Attainment

No high school diploma	37%
High school grad	57%
Some college	78%
College +	89%

Household Annual Income

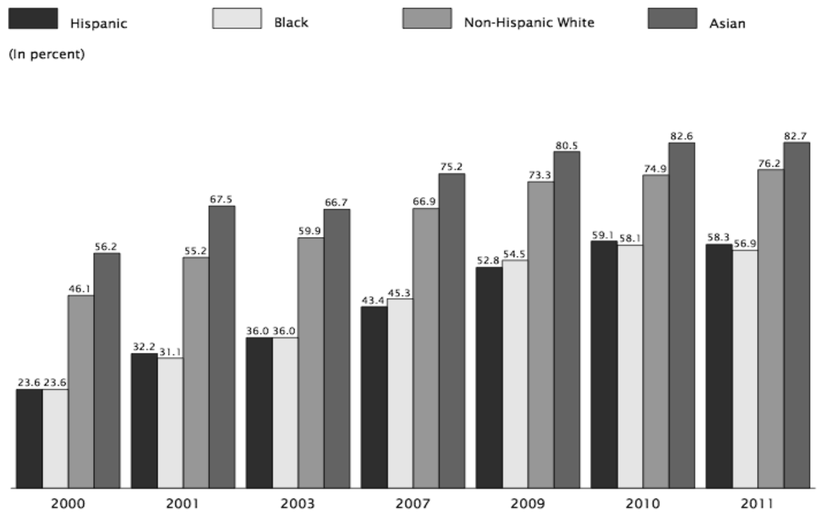
Less than $30,000	54%
$30,000–49,999	79%
$50,000–74,999	84%
$75,000 +	88%

However, the PRC also found that smartphone usage has created new means for accessing the Internet, especially for minority groups and those with lower economic means.[295] For example, 10% of Americans do not have home broadband internet access, but they do own a smartphone.[296] Smartphones also virtually eliminate the digital divide among races and ethnicities, with 80% of "White, Non-Hispanic," 79% of "Black, Non-Hispanic," and 75% of "Hispanic" having some internet access through home broadband or a smartphone.[297] Still, smartphones widen the digital divide between 18–29 year olds and those who are over age 65 (increasing from a gap of 37 percentage points in home broadband access to 49 percentage points when taking smartphones into account).[298] Furthermore, although smartphones have increased their utility with the advent of new technologies, they may not be as usable as a computer with a home internet connection—i.e., uploading and editing documents, and costs of data usage under smartphone plans may hinder access for those of lower economic means.[299]

It is expected that the digital divide will continue to shrink.[300] The U.S. Census Bureau noted how quickly individuals have gained access to the Internet in its 2011 study tracking internet use over time.[301] It found that in 1984 only 8.2% of American adults had a computer, while that number rose to 75.6% in 2011. Additionally, only 18.0% of Americans had access to the Internet in 1997 compared with 71.7% in 2011.[302] However, the study also acknowledged that a digital divide exists based on race and ethnicity.[303]

295. *Id.* at 4–5.
296. *Id.*
297. *Id.*
298. *Id.*
299. *See id.* at 4 (noting questions regarding the utility of smartphones for activities such as updating a resume, filing taxes, or viewing educational content because these activities are more challenging on a smartphone operating over a cell phone network than on a broadband-connected home computer).
300. WHITE HOUSE COUNCIL OF ECON. ADVISERS, MAPPING THE DIGITAL DIVIDE 2 tbl.1 (2015), https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf.
301. FILE, *supra* note 290, at 1.
302. *Id.* at 2.
303. *Id.* at 3 fig.2.

Figure 2.
Household Internet Use by Race and Ethnicity: 2000–2011



Source: U.S. Census Bureau, Current Population Survey, selected years.

