

Building Trust in Ecommerce Through Online Dispute Resolution

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I. Introduction

Electronic commerce (“ecommerce”) is quickly overshadowing face-to-face (“F2F”) contracting, especially in business-to-consumer (“B2C”) contexts. Business transactions are decreasingly made in person, and deals are no longer made on a handshake. Instead, individuals turn to the Internet for their buying and banking needs, while businesses move their sales online and close their brick-and-mortar locations. Online merchants have transformed how we make purchases, and lure us into buying products and services in previously unimagined ways.

For the most part, this growth in ecommerce has benefited both companies and consumers. Companies have gained access to multitudes of customers and consumers have connected with companies they would never otherwise encounter in the physical world. The Internet has become a gateway to an ever-expanding and globalized electronic marketplace for consumer goods and services. Nonetheless, the Internet also has created disconnections in B2C exchanges that some companies have used to evade consumer claims. For example, some companies have nearly eliminated customer-care call centers. Furthermore, merchants who conduct business on the Internet (“eMerchants”) often use customer-care email and messaging systems through which consumers rarely obtain satisfying assistance. For example, representatives replying to consumer emails are often slow in responding or lack authority to provide real remedies.

These disconnections also fuel the inequities of what I have referred to as the “squeaky wheel system” (“SWS”) in B2C exchanges.¹ This conception of the SWS builds on the notion that the “squeaky wheels” who artfully and actively pursue their interests are most likely to get the remedies and other assistance they seek. Meanwhile, the majority of consumers who lack the knowledge, experience, and/or resources to pursue their needs usually do not receive the same assistance. This means that the so-called “sophisticated” consumers who already enjoy disproportionate power due to social or economic status are usually the “squeaky wheels” who receive better remedies and assistance than the majority of consumers left vulnerable to one-sided contracting.²

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¹ Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012).

² See, e.g., 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, 672–76 (1996) (discussing how sellers differentiate among buyers by providing contract changes and adjustments to only the most sophisticated consumers who complain).

From a purely economic standpoint, it is rational for companies to capitalize on this SWS in an effort to cut costs and maximize their profits.³ However, the SWS also thwarts regulation by market forces because it prevents economists' proposed "informed minority" from policing the fairness of contract terms and business practices.⁴ Even assuming, *arguendo*, that there are enough "informed" consumers who read or shop for purchase terms,⁵ these consumers are usually the same sophisticated consumers who pursue their complaints and obtain their desired remedies.⁶ The SWS then hinders these consumers from alerting the majority about available claims and remedies by diminishing their incentive to share information about rationed benefits with the uninformed masses. In this way, the SWS hinders regulation by market forces and allows businesses to ration remedies to the detriment of those with the least resources and information.

This has created a need for more accessible, efficient, and low-cost means for consumers to obtain remedies online, regardless of their status or so-called sophistication – thus giving rise to a need for online dispute resolution ("ODR") processes. These processes use web-based programs and computer mediated communications ("CMC") to resolve disputes.⁷ They may employ procedures ranging from automated negotiations using algorithms for suggesting claim settlements to arbitration procedures that are carried out via email, document postings, and online hearings.

Furthermore, these programs have built momentum over time, especially in international ecommerce. For example, the European Union ("EU") has adopted a Directive on Alternative Dispute Resolution for Consumer Disputes⁸ (the "ADR Directive") and a Regulation on Online Dispute Resolution for Consumer Disputes⁹ (the "ODR Regulation"), which work in tandem to require member states to implement ODR systems for resolving consumer claims. Furthermore,

³ See Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 702 (1977) (noting that almost all sellers choose to use "less stringent quality control practices" and only compensate the few who have the time and resources to complain about defective products).

⁴ See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 714–16 (1992) (explaining the informed minority argument); 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, 637–39 (1979) (explaining the theory that competition among firms for well-informed consumers should tend to protect all consumers).

⁵ See Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (studying the Internet browsing of 48,154 households and finding that only one or two out of every thousand potential software purchasers accessed the software's end-user license agreement); see also LARRY A. DiMATTEO ET AL., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION 30 (2007) (noting that "most consumers do not even read most form contracts").

⁶ 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).

⁷ Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 164–68 (2012).

⁸ Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165) 63.

⁹ Regulation (EU) No. 524/2013 on Online Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165) 1 [hereinafter ODR Regulation].

the United Nations Commission on International Trade Law (“UNCITRAL”) is currently advancing guidelines on ODR for cross-border ecommerce through its Working Group III on Online Dispute Resolution.¹⁰ At the same time, many companies such as eBay and PayPal have instituted their own ODR systems for handling consumer complaints and have essentially created “virtual courthouses” to resolve ecommerce disputes.¹¹

There is great promise for ODR. This is especially true for low-dollar claims such as those in most B2C contexts because of its ease and efficiencies.¹² ODR systems help address the SWS by lowering the costs and burdens of pursuing complaints so that all consumers, regardless of power and resources, feel comfortable and able to seek assistance. Online complaint centers also foster transparency and empower consumers to share information about products and services. ODR processes that provide evaluations and final determinations also go beyond online review and blog sites by leading consumers to substantial remedies. This helps to police market fairness and hold companies responsible for their misdeeds in B2C commerce.

Accordingly, this chapter discusses how ODR systems expand and equalize remedy systems in B2C exchanges. Part II of the chapter discusses the need for expanded means to address the SWS and provide consumers with access to remedies regarding online purchases. Part III explains how ODR systems are unfolding on international and domestic fronts in B2C exchanges. Part IV then highlights their strengths and weaknesses and proposes ideas for how ODR systems can be improved to offer consumers efficient and fair means for accessing ecommerce remedies. The chapter concludes with Part V, an invitation to continue the development of such ODR systems in an effort to foster revived corporate responsibility and empower all consumers regardless of their resources, power, or status.

II. Need for ODR to expand and equalize access to consumer remedies

Most consumers do not pursue purchase complaints due to lack of resources, power, or awareness regarding their rights. The SWS then quiets the few informed and resourceful consumers who are sufficiently persistent in pursuing their claims to obtain rationed remedies.¹³ At the same time, merchants commonly forbid consumers from suing in court or asserting claims as a class by including mandatory arbitration clauses in the fine print of contracts that consumers usually accept without reading.¹⁴ Traditional F2F arbitration proceedings may be beneficial for resolving larger business-to-business (“B2B”) claims, but they are impractical in typical B2C

¹⁰ U.N. Comm’n on Int’l Trade Law Working Group III, 29th Sess., Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Guidelines, U.N. Doc. A/CN.9/WG.III/WP.128 (Mar. 24-28, 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/003/96/PDF/V1400396.pdf?OpenElement>.

¹¹ 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, 616–17.

¹² See Louis F. Del Duca, Colin Rule & Kathryn Rimpfel, *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).

¹³ See, e.g., Cruz & Hinck, *supra* note 2, at 673–75.

¹⁴ Jeremy B. Merrill, *One-Third of Top Websites Restrict Customers’ Right to Sue*, N.Y. TIMES, Oct. 23, 2014, available at <http://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html>.

cases when the cost to pursue a claim outweighs any likely award. Therefore, the majority of consumers forgo legitimate claims, thereby allowing companies to avoid responsibility to their customers and hide improprieties from the public eye.

A. The thriving SWS in ecommerce

Consumers lament the lack of meaningful access to customer assistance with respect to their purchases, especially those completed online. This is unsurprising in light of eMerchants' push to eliminate telephone assistance and staff email reply centers with individuals who often lack training or authority to provide meaningful remedies in response to consumers' complaints.¹⁵ Merchants also know that consumers very rarely take complaints to the courts, federal regulators, or third parties such as a local chamber of commerce or the Better Business Bureau.¹⁶ Merchants also may forbid consumers from filing judicial claims or seeking class relief of any kind by requiring that consumers submit any claims to individual F2F arbitration procedures.¹⁷

This leaves the vast majority of consumer claims off the public radar of courts and government regulators. It allows businesses to contain negative publicity and hinder filed claims by appeasing the few squeaky wheels who would otherwise have capacity to take such public actions, and thus inform the majority about available claims and remedies. This is economically wise for businesses, considering the costs of retaining versus obtaining customers. It is roughly five times harder to attract new customers than to retain current ones, which translates into twenty-five to eighty-five percent higher profits merely by retaining five percent more current customers.¹⁸ Furthermore, appeased complainers become especially loyal customers,¹⁹ while dissatisfied complainers are prone to share their negative experiences on social media and complaint sites like Yelp.²⁰

¹⁵ See generally Sheri Carder & Larry Gunter, *Can You Hear Me? Corporate America's Communication with Dissatisfied Customers*, 24 J. AM. & COMP. CULTURES 109, 109-110 (2001) (reporting study results showing businesses' low response rates to consumer complaints).