The Census Bureau's findings mirrored those of the PRC; finding that smartphone usage helped to somewhat narrow the digital divide based on race and ethnicity.[304]

Still, the Census Bureau reported differential access based on age (18–34 = 82% versus 65+ = 45.5%), income (less than $25,000 = 49.8%, $25,000–$49,999 = 63.7%, and $100,000+ = ~86%), and educational attainment (less than high school graduate = 31.5%; high school graduate or GED = 58.7%; some college or associate's degree = 80.7%; bachelor's degree or higher = 90.0%).[305] Furthermore, the Census Bureau noted that the Southeastern and Northeastern parts of the United States experienced smartphone usage below the national average, while most states west of the Mississippi enjoyed usage rates at or higher than the national average.[306] Notably, the technological devices used in ODR processes, such as computers, smart phones, and tablets come with costs, as do telecommunications services for home and cellular devices. This means that many consumers, especially those in vulnerable populations, may continue to feel disempowered in the digital age.

304. *Id.* at 10–12.

305. *Id.* at 4–5. With respect to smartphones, the Census Bureau found usage as follows: white, non-Hispanic alone: 48.6%; black alone: 47.3%; Asian alone: 51.6%; Hispanic: 45.4%. *Id.* at 11 tbl.5. When taking into account either smartphone or internet users, the Census Bureau found internet usage rates as follows: white, non-Hispanic alone: 79.2%; black alone: 67.9%; Asian alone: 83.0%; Hispanic: 65.5% (changing the gap from 27 percentage points among Asian and Hispanic internet users, to 18 percentage points when accounting for smartphones). *Id.*

306. *Id.*

Accordingly, policymakers and businesses must consider ways to expand free or low-cost internet access.[307] They also would be wise to adopt educational access programs to assist those over age 65 and those with lower education. Most consumers will need to invest some time and resources in gathering information about new ODR processes. Furthermore, using ODR will be more difficult for those who are uncomfortable with online processes and grew up in a society that relied on F2F discussions and "cowboy contract" handshakes to ensure the quality of their deals.[308]

Nonetheless, seniors are becoming more internet savvy, and there are programs aimed at providing internet assistance and access. For example, the City of Lafayette Senior Center in Colorado offers free computer classes, clinics, and labs.[309] Such facilities could provide ODR tutorials and "ODR stations" set up with computers. These ODR stations could also be at libraries and other public buildings with assistants to walk individuals through the process. Businesses that use ODR also could provide assistance for consumers, and cover related costs with savings from cutbacks on other means of customer support. They also may happily cover the costs due to gains they will enjoy from boosting goodwill. Public assistance and donations could defray any additional costs and would be worth the investment to help fill the gap left by the digital divide and expand access to remedies for consumers regardless of wealth, education, or other status.

Of course, some consumers may remain silent about their claims regardless of the remedy processes available. Psychological and behavioral barriers to pursuing remedies may continue to hinder some consumers from complaining, and others may remain unwilling to learn about or use new ODR systems. That does not mean, however, that policymakers and businesses should abandon reform ideas. Expanded access to consumer justice is worth the investment in making a change.

3. Privacy Perils

Consumers also may distrust that the information they convey through an ODR process will remain private. As noted above, there is growing concern with Big Data companies' intrusion into our privacy.[310] Consumer trust in the Internet is declining amidst stories of rampant hacking scandals. Policymakers have also become increasingly concerned with the usage of consumer information to provide

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307. *See, e.g.*, Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, May 28, 2015, at A1 (discussing plan to expand access to the Internet for the poor).

308. *See* Braucher, *supra* note 218, at 191–98 (discussing "cowboy contracts" sealed by a handshake).

309. *Adult Programs - Technology Classes Fall 2015*, CITY OF LAFAYETTE, COLO., http://www.cityoflafayette.com/DocumentCenter/View/7054 (last visited Feb. 29, 2016) (discussing the various classes and computer labs, including classes on using Google, smartphones, etc.).

310. *See supra* notes 164–71 and accompanying text (discussing dangers of Big Data and its allowance for differential treatment of consumers with respect to pricing and remedies).

consumers with different deals depending on data brokers' assessment of an individual's value as a potential or current customer.[311]

Full discussion of data privacy is an expansive issue beyond the scope of this Article.[312] However, it is important in the ODR context to address consumers' fear that the information they submit in an ODR process will not remain secure. For example, a consumer may fear that any documents that they submit online could reach the wrong hands—such as fraudsters mining the Internet for personal financial data. Consumers also may worry that businesses may retaliate against them for filing an ODR claim by dropping or avoiding them as a customer.