¹⁶ Best & Andreasen, *supra* note 3, at 713-15.

¹⁷ See text accompanying note 14, *supra*.

¹⁸ See WOLF J. RINKE, DON'T OIL THE SQUEAKY WHEEL: AND 19 OTHER CONTRARIAN WAYS TO IMPROVE YOUR LEADERSHIP EFFECTIVENESS 138 (2004).

¹⁹ See Tibbett L. Speer, *They Complain Because They Care*, 18 AM. DEMOGRAPHICS 13 (1996) (noting "grouchers are likely to remain loyal" if they are happy with resolution of their complaints); Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767, 772, 774 (2012) (observing that "user trust is a crucial driver to growing usage of online services," and explaining results of study suggesting that those who use ODR to resolve their disputes become more loyal customers).

²⁰ 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 (Aug. 2011), <http://www.consumerreports.org/cro/money/consumer-protection/new-ways-to-complain/overview/index.htm>.

Companies also may ration remedies knowing that most consumers are inert and unlikely to read their contracts, let alone understand their contracts and pursue their rights through litigation or F2F arbitration. Most consumers ignore contract terms when reading them would require action such as clicking a link on a website or scrolling through endless terms in many online contracts. Contract terms in online contracts also may be confusing, filled with legalese, and difficult to access due to “pop-ups” and other shrouding techniques. Indeed, most individuals do not read or digest the often long and complex form contracts that have become the norm in B2C exchanges.²¹ Consumers also may suffer over-optimism, cognitive dissonance, and confirmation bias with respect to their purchases.²²

These tendencies converge to hinder consumers from asserting their claims through F2F procedures that require sophistication and resources. Overly optimistic consumers do not want to believe they made bad purchase decisions and are prone to continue with contracts after investing time and resources in making a purchase. Most consumers also suffer from inertia, which prevents them from proactively reading or seeking to change contract terms.²³ They similarly drop purchase complaints if pursuit requires efforts such as hiring an attorney and filing a claim in court or with an arbitration association.

At the same time, many eMerchants employ arbitration clauses that require costly F2F arbitration procedures. These arbitration procedures may require consumers to deposit high filing and administrative fees.²⁴ This hinders consumers’ incentive to file a claim when the initial filing and administration costs outweigh any potential recovery through the procedure. This is true even if consumers may be able to recoup fees in an award. Furthermore, arbitration clauses in online contracts nearly always preclude class proceedings, which would otherwise allow consumers to collectively pursue factually similar low-dollar claims.

Moreover, F2F processes are often infeasible for many consumers. Individuals lack the time, money, knowledge, and patience to pursue even small claims court proceedings. People busy with work and family obligations are likely to give up on pursuing complaints when

²¹ 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 Pogrud 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 frequently overlooked terms, including adjustable versus fixed rates on loan agreements).

²² See Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 122–24 (2007) (explaining behavioral law and economics basics); see also Star & Choplin, *supra* note 21, at 100–01 (discussing “anchoring effects”). But see Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559–75 (1998) (critiquing behavioral law and economics as merely a psychological and sociological account of human behavior that “confuse[s] explanation and prediction” and lacks “theoretical ambition”).

²³ See Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1605–08, 1627 (1998) (noting impact of consumer inertia in standard form contracting).

²⁴ See Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 135–143 (2004); PUBLIC CITIZEN, *THE COSTS OF ARBITRATION 2-3* (2002), available at <http://www.citizen.org/documents/ACF110A.PDF>.

companies ignore their initial requests for assistance.²⁵ Anger may fuel a consumer's initial e-mail or phone call regarding a purchase problem, but consumers generally do not follow up after receiving no reply or facing long hold times with customer service phone lines.²⁶ Customer service representatives also may lack authority to provide remedies or may make it very stressful for consumers to obtain any redress.²⁷

Societal influences and stereotypes also hinder consumers from asserting complaints or getting remedies in person. As an initial matter, culture teaches individuals to prefer status quo norms and contract terms.²⁸ This is especially true for women, who may be reluctant to assert complaints or pursue their needs due to fear of appearing "pushy."²⁹ Women also are much less likely than men to recognize opportunities to negotiate and usually use less assertive language than men when they do pursue negotiations.³⁰ Similarly, research shows that black consumers are less likely than white consumers to realize opportunities to complain regarding their purchases.³¹ In addition, these consumers often do not receive the same deals and purchase benefits as white consumers regardless of education or income.³²

Furthermore, conscious or subconscious biases may lead company representatives to offer the least advantageous prices to racial minorities.³³ For example, in December 2013, the Consumer Financial Protection Bureau ("CFPB") and the Department of Justice ("DOJ") ordered Ally Financial, Inc. to pay \$80 million in damages as part of a settlement for claims of

²⁵ See Best & Andreasen, *supra* note 3, at 715 (commenting on how complexity in the consumer complaint process is related to the likelihood that a consumer will complain).

²⁶ See Carder & Gunter, *supra* note 15, at 109-10.

²⁷ *NBC 9news: How to Get What You Want from Customer Service* (NBC 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> (televised interview and article on NBC site relating to a consumer's laborious attempt to obtain assistance from a Comcast customer service representative).

²⁸ See Korobkin, *supra* note 23, at 1626-27 (discussing contracting parties' preference for default terms).

²⁹ See 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); Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. OF PERSONALITY & SOC. PSYCHOL. 629, 629-30 (1998) (explaining societal expectations that women should remain more relational and less confrontational); Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653, 656 (1999) (summarizing previous studies).

³⁰ LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 20 (2003) (noting that women were 45% more likely to score low on a rating scale assessing whether people saw their situations as open to change via negotiations); Stuhlmacher & Walters, *supra* note 29 (reviewing findings from studies on gender in negotiations).

³¹ Best & Andreasen, *supra* note 3, at 707, 723 (reporting study findings).

³² See, e.g., Carol Necoce Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907, 911 (2010) (documenting impact of race on subprime mortgage lending).

³³ See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819-57 (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, despite market competition that should have eliminated such discrimination).

discriminatory lending from the bank's indirect auto lending program.³⁴ Evidence indicated that more than 12,000 car dealerships that participated in Ally'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.³⁵ This supports CFPB Director Richard Cordray's conclusion that "[d]iscrimination is a serious issue across every consumer credit market."³⁶

In sum, companies understandably ration available remedies by giving them only to the most powerful squeaky wheel customers who persistently pursue their complaints. Meanwhile, consumers with the least time and resources to learn about, understand, or pursue their claims are left without remedies and other contract benefits. At the same time, behavioral tendencies and biases work to disadvantage consumers with less power and resources. Moreover, arbitration clauses cut off access to class relief, which is often the only economically feasible means for consumers to pursue the type of low-dollar claims usually involved with Internet purchases.

B. Lack of market regulation

Of course, there are legitimate arguments against these fairness critiques of the B2C market. For example, law-and-economics theorists posit that strict contract enforcement results in an optimal allocation of resources overall, even if a few consumers lose out on their claims. They suggest that consumers buy the optimal quality and quantity of goods and services under competitive terms, and this competition drives companies to structure their offerings to serve consumer preferences.³⁷

In reality, however, most consumers do not have perfect information about the market and do not read or understand the complicated terms commonly appearing in form contracts. Consumers therefore fail to purchase optimal quantities or bargain for competitive and efficient terms.³⁸ This arguably leaves market players free to take advantage of consumers' lack of information and bargaining power. It is therefore unlikely that the market is policing the fairness or efficiency of consumer contracts.

Defenders of the theory that the current market structure promotes efficiency and fairness nonetheless argue that regardless of whether most consumers bargain for efficient contract terms

³⁴ See 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> [<http://perma.cc/D5YM-5MQQ>] (noting that the Equal Credit Opportunity Act prohibits "creditors from discriminating against loan applicants in credit transactions on the basis of characteristics such as race and national origin").

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 530-31 & n.19 (1981) (advocating courts' legal enforcement of contract terms to promote efficiency). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-28 (7th ed. 2007) (explaining the economic model and the usefulness of economic theory in analyzing law).

³⁸ See generally Cruz & Hinck, *supra* note 2, *passim* (explaining the various arguments).

or improved company practices, a sufficiently knowledgeable and noisy “informed minority” will speak for the uninformed masses. This minority will then pressure companies to improve their contracts and practices or face the risk of lawsuits and negative publicity.³⁹ Studies, however, cast doubt on the existence of this “informed minority” – let alone informed (or any) consumers’ propensity to champion the masses. For example, researchers who studied consumers’ Internet browsing behavior on ninety software companies’ websites found that only one or two out of one thousand shoppers on these sites actually accessed the companies’ standard form contracts (referred to as end-user software license agreements, or “EULAs”).⁴⁰ Furthermore, they found that shoppers rarely read product reviews or otherwise seek information about the terms and conditions of their purchases.⁴¹

Similarly, it is unlikely that a sufficient number of proactive consumers will regulate merchant practices by spreading information and taking action regarding purchase problems.⁴² One European study found that only seven percent of consumer cases ended with a resolution in court or an alternative proceeding.⁴³ The researchers also found that forty-five percent of launched complaints ended with no agreement or decision, suggesting that consumers who took initial action on their complaints gave up their pursuit along the way.⁴⁴ While some complaints may truly lack merit, the studies’ findings suggest that perhaps even initially proactive consumers are unlikely to continue a fight to the benefit of themselves, let alone all consumers.⁴⁵

Furthermore, it is becoming more difficult for consumers to obtain reliable information about their rights and remedies due to the overabundance of misinformation and difficulties of determining what information is accurate and important. For example, only sixteen percent of the nearly two-thirds of *Consumer Reports* survey respondents who claimed that they actually read all of the disclosures regarding a new loan or credit card said that they found the disclosures easy to understand.⁴⁶ Additionally, well-meaning policymakers have advanced disclosure laws aimed to address information asymmetries that often leave consumers in the dark about their rights. However, these seemingly pro-consumer rules often backfire by adding to the information overload that already clouds consumers’ comprehension of their contracts, and

³⁹ Schwartz & Wilde, *supra* note 4, at 637–39 (discussing this theory); Cruz & Hinck, *supra* note 2, at 646.

⁴⁰ See Bakos et al., *supra* note 5, at 3.

⁴¹ *Id.* at 27–28.

⁴² See Marco B.M. Loos, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe* 5–15 (Ctr. for the Study of European Contract Law, Working Paper Series, No. 2010/01, 2010), available at <http://ssrn.com/abstract=1535819> (discussing the obstacles that a consumer encounters when attempting to enforce rights through a court action).

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Noreen Perrotta, *No More Fine-Print Surprises*, CONSUMER REP. MONEY ADVISER, Feb. 2011, at 2 (noting survey results).

increasing consumer costs to account for the expense of compliance.⁴⁷ Consumers are simply overwhelmed by lengthy contracts.⁴⁸

Companies also may discourage consumers' attempts to read purchase terms by using especially complicated fine print in their contracts and teaser promotions.⁴⁹ For example, lenders may stealthily add credit insurance provisions into loan documents using confusing language that most consumers do not understand, regardless of their education or so-called sophistication.⁵⁰ In addition, as noted above, some companies use the SWS to waylay lawsuits and other public complaints, and to keep the majority of consumers unaware of their potential rights. This also allows merchants to keep claims out of the public eye and further limit consumers' access to remedies.⁵¹

Complaint systems therefore become skewed in favor of the most experienced, educated, and powerful consumers who know how to artfully submit complaints and get what they want. These consumers then have little to no incentive to alert the majority about available remedies, and they become essentially complicit in the exploitation of the uninformed majority by reaping the benefits of remedy rationing.⁵² Companies have more resources for assisting these powerful consumers when they provide rationed remedies only to them, while keeping the majority in the dark about their rights and remedies. At the same time, there is no reason to believe that any sort of informed minority has the same purchase interests and needs, or types of claims as the majority.⁵³ Accordingly, remedy systems must be not only expanded, but also contextualized to fit the different types of claims consumers seek to assert.

C. Contractual discrimination

⁴⁷ See Star & Choplin, *supra* note 21, at 85–89, 96–106 (discussing the inability of disclosure laws to protect consumers from predatory lending).

⁴⁸ See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 652-79 (2011) (offering examples of mandated disclosures that overwhelm consumers with their length and complexity).

⁴⁹ See Alces & Hopkins, *supra* note 6, at 889–92 (discussing “shrouding”).

⁵⁰ See Star & Choplin, *supra* note 21, at 90–95 (explaining the various predatory practices that are difficult for consumers to understand or digest).

⁵¹ For example, one credit card issuer that inexplicably raised all of its customers' interest rates by two percent apologized and rescinded the rate increase for only the few customers who complained, while the rest of the consumers continued to pay the increased rates. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 22 (2008).

⁵² Alces & Hopkins, *supra* note 6, at 890.

⁵³ See generally Morris B. Holbrook & Elizabeth C. Hirschman, *The Experiential Aspects of Consumption: Consumer Fantasies, Feelings, and Fun*, 9 J. CONSUMER RES. 132 (1982) (discussing the many factors that affect buyer behavior and calling for more research into those considerations); William H. Redmond, *Consumer Rationality and Consumer Sovereignty*, 58 REV. SOC. ECON. 177 (2000) (discussing consumer choice as a prime example of suboptimal decision-making).

Most consumers feel powerless when seeking remedies regarding their purchases.⁵⁴ For example, the majority of cellular phone customers feel they must submit to price increases and added charges. This is especially true when the consumer does not have time or resources to research her options and is striving to retain cellular services in a market dominated by relatively few companies.⁵⁵ Consumers have become acutely aware that oligopolistic market conditions such as those in the cellular service industry give the companies great power in determining prices and contract terms.

Merchants may therefore capitalize on consumers' irrationality and overconfidence regarding their purchases, and offer onerous deals knowing that relatively few will seek contract changes. These merchants may then manipulate the SWS by appeasing, and thus quieting, the few sophisticated squeaky wheels who pursue contract changes and other remedies.⁵⁶ Consumers with higher incomes and more education thus end up on top in a consumer caste system. The squeaky wheels expect more and get more from their purchases than those in lower socio-economic status groups.⁵⁷ One study indicated "for 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."⁵⁸

This coincides with research indicating that consumers in lower socioeconomic status groups often become accustomed to poor treatment and have lower expectations regarding the quality of their purchases and their ability to obtain remedies if problems arise.⁵⁹ Consumers with a lower socioeconomic status also are likely to have less confidence, fewer resources, lower levels of education, and are possibly hindered in asserting themselves due to limited English proficiency.⁶⁰ Of course, "status" is an ill-defined term and no assumptions or studies apply for all consumers. Nonetheless, data suggests a growing divide between the high-power "haves" and low-power "have-nots" based on income, education, and age.

⁵⁴ See Anjanette H. Raymond, *Yeah, But Did You See The Gorilla? Creating and Protecting an Informed Consumer in Cross-Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV. 129, 144 (2014) (noting that consumers passively accept terms in online contracts even if contrary to industry practice because they feel powerless understand or change the terms).

⁵⁵ See Adi Ayal, *Harmful Freedom of Choice: Lessons from the Cellphone Market*, 74 LAW & CONTEMP. PROBS. 91, 91–100 (2011) (discussing the complexity of the cellphone market, which arguably allows cellphone companies to steer consumers toward deals and contract terms to the companies' advantage); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J.L. & TECH. 49, 118 (2009) (concluding that cellphone service contracts are "designed to exploit the cognitive biases of many consumers").

⁵⁶ Becher, *supra* note 22, at 140–51 (discussing consumers' failure to properly assess low-probability risks and the likelihood of future incidents).

⁵⁷ See Bård Tronvoll, *Complainer Characteristics When Exit is Closed*, 18 INT'L J. SERVICE INDUSTRY MGMT. 25, 26–35 (2007) (discussing research regarding characteristics of consumers who complain about their purchases).