Fair use of data and data privacy are concerns with any website or online system. Forty-seven percent of respondents in a recent survey said they were concerned with companies tracking their behavior online.[313] "Consumer data companies are scooping up huge amounts of consumer information" and "selling it, providing marketers details about whether you're pregnant or divorced or trying to lose weight, about how rich you are and what kinds of cars you drive."[314] Data brokers track online purchases, use of store loyalty cards, how long one lingers on a website, online searching histories, family information, and even postings on social sites such as Facebook.[315] It is thus unsurprising that consumers are 74% more concerned with their online privacy than they were a year ago.[316]

However, ODR systems designers already have begun developing robust means for protecting privacy and encrypting data.[317] For example, Modria, a leading ODR provider, uses sophisticated encryption and other data safety mechanisms to ensure the safety of its services.[318] In fact, such websites are generally safer than most B2C sites, especially those that unabashedly collect and sell user data.[319] There is, therefore, no reason to fear provision of information through ODR platforms to any degree greater than that of using the Internet generally.

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311. *See* Joseph W. Jerome, *Buying and Selling Privacy: Big Data's Different Burdens and Benefits*, 66 STAN. L. REV. ONLINE 47, 50–52 (2013).

312. For a discussion of data brokers' practices and suggestions of privacy regulations addressing problems associated with those practices, see Schmitz, *Secret Consumer*, *supra* note 17, at 1411–73.

313. TRUSTE INC., TRUSTE 2014 U.S. CONSUMER CONFIDENCE PRIVACY REPORT: CONSUMER OPINION AND BUSINESS IMPACT 3 (2014), http://download.truste.com/dload.php/?f=4HKV87KT-447 [hereinafter TRUSTE REPORT]. Concerns about tracking have escalated among those aged 55–64, and is higher among married than single persons. *Id.* at 7.

314. Lois Beckett, *Everything We Know About What Data Brokers Know About You*, PROPUBLICA (June 13, 2014, 12:59 PM), http://www.propublica.org/article/everything-we-know-about-what-data-brokers-know-about-you.

315. TRUSTE REPORT, *supra* note 313, at 3–10.

316. *Id.* at 7–10.

317. COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT INSURANCE AND OTHER COMMERCIAL CONFLICTS 199–201 (2004).

318. *See Security*, MODRIA, http://modria.com/security/ (last visited Jan. 11, 2016) (describing the ODR provider's compliance with international information security standards known as the ISO/IEC 27001 certification requirements).

319. *Id.*

Furthermore, consumers may not be as concerned with provision of information over the Internet if the end goal is to obtain a remedy. "Few people make the effort to read [privacy policies]. Similarly, empirical evidence suggests that consumers do not fully understand the meaning of privacy seals."[320] Instead, studies have indicated that most people are willing to put aside privacy concerns and provide personal information for even small rewards.[321]

That said, transparency is of paramount importance in challenging the F2F norm for claims resolution. Individuals using ODR services must trust that the ODR platforms protect their privacy. Users also must feel that the ODR services use decision-making processes that consider their views. For example, some consumers may not trust an algorithmic ODR mechanism that feels like simple number swapping. That is why ODR processes that spit out settlements based on algorithms using data on similar claims are not necessarily just in all cases or for all parties.[322] It is therefore essential to build ODR systems for particular contexts in consideration of due-process standards.

4. Evolving Ethical Dilemmas

The importance of ODR due-process standards coincides with the need for specialized ethics rules to address the new and evolving dilemmas ODR creates for systems designers, providers, and third-party neutrals. Some commentators argue that ODR providers will focus on speed to the detriment of due process.[323] They also worry that private ODR providers will favor the businesses that hire them and pay the bill for their services.[324] Furthermore, even if providers are not in fact biased, consumers may nonetheless remain skeptical that the businesses are repeat players who have mastered use of the ODR systems for their benefit.