⁵⁸ Best & Andreassen, *supra* note 3, at 723.

⁵⁹ Tronvoll, *supra* note 57, at 26–35.

⁶⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-518, *FACTORS AFFECTING THE FINANCIAL LITERACY OF INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY* 7–18 (2010) (reporting the extent to which limited English proficiency—along with income and education—impact financial literacy, and the ability to make informed judgments and take effective actions regarding contracts and money management).

Furthermore, stereotypes and biases may augment this divide, especially when individuals are dealing with one another in person or on the telephone and consciously or subconsciously make assumptions about the other based on race, gender, and age. Customer service associates' conscious and subconscious biases may affect how they treat consumers, and lead them to offer less advantageous deals to racial and ethnic minorities and women.⁶¹ Consumers also may make assumptions about customer service associates, which may impact their interactions and impede their access to remedies. Furthermore, consumers may perpetuate their own low-power status by assuming that they will be unfairly judged or brushed aside.⁶² For example, a woman fearful that she will appear “pushy” if she seeks assistance may feel constrained in her communications with customer service representatives.⁶³ These forces all contribute toward consumers receiving different deals and remedies.

D. Avoidance of consumer protections

Limited remedy systems, the SWS, and traditional arbitration clauses converge to hinder public regulation of B2C ecommerce, thereby allowing eMerchants to avoid consumer protection regulations. As noted, very few consumers take their complaints to court or to public regulators. Instead, companies use the SWS to control complaint resolution and quiet the relatively few squeaky wheels who have the requisite resources and confidence to pursue such processes.⁶⁴ Some companies even go so far as to offer what some may see as “courthouse stairs” settlements to would-be plaintiffs to stop class actions.⁶⁵

At the same time, eMerchants have increasingly cut consumers' access to class action proceedings of any sort by including arbitration clauses in their consumer contracts that very clearly deny consolidated or group procedures in court or arbitration. This makes it economically unwise for consumers to bring the typically small claims that arise in B2C ecommerce into court.⁶⁶ For example, it generally makes no economic sense for a consumer to pay hundreds or thousands of dollars in filing fees and travel costs to assert an individual claim regarding a defective cellular phone that cost \$300. However, it may be worthwhile for a consumer to join a class action with many other consumers who have faced similar problems with their phones. This is true even if the consumer only gets \$150 in the final settlement after paying her attorneys.

⁶¹ See DiMATTEO ET AL., *supra* note 5, at 237–39 (noting economic factors underlying discriminatory conduct).

⁶² Cf. Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 108–10 (2000) (discussing how minority employees may refrain from complaining due to stereotype concerns).

⁶³ Cf. *id.* at 109–22, 133–39.

⁶⁴ Best & Andreasen, *supra* note 3, at 728–29.

⁶⁵ 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).

⁶⁶ See Jeffrey I. Shinder, *In Praise of Class Actions*, NAT'L L.J., Apr. 5, 2010, at 39 (highlighting how class actions give voice to “little guy” consumers who have been wronged).

The SWS and mandatory arbitration provisions thus privatize dispute resolution and limit public access to information regarding faulty products and company improprieties.⁶⁷ Economists may argue that this is beneficial to the extent that it generates cost-savings companies may pass on to consumers through lower prices and better products and services. However, public action or reporting often is necessary to uncover product recalls and inform the masses about companies' malfeasance.⁶⁸

Consumer Reports found in a 2010 survey that less than a quarter of the respondents said they researched product recalls, and only a fifth of the respondents were aware of recalls regarding products they had purchased in the past three years.⁶⁹ Furthermore, "an additional 15 percent simply threw the product in the trash rather than returning it for a refund, an exchange, or a free repair."⁷⁰ This is largely because consumers' inertia and diminishing expectations about customer care hinder their willingness to endure the hassle of seeking a repair. Again, this suggests need for expanded and readily accessible remedy systems that lower the hurdles to obtaining remedies and raise expectations regarding customer care.

III. Current processes and proposals

ODR is growing on international and domestic fronts and in both public and private markets.⁷¹ On the international front, there are movements toward establishing publicly regulated ODR portals that are monitored by government agencies, thus ensuring compliance with respective due process standards. In the United States, private companies are at the forefront of creating ODR processes and platforms for resolving consumer disputes. At the same time, several of these platforms have failed due to technical and coverage limitations and other cost-associated issues. However, a novel breed of public ODR platforms in Europe, Mexico, and British Columbia, Canada, is developing and likely to expand existing services.⁷²

A. International developments

⁶⁷ 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).

⁶⁸ *Iffy Product? Now a Way to Tell*, CONSUMER REP. MAG., Feb. 2011, available at <http://www.consumerreports.org/cro/magazine-archive/2011/february/recalls-and-safety-alerts/iffy-product/index.htm> (highlighting the difficulties of obtaining information regarding complaints and companies' power to block access to information).

⁶⁹ *Trouble with Recalls*, CONSUMER REP. MAG., Feb. 2011, available at <http://www.consumerreports.org/cro/magazine-archive/2011/february/home-garden/bad-products/recalls/index.htm>.

⁷⁰ *Id.*, available at <http://www.consumerreports.org/cro/magazine-archive/2011/february/home-garden/bad-products/recall-notifications/index.htm>.

⁷¹ See Shackelford & Raymond, *supra* note 11, at 622-27.

⁷² 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. 485, 504-09 (2014).

As noted above, UNCITRAL established the ODR Working Group III (“WG III”) to advance online dispute settlement mechanisms for cross-border cases involving both commercial parties and consumers. Difficulty in navigating international disagreements stemming from different legal and cultural norms has hindered the WG III from proposing specific rules for international adoption, but the group has inspired a global push for broad-based ODR rules and standards for cross-border transactions. The recent focus of the WG III has been on B2C transactions, being mindful of consumer protection laws, the effects of draft rules on developing countries, and the practicalities of implementation.⁷³

Public meetings and debate of the WG III have illuminated important issues that warrant discussion in the ODR community. For example, WG III has struggled with the relationship and liability among “ODR providers” and “ODR platforms” in any global ODR system. Furthermore, delegates have debated the creation and content of minimum best practices or due process standards for ODR providers and neutrals that preserve neutrality, transparency, confidentiality, efficiency, and equal access to fair ODR processes for all parties.⁷⁴ In addition, there has been considerable disagreement regarding choice of law in cross-border claims.⁷⁵

WG III delegates confirm that effective processes are lacking for B2C disputes in ecommerce. Cross-border resolution systems are mainly limited to expensive and unsatisfying arbitration processes that require F2F hearings or utilize only partially online components.⁷⁶ Commentators argue for expansion of ODR that is entirely online and favor mediation, especially for B2C claims in which consumers have little interest in the formalities or enforcement of arbitration.⁷⁷ Indeed, the WG III has acknowledged that consumers and businesses have different dispute resolution needs, and that a “consensus-based system should be friendly to consumers, cost-effective to businesses and fair to consumers.”⁷⁸

At the same time, the EU is seeking to boost ecommerce among member states through its adoption of the ADR Directive and the ODR Regulation.⁷⁹ The ADR Directive aims to address three shortcomings in the provision of extra-judicial redress in the EU: (i) the absence of quality standards; (ii) the low levels of consumer awareness of ADR schemes; and (iii) the unavailability of ADR entities for the resolution of consumer complaints.⁸⁰ The ODR Regulation then supports the ADR Directive by calling for creation of an online database and

⁷³ U.N. Comm’n on Int’l Trade Law Working Group III, 29th Sess., U.N. Doc. A/CN.9/WG.III/WP.128 (Mar. 24-28, 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/003/96/PDF/V1400396.pdf>.

⁷⁴ *Id.* at 4-6.

⁷⁵ Mirèze Philippe, *ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR*, 1 INT’L J. ONLINE DISP. RESOL. 57, 60-63 (2014).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 64.

⁷⁹ See *supra* notes 8 & 9.

⁸⁰ Pablo Cortés, *A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward*, 35 LEGAL STUD. 114, 115-16 (2015), available at <http://onlinelibrary.wiley.com/doi/10.1111/lest.12048/abstract>.

single entry point for the resolution of all consumer B2C ecommerce complaints.⁸¹ The aim of this Regulation is to provide ODR services that better meet the needs of consumers than the more complicated and costly F2F judicial and arbitration processes that traditionally have been the only means for consumers to pursue their purchase claims.⁸²

Accordingly, the ADR Directive and ODR Regulation work in tandem to require the establishment of common rules for ADR providers and a web-based platform for resolution of any disputes related to cross-border online sales of goods or provision of services by merchants to consumers.⁸³ In addition, the platform must provide standard forms in all the official languages of the EU and direct submitted disputes to the relevant national ADR scheme through a website link.⁸⁴ The platform also must use uniform technical specifications for interconnections with national ADR schemes and remain free to consumers through the financial support of the European Consumer Centres Network.⁸⁵

The ODR Regulation thus calls for creation of a consumer-oriented and user-friendly dispute resolution platform.⁸⁶ It also requires privacy protections and use of clear and easy complaint, case management, and feedback processes.⁸⁷ To commence a complaint, a party submits an electronic form and attaches supporting documents.⁸⁸ The complaint is transmitted on the platform and the process will continue if the parties agree on an ADR entity to resolve the complaint.⁸⁹ The selected ADR entity will then aim to resolve the dispute based on information provided; however, the Regulation also allows for disputes to be resolved outside of the ODR platform.⁹⁰

Under this rubric, each member state must designate one contact point for the platform, which will be responsible for informing the public of the platform and explaining its operation.⁹¹ These responsible authorities also must monitor merchants and ADR entities within their borders to ensure compliance with six quality criteria. These criteria are: expertise (along with independence and impartiality), transparency (posting reports and results), effectiveness (using ADR norms), fairness (alerting parties of their rights and consequences of participating in ADR procedure), liberty (preserving consumers' knowing consent to binding ADR), and legality

⁸¹ *Id.* at 116.

⁸² See Philippe, *supra* note 75, at 67-68.

⁸³ *Id.*

⁸⁴ ODR Regulation, *supra* note 9, art. 5.

⁸⁵ For general information on the European Consumer Centres Network see *European Consumer Centres Network*, EUROPEAN COMMISSION, http://ec.europa.eu/consumers/ecc/index_en.htm.

⁸⁶ ODR Regulation, *supra* note 9, art. 5.

⁸⁷ *Id.* art. 5(1)-(5).

⁸⁸ *Id.* art. 8.

⁸⁹ *Id.* art. 9.

⁹⁰ *Id.* art. 10.

⁹¹ *Id.* art. 7.

(providing equal or greater consumer protection).⁹²

In addition, all online merchants and intermediaries are required to provide a link to the ODR platform, regardless of whether they use ADR. This allows consumers to see if a merchant is affiliated with an approved ADR entity and, if it is not, to select an approved ADR entity to handle the dispute.⁹³ Member states have the right to enforce penalties against those who infringe the regulation.⁹⁴ Furthermore, the platform will be subject to rigorous testing.⁹⁵

In theory, this framework holds great promise for expanding consumers' access to justice in ecommerce disputes. However, sovereignty has demanded preservation of member states' power to determine the means for implementing the framework.⁹⁶ This means that twenty-eight different national authorities will be monitoring ODR compliance within the various member states. Commentators are therefore understandably fearful that monitoring and compliance inconsistencies will thwart the success of the dispute resolution framework.⁹⁷ Accordingly, policymakers are reserving judgment on the system's ultimate success and survival.

More centralized public ODR portals have begun to flourish with considerable success. For example, the Mexican government hosts Concilianet, an ODR platform designed to resolve B2C disputes between merchants and their customers in Mexico.⁹⁸ Concilianet's dispute resolution process and platform are free to consumers, allow both online and in-person filing, and use CMC along with access to a virtual courtroom to foster efficient and satisfying resolution of B2C disputes.⁹⁹ The platform welcomes disputes against all merchants regardless of whether they are registered with the Concilianet service.¹⁰⁰ However, Concilianet is voluntary to the extent that no party can be compelled to utilize its platform.¹⁰¹ Additionally, complainants' only remedy through Concilianet is an order for merchants' contract compliance.¹⁰² This means that consumers seeking money damages must resort to judicial action or other traditional claims processes.¹⁰³

⁹² Cortés, *supra* note 80, at 118-19.

⁹³ *Id.* at 118.

⁹⁴ ODR Regulation, *supra* note 9, art 18.

⁹⁵ *Id.* art. 6.

⁹⁶ *Executive Summary of the Impact Assessment*, at 5-6, SEC (2011) 1409 final (Nov. 29, 2011), available at http://ec.europa.eu/consumers/redress_cons/docs/summary_impact_assessment_adr_en.pdf.

⁹⁷ Cortés, *supra* note 80, at 118 (also noting that this could be avoided if the EU appoints a single pan-European authority to guarantee uniformity).

⁹⁸ Raymond & Shackelford, *supra* note 72, at 504. Concilianet is managed by the Mexico's Federal Attorney's Office of Consumer. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 505.

¹⁰¹ *Id.*

¹⁰² Jill I. Gross, *AT&T Mobility and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 79-80 (2012).

¹⁰³ Louis Del Duca, Colin Rule & Zbynek Loebl, *Facilitating Expansion of Cross-Border E-Commerce—Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems—Work of the United Nations Commission on International Trade Law)*, 1 PENN ST. J.L. & INT'L AFF. 59, 67 (2012).

Despite these limitations, commentators have noted Concilianet's success. First, it has reduced the time for resolving disputes by fifty percent and has led to settlements in almost ninety-six percent of the cases filed through its platform.¹⁰⁴ Second, it provides added consumer protection to the extent that it is monitored and supported by court-associated personnel.¹⁰⁵ This relationship offers a greater level of public judiciary support than that anticipated by the EU's framework. The platform is therefore an innovative example of how traditional courthouses can collaborate with private ODR providers to deliver justice for individuals who prefer to resolve their disputes online, rather than endure the expense and hassles of traditional F2F claim resolution procedures.

Similarly, in British Columbia, Canada, policymakers are launching an even more comprehensive publically supported ODR platform.¹⁰⁶ Unlike Concilianet, this platform is not entirely voluntary in that it requires businesses to engage in its ODR process. Furthermore, its ODR process culminates in a binding and final arbitration award if the parties are unable to settle through prior facilitative means.¹⁰⁷ Although the platform provides no means for enforcing these arbitration awards, it allows parties to bring judicial action to compel award enforcement.¹⁰⁸ The binding nature of the resulting awards sets this system apart from the EU ODR Regulation or Concilianet – and may generate greater success and satisfaction for consumers who would otherwise face uphill battles in pursuing compliance with the voluntary settlements most ODR schemes provide.¹⁰⁹

B. Domestic processes

Companies based in the United States have been building their own private ODR systems for resolving ecommerce claims. For example, the popular ecommerce website, eBay, offers a high-volume ODR process that addresses disputes from a systems perspective. It features a purposeful design that challenges the boundaries of existing ADR approaches, which merely incorporate various types of CMC.¹¹⁰ eBay began building its system in 2002 when it purchased PayPal, and has expanded the system to create what can be described as a virtual courthouse. The system has capacity to address problems such as “item not received,” “item not as described,” and “unpaid item” in a simple and straightforward manner.¹¹¹ However, eBay also has contextualized its system to address different types of disputes by creating special platforms

¹⁰⁴ *Id.* at 66.

¹⁰⁵ Shackelford & Raymond, *supra* note 11, at 626.

¹⁰⁶ Raymond & Shackelford, *supra* note 72, at 505.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Rabinovich-Einy & Katsh, *supra* note 7, at 169.