Related concerns have led to more public ODR regulations and programs outside of the United States. For example, the European Union adopted a Directive on Alternative Dispute Resolution for Consumer Disputes[325] and a Regulation on Online Dispute Resolution for Consumer Disputes,[326] which work in tandem to require member states to implement ODR systems for resolving consumer claims. Furthermore, the United Nations Commission on International Trade Law is

320. Janice Y. Tsai et al., *The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study*, *in* THE 6TH WORKSHOP ON THE ECONOMICS OF INFORMATION SECURITY 1 (2007), http://www.econinfosec.org/archive/weis2007/papers/57.pdf (internal citations omitted).

321. *Id.* at 2.

322. *See* Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 486, 492 (2014).

323. *See id.* at 518.

324. *See id.* at 519–20.

325. Council Directive 2013/11/EU, 2013 O.J. (L 165) 63.

326. Commission Regulation 524/2013, 2013 O.J. (L 165) 1.

currently advancing guidelines on ODR for cross-border e-commerce through its Working Group III on Online Dispute Resolution.[327]

However, ODR has remained private in the United States, and the private ODR providers, such as Modria, should play a pivotal role in creating robust ODR systems in the United States.[328] Private ODR providers have the necessary expertise and already lead the way in creating safe and fair ODR systems. Unlike the government, these private companies have the necessary tools to efficiently and effectively build ODR frameworks, which ultimately benefits all taxpayers. Nonetheless, these private entities must work in collaboration with government regulators and other public entities to ensure system fairness. This should include implementation of rules for independent review and accreditation of ODR programs, which again could be linked with a government-backed trustmark.[329]

Furthermore, ODR practitioners (including lawyers and nonlawyers, and ranging from advisors to mediators and arbitrators) who utilize CMC should create and follow ethical standards that account for technology with regard to confidentiality, impartiality, competence, and quality of process.[330] ODR designers also must consider how technology allows for outside parties to essentially "spy" on an ODR process through compromised e-mails, cloud computing platforms, and penetrable chat rooms.[331] Practitioners must understand these confidentiality risks and communicate those risks to clients.[332] As noted above, ODR systems designers also must remain vigilant in creating robust security measures to prevent data security breaches during the process.[333]

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327. Int'l Law Comm'n, Trade Law Working Grp. III, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Guidelines, U.N. DOC. A/CN.9/WG.III/WP.128 (Apr. 4, 2014).

328. *See* Interview by Aled Davies with Colin Rule, Founder and COO, Modria.com (2015), http://www.judiciary.gov.uk/wp-content/uploads/2015/02/colin_rule_modria_os_for_odr.pdf (discussing the history and growth of private ODR providers).

329. ODR providers are already learning the importance of creating just and legitimate systems. They know that government regulators may shut them down if they favor the companies that hire them. The National Arbitration Forum ("NAF") shutdown with respect to F2F consumer arbitration provides a cautionary tale. This arbitration provider halted its consumer arbitration services pursuant to a settlement of a lawsuit the Minnesota Attorney General filed against NAF for consumer fraud, deceptive trade practices, and false advertising. *See* Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BUSINESSWEEK (July 19, 2009), http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html (discussing the lawsuit against NAF and the large impact this will have on credit card and other consumer arbitrations NAF has administered in the past).

330. Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 INT'L J. DISP. RESOL. 37, 56 (2014).

331. *See generally* Esther Van den Heuvel, *Online Dispute Resolution as a Solution to Cross-Border E-disputes* (2000), http://www.oecd.org/internet/consumer/1878940.pdf (discussing foreseeable privacy concerns in ODR).

332. Rainey, *supra* note 330, at 45.

333. *See supra* text accompanying notes 317–22.

Additionally, the neutrals facilitating or deciding ODR cases must be forthright with clients in explaining the pros and cons of ODR and ensuring parties' right to self-determination. They should be vigilant in ensuring that all parties have an adequate opportunity to participate in the process and that parties can make free, voluntary, and informed choices surrounding the procedures and outcome.[334] This should be true in F2F dispute resolution as well, but may be more of a concern in ODR because there will be more nonlawyers involved in deciding or facilitating ODR disputes.[335] ODR facilitators also must be more careful than F2F dispute resolution neutrals to remain focused on cases submitted online. It is easier to be distracted by email and outside surroundings while facilitating a case behind the comfort of one's computer than facing the disputing parties in a conference room.