¹¹¹ Del Duca, Rule & Rimpfel, *supra* note 12, at 206-09.

for claims related to its Vehicle Purchase Protection and Business Equipment Purchase Protection plans, which usually involved larger sums of money.¹¹²

eBay's purchaser complaint process for online purchases begins with its Resolution Center asking a series of questions to diagnose the problem and ensure the complaint is within eBay's coverage for a Money Back Guarantee—meaning an item never arrived or differed from its description. The purchaser also must have used the “Pay Now” option and have asserted the complaint within thirty days after the actual or estimated delivery date. The Resolution Center gathers the proposed resolution and encourages the two parties to communicate through the eBay messaging platform. If that does not succeed in resolving the dispute within three business days, the claimant may escalate the case back to the Resolution Center for an evaluation. The Resolution Services team then contacts the Buyer within forty-eight hours with a determination as to whether the complaint qualifies for a refund.¹¹³ A similar process exists for seller complaints.¹¹⁴

Much of the success of websites such as eBay and Amazon has depended on their solicitation of feedback, ratings, and reviews from their users. Therefore, they have used ODR processes to improve the reliability of these ratings and reviews.¹¹⁵ ODR provides an efficient means for resolving disputes regarding the accuracy of consumer ratings, which are essential for consumers' trust in the system and sellers' survival in the market.¹¹⁶ Indeed, ratings have a powerful punch, but are difficult to regulate through traditional defamation litigation—due in part to the fluidity of online identities and ease of creating new identities online for leaving reviews.¹¹⁷ Furthermore, a provision of the Communications Decency Act¹¹⁸ provides protection against liability for websites in the United States that provide or republish content authored by others and generally prevents reputation system administrators from being held liable for publishing third party material.¹¹⁹

Nonetheless, ecommerce websites like eBay have created systems for resolving disputes regarding reviews in order to gain goodwill and consequent success.¹²⁰ eBay uses mainly an automated process which offers a panel of live mediators if a ratings dispute cannot be resolved online. This generally results in removing negative ratings from both sellers and buyers. eBay's

¹¹² *Id.* at 210-14.

¹¹³ *Id.* at 206-09.

¹¹⁴ If a bid is unpaid, a seller will report the incident to the Resolution Center, which will contact the buyer and ask her to pay, prove payment has been made, or request cancellation. Parties may seek to resolve the issue through eBay systems but a dissatisfied seller may give the buyer an “Unpaid Item Strike”—which may eventually lead to an account suspension. Human intervention also may become necessary if there are appeals. *Id.* at 208-09.

¹¹⁵ Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* 175, 176-80 (Mohamed S. Abdel Wahab et al. eds., 2011).

¹¹⁶ *Id.* at 178.

¹¹⁷ *Id.* at 179.

¹¹⁸ 47 U.S.C. § 230.

¹¹⁹ Rule & Singh, *supra* note 115, at 181-83 (discussing cases applying § 230).

¹²⁰ *Id.* at 186-89.

system benefits from use of neutrals who ultimately determine the disputes based on limited statements submitted by the buyer and seller at issue, thus allowing for swift action—for example, quickly deleting an abusive or inaccurate review before it misleads too many consumers or greatly harms a seller’s business. In addition, eBay India uses a “Community Court” consisting of twenty-one randomly selected eBay members who become an online jury that fairly indicates whether a review should remain or be removed.¹²¹

Some state and county governments are using systems for resolving particular types of disputes such as tax appeals through ODR platforms such as Modria. ODR platforms like Modria are particularly interesting because they are independent and thus are able to bridge the public/private divide and to use a staged process for advancing parties toward a final resolution. For example, Modria uses a four-stage process: conflict diagnosis, negotiation, mediation, and finally binding arbitration. It is a progression from party-controlled to externally-managed processes involving a neutral decision maker.¹²² In addition, Cybersettle and SmartSettle have used technology to enhance interest-based negotiations with an aim toward assisting resolutions in cases when parties may not otherwise meet to reach optimal resolutions.¹²³ Similarly, the Mediation Room was an early example of software that facilitates online discussions between disputing parties.¹²⁴

Furthermore, the CFPB and other government regulators have online consumer complaint mechanisms. They are limited in that they do not necessarily lead to actual resolution of disputes. They merely allow for consumers to submit their claims in hopes that regulators can help facilitate a resolution or seek enforcement measures when a critical mass of claims have been launched against a particular company.¹²⁵

IV. Improving ODR to address current remedy injustices

As noted above, current limitations on remedies combine with the SWS to augment the divide between the consumer “haves” and “have-nots,” and foster contract discrimination and regulation avoidance in B2C contracts. ODR nonetheless holds promise for addressing these injustices by expanding consumers’ access to remedies and means for holding businesses accountable with respect to online sales.¹²⁶ Indeed, ODR processes that are fair and efficient

¹²¹ *Id.* at 192-93.

¹²² *See* Shackelford & Raymond, *supra* note 11, at 626-27.

¹²³ Rabinovich-Einy & Katsh, *supra* note 7, at 175-77.

¹²⁴ *Id.* at 177 (also noting that the software did not have ability to guide the parties to a resolution or to help a third party facilitate resolution).

¹²⁵ *See* CONSUMER FIN. PROTECTION BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 20-48 (2014), available at http://files.consumerfinance.gov/f/201405_cfpb_semi-annual-report.pdf.

¹²⁶ *See* Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 199–207, 223-33 (2010).

could create the “New Handshake” of the digital age.¹²⁷ However, it is essential for companies, consumer groups, and dispute resolution providers to work with policymakers to create regulations ensuring that ODR systems are designed, implemented, and monitored with attention to delivering justice and not merely cost savings.

A. Strengths and weaknesses of ODR as a vehicle for justice

As discussed above, consumers are losing patience and respect for companies’ sense of responsibility to the public. There is an increasing lack of customer service and inability to reach live representatives with respect to ecommerce problems. The majority of consumers, especially those with less power and resources, usually give up on complaints and do not become the squeaky wheels who obtain rationed remedies. Furthermore, ecommerce merchants often impose one-sided arbitration provisions that require costly and impractical F2F arbitration procedures that prevent consumers from bringing or joining class actions. Accordingly, there is need for expanded access to remedies for consumers to build trust and preserve fairness in ecommerce. ODR mechanisms provide an opportunity to fill that need.

Companies enjoy the efficiencies of online contracting and communications in B2C commerce, and they may pass on their savings to consumers through lower prices and/or higher quality goods and services.¹²⁸ Consumers also enjoy managing accounts, paying bills, and communicating with companies online with relatively little cost or time. Many companies also are more responsive to complaints posted on social media and requests sent through email or website chat systems than they are to phone calls or letters.¹²⁹ Online dispute management enables merchants to prioritize cases and respond publicly to certain issues, thereby significantly improving communication efficiencies.

The relative anonymity and comfort of communicating through a computer or smartphone also may ease some of the social and power pressures of F2F communications.¹³⁰ This is especially true for consumers who fear stereotypes or biases based on appearance.¹³¹ In addition, some individuals are less adversarial online than in person, as the asynchronous nature of online communication gives them space to “take a deep breath” and dissipate anger before

¹²⁷ See Amy J. Schmitz, *Introducing the “New Handshake” to Expand Remedies and Revive Responsibility in ECommerce*, 26 ST. THOMAS L. REV. 522 (2014).

¹²⁸ See Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 309–10 (2008) (noting ways that online standard form contracts save time and money).

¹²⁹ See 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>.

¹³⁰ See Paul Stylianou, *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 in dispute resolution).

¹³¹ See *id.* at 125–26 (noting benefits and drawbacks of online dispute resolution processes).

replying.¹³² Individuals also may be more cautious in composing emails due to awareness that their messages are easily retrievable. Most consumers also have become very comfortable communicating electronically and have developed means for virtually building rapport over the Internet.¹³³

The Internet also is a powerful facility for consumers to research products and services, and share reviews about their purchases.¹³⁴ Online forums allow consumers to share information about not only the quality of goods and services purchased, but also means for reaching customer service and obtaining remedies. For example, Utility Consumers' Action Network in California provides an online forum for consumers to alert others regarding issues related to utility services and to obtain advice for avoiding or responding to such issues.¹³⁵ Websites also have become portals for formalized ODR, such as online mediation, arbitration, and other settlement processes that utilize messaging systems, email, and other CMC.¹³⁶

Given ODR's benefits, why has it not become the norm? Despite individuals' growing comfort with expressing themselves online, some fear that online communications have become too nasty or offensive due to the relative anonymity of communicating through a computer or cellular phone.¹³⁷ This anonymity arguably allows for "cyber bullying" and use of abusive or combative language one would not feel comfortable using in person or on the telephone.¹³⁸ Online negotiations may become overly aggressive due to the social and physical distance created through CMC.¹³⁹ CMC also may diminish empathy and foster misinterpretations.¹⁴⁰

¹³² See 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) (presenting evidence that less bullying occurs through online communication than F2F).