Standards also must clarify when ODR neutrals should withdraw from an online case for ethical reasons. Ethics rules usually require a third-party neutral in dispute resolution to withdraw from a case when actual bias or the appearance of bias threatens to undermine the integrity of the process.[336] This is easier to determine in a typical F2F process because neutrals generally have sufficient facts about parties' identities and time to investigate possible conflicts of interest and disclose those conflicts at the outset of a process. For example, arbitrators must determine and disclose all conflicts of interest at the outset of an arbitration, thus giving the parties freedom of choice with respect to the arbitrator.[337]

In contrast, ODR neutrals may not know parties' identities at the outset due to well-meaning technological devices that seek to preserve anonymity.[338] This can be beneficial when ODR allows for true anonymity, which may prevent parties and neutrals from ever knowing the others' identities. This would prevent conflicts of interest from thwarting the dispute resolution process. However, there may be some cases in which parties mistakenly reveal their identities through their presentation of the facts. This could result in last-minute withdrawal of the online neutral, thus derailing the process.

For example, an ODR mediator may not know parties' names at the outset of an ostensibly anonymous process. However, the content of parties' statements or even the tone of communications may reveal identities. Consumers and companies may inevitably disclose their identities while submitting relevant documents or explaining the facts. Accordingly, new ethical standards for ODR should address these situations. There already is a lack of uniform standards and accreditations for

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334. Rainey, *supra* note 330, at 46.

335. *See* Douglas H. Yam, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 211–12 (2001).

336. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 2 (AM. LAW INST. 2011) ("A judge shall perform the duties of judicial office impartially, competently, and diligently.").

337. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard III (AM. LAW INST. 2005).

338. Colin Rule & Indu Sen, *Online Dispute Resolution and Ombuds: Bringing Technology to the Table*, 8 J. INT'L OMBUDSMAN ASS'N 73, 78–79 (2015), https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/docs/JIOA-15-V8-1-Rule_Sen.pdf.

F2F mediators, and therefore, this impetus may inspire action to ensure legitimacy of all mediation processes.[339]

In addition, ODR raises new questions about the unauthorized practice of law. Nonlawyer dispute resolution providers have long struggled with avoiding the unauthorized practice of law.[340] The growth of ODR makes this more complicated by introducing more nonlawyers into dispute resolution processes. Furthermore, individuals may not be as careful in the online communications to avoid giving legal advice, or otherwise crossing over the line and practicing law.

ODR providers also must be careful not to over-automate their processes in the name of efficiency.[341] Cost and time savings are important ODR goals, but they should not overshadow fairness and justice.[342] ODR designers must safeguard due process and be careful in creating and using algorithms to decide disputes based on models that may not fit a particular case or context. Some parties may enjoy the speed of code-based claim determinations, but others may feel dissatisfied by any process that feels like actuarially determined number swapping.[343]

Still, ODR developers and providers, in collaboration with government regulators, can overcome these hurdles and develop fair and ethical ODR systems. Consumers are eager to use technology in new ways, especially if that will help them obtain remedies with respect to their B2C claims. They seek economical and easy ways to obtain redress when products do not conform to their expectations or when businesses fail to provide the services they promise. Accredited and monitored ODR systems may offer access to remedies they desire. The businesses that employ these systems also would benefit by saving dispute resolution costs and building goodwill among their customers.

5. Ensuring Enforcement of Public Rights

Private companies may play a part in creating ODR processes, but as suggested above, government regulators, such as the CFPB, must play a role in ensuring the fairness of these privately created processes. Additionally, it is essential to promote enforcement of consumer protection laws and other public rights. As discussed above, the demise of class actions has arguably left businesses free to avoid enforcement of these rights.[344] At first glimpse, ODR may further privatize claims resolution—thereby putting a nail in the coffin on public enforcement of consumer laws. Accordingly, ODR systems should add a "trigger mechanism" that would (1) alert regulators about recurring claims indicating possible grounds for enforcement action; and (2) result in a public posting on a central ODR website notifying other consumers of potential problems. This would be especially important where repeated complaints indicate that health or safety issues are at stake.

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339. *See* Yam, *supra* note 335, at 207–11 (noting need for updated ethical rules).

340. *Id.*

341. Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 616.

342. *Id.* at 627–29, 640–45.

343. *Id.* at 647.

344. *See supra* text accompanying notes 45–46.

Specifically, the "trigger" could alert the CFPB or FTC, depending on the type of product or service involved, when there are an inordinate number of claims filed regarding a particular product or service that has harmed individuals in a significant way. Such a trigger also could generate a public posting about the recurring claims after the CFPB or FTC has verified the claims' legitimacy. This would promote public awareness about a danger that may otherwise remain private due to the SWS and the proliferation of pre-dispute arbitration clauses and class action waivers.

The trigger mechanism would also benefit regulators by helping them determine when to pursue enforcement actions. In this way, the trigger would help address the underenforcement of statutory and other public policy claims that has occurred due to the privatization of justice in B2C cases. For example, an ODR process with a trigger mechanism would help alert the Federal Communications Commission ("FCC") when particular telecommunications companies add unauthorized third-party charges to customers' bills (a practice known as "cramming").[345] Although the FCC has brought some enforcement actions to stop cramming,[346] many consumers continue to fall prey to these charges due to lack of vigilance regarding small charges on their bills and their reliance on automatic payment systems. Thus, ODR would lower consumers' hurdles to remedies, albeit in a largely privatized process, while the trigger mechanism would prompt public awareness and allow the FCC to notify a company to reverse unauthorized charges or face an enforcement action.

It seems at first blush that no company would agree to use an ODR platform that integrates the proposed trigger mechanism, as it could arouse unwanted regulatory action. However, as noted above, use of the ODR process could ease companies' overall dispute resolution costs making the entire process more economically efficient.[347] Additionally, the associated trustmark would provide marketing benefits for companies that agree to the process. Furthermore, companies' adherence to the ODR process could help them avoid any potential enforcement actions and class claims.[348]

CONCLUSION

The costs and complexity of traditional F2F processes for resolving B2C purchase problems have hindered consumers' access to remedies and enforcement of consumer protection regulations. Legal rights on the books have become meaningless for individuals living in the real world. This is especially true with respect to low-dollar claims. It is rarely worth the cost and stress of pursuing F2F

345. *See* Amy J. Schmitz, *Ensuring Remedies to Cure Cramming*, 14 CARDOZO J. CONFLICT RESOL. 877, 877–97 (2013).

346. *See, e.g.*, Press Release, Fed. Commc'ns. Comm'n, FCC Proposes $5.2 Million Fine Against U.S. Telecom Long Distance, Inc., for Deceptive Slamming, Cramming, and Billing Practices (Jan. 24, 2014), http://www.fcc.gov/document/fcc-proposes-52-m-fine-against-us-telecom-long-distance-inc (highlighting the FCC's action against a telecommunications company for changing consumers' long distance carriers and adding charges without proper authorization).

347. *See supra* Section I.B.2.

348. *See supra* text accompanying notes 231–33.

processes when the expected recovery is low. Additionally, businesses rely on individuals' inertia by curbing customer assistance and privately quieting claims of the relatively few squeaky wheels who persistently pursue their complaints. This leaves the majority of consumers unaware of their rights and unsatisfied when purchases go awry.

This Article therefore suggests a need for considering "law in action," and thus developing lower cost, easily accessible consumer remedy processes. Namely, it advocates the development of ODR processes designed to revive corporate responsibility and consumer trust in their purchases. These processes must be secure, transparent, user friendly, and worth their costs in light of the complexity and possible payout on the claims at issue.[349] Consumers also must have adequate information about the ODR processes so that they are comfortable using these processes to vindicate their rights. Furthermore, government regulations and an enforcement mechanism should support ODR processes. This could result in a win-win for consumers and companies. When companies provide such resolution processes, "[c]onsumers are happier; they become more loyal; the bottom line increases."[350]

349. *See* Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305, 308–16 (2010).

350. Carder & Gunter, *supra* note 148, at 112.