¹³³ 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); Larson & Mickelson, *supra* note 132, at 140–41 (noting how "[t]echnology can protect parties from uncomfortable or threatening face to face confrontations and offer vulnerable individuals a place where their communications can appear as forceful as the statements of someone who is physically much larger and louder," although it also creates a risk of cyber bullying).

¹³⁴ Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1169–81 (2010) (discussing the pros and cons of technology with respect to consumer contracting).

¹³⁵ See UCAN: UTILITY CONSUMERS' ACTION NETWORK, <http://www.ucan.org>.

¹³⁶ Am. Bar Ass'n Task Force on Electronic Com. & Alternative Disp. Resol., *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419 (2002) (defining ODR broadly).

¹³⁷ See Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125, 125–30 (2006) (discussing communication via the Internet in resolving disputes).

¹³⁸ Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES (June 27, 2010), <http://www.nytimes.com/2010/06/28/style/28bully.html> ("It's easier to fight online, because you feel more brave and in control . . .").

¹³⁹ JARON LANIER, *YOU ARE NOT A GADGET: A MANIFESTO* 60–63 (2010) (noting the dehumanizing effect of anonymity in online communications).

¹⁴⁰ *Id.*

Furthermore, concerns regarding Internet security and capacity for algorithms to deliver justice have discouraged companies and consumers from using ODR. Many individuals simply do not trust online systems in the wake of rampant reports about Internet hackers and viruses. This fear is pronounced with respect to ODR communications when consumers may be asked to submit potentially sensitive purchase and payment data. In addition, consumers may not trust settlement systems that rely on algorithms and essentially dehumanize the dispute resolution process.¹⁴¹ Consumers also may assume that so-called “neutral” decision-makers behind ODR procedures have allegiances to the companies, which are often deemed “repeat players” in their selected claims processes.

At the same time, most consumers are unaware of the ODR processes currently in existence. Accordingly, even consumers quite comfortable with online systems may fail to use current ODR offerings simply because they do not know they are available. For example, the social networking website Facebook has implemented an ODR mechanism through TRUSTe for resolution of consumers’ privacy disputes.¹⁴² However, unscientific polling suggests that consumers generally know nothing about these ODR rules or other remedies regarding privacy rights on Facebook.¹⁴³ This is due in part to the fact that information about their rights is buried in fine print among the labyrinth of website links on Facebook’s site. This is unsurprising in that companies lack incentive to instigate more consumer claims. Most companies merely provide minimum consumer rights to appease regulators, while also serving their powerful shareholders.

That said, the pros outweigh the cons with respect to ODR’s potential for expanding online consumers’ access to remedies regarding their claims. The hurdles to creating fair and efficient ODR systems are not unsurmountable. As noted, communications through CMC have become increasingly satisfying for individuals and there are ways to moderate risks of cyberbullying. Furthermore, although businesses may initially resist adoption of ODR systems, they should eventually embrace ODR as means for attracting customers and avoiding regulatory enforcement actions. They also may advance ODR to gain intelligence regarding problems with their products and services. Wise companies boost their bottom lines by using feedback to improve practices and products, before they lose goodwill in the wake of poor consumer reviews.

B. Ideas for delivering justice

¹⁴¹ Raymond & Shackelford, *supra* note 72, at 513-20.

¹⁴² See Fran Maier, *Facebook & TRUSTe*, TRUSTe BLOG (May 12, 2010), <http://www.truste.com/blog/2010/05/12/facebook-truste> [<http://perma.cc/Y98U-33DH>] (noting Facebook and TRUSTe’s business relationship); see also *Certification Standards*, TRUSTe, <https://www.truste.com/privacy-certification-standards>; *TRUSTe Dispute Resolution Services*, TRUSTe, <http://www.truste.com/products-and-services/dispute-resolution-services> [<http://perma.cc/LY6L-S5HR>]; *TRUSTe Feedback and Resolution System*, TRUSTe, <https://feedback-form.truste.com/watchdog/request> [<http://perma.cc/4YNR-DMC9>].

¹⁴³ See Memorandum from Heather Park, Research Assistant, to Amy Schmitz, Professor of Law, Colorado Law School (May 25, 2010) (on file with author) (documenting and reporting an informal poll of users indicating that they did not know about the TRUSTe online process for resolving privacy disputes against Facebook). Admittedly, this was not a scientific or thorough survey, but it nonetheless shed light on common Facebook users’ awareness regarding this ODR process.

Considering the benefits of ODR, it is no surprise that ODR systems have been developing in the United States and abroad for over ten years. Nonetheless, many ODR architects and providers have focused largely on cost and efficiency without sufficient attention to transparency and fairness. This has hindered ODR's advancement and potential for delivering consumer justice. It is therefore imperative to address policy inadequacies and advance due process principles designed to build trust in ecommerce and ensure equitable treatment of all consumers, regardless of wealth or status. Indeed, fairness should set the stage for any dispute resolution system, including those conducted online.

Of course, the proposition that fairness should lie at the core of resolving conflicts is not new or revolutionary. It proceeds from Aristotelian notions of justice, which were influential in the development of contract law and theory.¹⁴⁴ Indeed, contract law historically has considered fairness and the importance of equivalent exchange.¹⁴⁵

With this in mind, ODR systems should be developed with an aim toward promoting equality of exchange and fair behavior by merchants and consumers online. This means that consumers should receive equitable treatment with respect to their online purchases and have equal access to remedies regardless of their social and economic status. ODR policies should therefore ensure such equitable treatment, while providing efficient and transparent avenues to obtaining enforceable remedies.¹⁴⁶

Again, these are not novel ideas and most agree that these are laudatory principles. However, there is no clear consensus on how to attain these goals. Classical contract law endorses strict enforcement of contracts, free from regulations that hinder contractual freedom. Thus, advocates of free-market principles may resist regulations requiring businesses to provide ODR processes in accordance with fairness dictates. Furthermore, regulations should not thwart the free market's allowance for ODR experimentation and innovation. ODR creators are continually developing advanced systems and must remain free to adapt to new technologies and address new issues that develop over the longer term.

That does not mean that policymakers should not advance justice-focused regulations to guide the development of ODR systems.¹⁴⁷ Accordingly, ODR regulations should set minimum fairness standards while allowing for flexibility and honoring choice. ODR systems should allow parties to choose from a range of processes depending on the type of claims at stake and how settlement negotiations unfold after a consumer files an initial complaint. The processes could begin with online negotiations and move to online mediation and potentially a binding evaluative procedure if parties are unable to settle their claims prior to that point. Such a tiered

¹⁴⁴ See HENRY MATHER, *CONTRACT LAW AND MORALITY* 46 (1999) (noting that "Aristotelian rectificatory justice is linked to morality in a very direct and pervasive way," and explaining how this theory of justice bases remedy on "whether the defendant's conduct was morally wrongful" although it seeks to limit remedy to restoring the status quo ante).

¹⁴⁵ See James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1849-50 (2000) (discussing the history of contract law).

¹⁴⁶ Raymond & Shackelford, *supra* note 72, at 492.

¹⁴⁷ See Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305, 306-13, 325-27 (2010).

process like that employed by eBay provides consumers with choices and systems options on the way toward a final determination. It keeps the consumers in control of their own solutions.

The process should nonetheless culminate in a binding award through online arbitration (what I have termed “OArb” to distinguish it from nonbinding processes) if the parties do not reach a settlement through online negotiation or mediation.¹⁴⁸ Allowing for OArb as the “last stop” in the process helps prevent parties from using delay tactics to waylay resolution and thus access to remedies. Neither companies nor consumers benefit from wasteful discussions, and they may not take nonbinding processes seriously if the process will not end the dispute.¹⁴⁹

Furthermore, ODR processes should be backed by an enforcement mechanism that provides assurances to users that they will receive the remedies determined appropriate from the process. An ODR process is worthless if companies can avoid paying awards. Successful ODR process employed by online platforms like eBay have relied in large part on their enforcement of ODR determinations through chargebacks, similar to those consumers now enjoy to remedy fraudulent charges on their credit cards. For example, if a seller on eBay fails to comply with an award for a consumer, then eBay can use its internal payment mechanisms to compensate the buyer and charge the amount of the award back to the seller.

It is fairly easy for platforms like eBay to institute chargeback systems when they control the payment system. Accordingly, public regulations could begin by requiring online merchants to create and honor automatic chargeback systems on a global level to remedy fraudulent or otherwise faulty B2C sales through their sites. This regulation or law could mimic that governing credit card chargebacks. That said, such a new law could open the door to improper consumer claims and fraudulent payment avoidance. It also may be overly burdensome for many online merchants – especially small businesses that rely on daily funds to keep their businesses flowing and growing.

Accordingly, instead of mandatory chargebacks, regulations could advance a trustmark to support enforcement of an ODR system. Under such a system, companies would earn the right to post a government-sanctioned trustmark if they agreed to use and abide by the ODR regulation and contribute to an escrow account that would be used to pay awards in the event that the company fails to comply with awards within thirty days. Such trustmark proposals have gained traction in cross-border ODR discussions. Nonetheless, policymakers and companies would need to work out details and include sufficient safeguards to build consumers’ awareness and trust in the process. Indeed, this is just one of several ideas for remedy enforcement that should be open for discussion.

ODR systems also should add a “trigger mechanism” that allows for regulatory and consolidated actions when consumers file a sufficient number of similar complaints. This would

¹⁴⁸ See Schmitz, *Arbitration in the Digital Age*, *supra* note 128, at 181–200 (explaining that OArb differs from other ODR because it results in a final third-party determination without the cost and stress of traditional litigation).

¹⁴⁹ *Id.* at 193–94. See generally Colin Rule et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 UCC L.J. 221 (2010) (discussing how to create a global system for resolving consumer disputes and highlighting the United States’ proposal for an ODR system). Full discussion of ODR and OArb and means for expanding them in a measured manner is beyond the scope of this essay, but further discussion may be found in Schmitz, *Arbitration in the Digital Age*, *supra* note 128 (proposing prudent expansion).

be especially important where multiple complaints indicate that health or safety issues are at stake. For example, the trigger could alert the CFPB and/or the Federal Trade Commission (“FTC”) when there are an inordinate number of claims filed against a manufacturer regarding a particular product that has caused multiple injuries. Such a trigger would alert the public of the danger that may otherwise remain private due to the SWS and proliferation of pre-dispute arbitration clauses and class action waivers.

Regulators also would benefit from notice through the trigger mechanism, which would help them determine when to pursue enforcement actions. In this way, the trigger would help address the under-enforcement 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”). Although the FCC has brought some enforcement actions to stop “cramming,”¹⁵⁰ 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 payments systems. Furthermore, consumers generally do not file F2F arbitrations or lawsuits on “cramming” claims because litigation costs would outweigh any likely recovery. Accordingly, ODR would lower consumers’ hurdles to remedies, while the trigger would prompt 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. 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 enforcement actions and class claims. Moreover, it is usually more cost-effective for businesses to address regulators’ warnings and change their practices than to endure the expense and negative publicity of enforcement actions and multiple lawsuits.

Nonetheless, commitment to any ODR process must be voluntary and properly regulated to ensure fairness and foster open-minded use of the process.¹⁵¹ F2F arbitration has earned a poor reputation due to pro-business procedures and administration.¹⁵² In contrast, ODR regulations should require that online forms for filing claims be user-friendly and guide consumers on how to structure complaints and upload information supporting their claims. Forms should ease or eliminate the need for the expensive legal assistance required for filing

¹⁵⁰ E.g. Press Release, Fed. Comm’n 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> [<http://perma.cc/6XJV-D9LA>] (highlighting the FCC’s action against a telecommunications company for changing consumers’ long distance carriers and adding charges without proper authorization).

¹⁵¹ See Schmitz, *Arbitration in the Digital Age*, *supra* note 128, at 235–40 (discussing need for regulation and safety measures for ODR).

¹⁵² See Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad*, 65 DISP. RESOL. J. 30, 33 (2010) (noting concerns regarding arbitration and European law’s protection of consumers from unfair arbitration provisions).

complaints in litigation and traditional F2F arbitration.¹⁵³ The online system also should be geared for consumers of all education levels and provide means for translations to assist non-English speakers.

Additionally, consumers should be able to trust the implementation and individuals behind the ODR system.¹⁵⁴ Therefore, online mediators and arbitrators who serve as neutrals in the ODR processes must be truly neutral and properly trained. ODR rules supported by government oversight should require these individuals to go through training and obtain a certification. The rules also should provide for a mechanism to gather user feedback in order to foster continual system improvements.

This could be done through a central website portal linked to the proposed trustmark to indicate a company's compliance with ODR due process rules. Companies also could use the portal to post their particular ODR policies, along with demonstrations for consumers to consult to learn about the ODR process. This could be done through a simple and straightforward chart stating whom to contact regarding complaints and how the complaint process works. In addition, this portal could be searchable and include information about legitimate complaints asserted against companies and the remedies provided. OArb opinions also could be posted and searchable on this portal. Such transparency should spark companies to improve their complaint-handling processes, and help empower consumers to pursue legitimate complaints and protect consumers' rights regardless of status.

Innovation fostered through private providers' creation of ODR systems is beneficial, but regulators such as the FTC or CFPB should oversee the central portal. The trustmark and the ODR process it represents would become meaningless without this oversight to ensure compliance with due process regulations.¹⁵⁵ Nonetheless, the portal should not add great public expense. Therefore, companies that benefit from use of the ODR process and trustmark could help share costs of maintaining the system. Although some companies may resist absorption of costs, they should warm to the process as means for lowering claim costs and gaining consumer trust. These companies would benefit when consumers choose to buy from them due to assurance that they would have means for obtaining a remedy if a purchase goes awry.

Of course, these are only initial ideas subject to further debate and development. They are intended to foster creative brainstorming for the creation of just ODR systems for the resolution of consumers' ecommerce claims. The SWS and hurdles to obtaining remedies have harmed consumers' confidence in the market, and have fostered contractual discrimination to the detriment of those with the least resources. ODR provides promise for easing cost, time, and bias concerns that have hindered most consumers from seeking remedies through traditional F2F dispute resolution mechanisms.¹⁵⁶ Well-crafted online processes also help dispel the stresses of

¹⁵³ See Stuhlmacher & Walters, *supra* note 29, at 659 (noting how varying the communication mode may reduce gender bias).

¹⁵⁴ See Raymond & Shackelford, *supra* note 72, at 516-24 (highlighting the need for a balance between efficiency and justice, and suggesting polycentric regulation of ODR).

¹⁵⁵ See *id.* at 515-24.

¹⁵⁶ See Stuhlmacher & Walters, *supra* note 29, at 659 (noting studies showing that CMC eases communication bias by reducing social cues and subconscious propensities present in F2F communications).

seeking assistance by providing a structured and form-driven means for communicating claims.¹⁵⁷ They also help consumers hold companies accountable and provide companies with better information regarding their products and services—which, in turn, may fuel improvements that boost trust in ecommerce more generally.

V. Conclusion

Traditional arbitration clauses requiring individual F2F procedures have combined with the SWS to skew remedy processes to favor the most sophisticated and powerful consumers in ecommerce. Hurdles to obtaining remedies in B2C exchanges also have allowed businesses to relinquish responsibility to consumers and quiet information about companies' improprieties. This creates a need for expanded and equalized access to remedies through ODR in order to revive companies' sense of responsibility to consumers and the market. Such an ODR system would lower costs and burdens of pursuing purchase complaints so that all consumers, regardless of power and resources, would feel comfortable and able to seek needed assistance. Indeed, policymakers must work with companies, consumers, and ODR providers to create a system that is transparent, efficient, secure, accessible, and fair for consumers from every social and economic group. Moreover, the system must be built with attention to justice in order to facilitate due process and address the inequities of the SWS and privatized dispute resolution in B2C ecommerce.

¹⁵⁷ See Jelle van Veenen, *From :- (to :-): Using Online Communication to Improve Dispute Resolution* (Tilburg Inst. for Interdisc. Stud. of Civil Law & Conflict Resol. Sys., Working Paper No. 002/2010, 2010), available at <http://ssrn.com/abstract=1618719> [<http://perma.cc/AH37-J9Y2>] (noting how online communications can improve dispute resolution).