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# Access to Consumer Remedies in the Squeaky Wheel System

Amy J. Schmitz\*

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## I. INTRODUCTION

Most have heard the adage: “The squeaky wheel gets the grease.” This refers to the notion that the “squeaky wheels”—who are proactive in pursuing their needs and complaints—are most likely to get the assistance, remedies, and other benefits they seek. However, those who remain silent usually do not learn about or receive the same benefits. Furthermore, the individuals with the requisite resources to pursue their interests are often those who already enjoy disproportionate power due to social or economic status.<sup>1</sup> This dynamic—which this Article will refer to as the “squeaky wheel system” (SWS)—dominates the workplace and marketplace.<sup>2</sup>

The SWS thrives in debt, insurance, and other business-to-consumer (B2C) contexts. Although creditors are notoriously squeaky wheels in pursuing payment from debtors, debtors also must become squeaky wheels to obtain fee waivers and interest rate deductions that lenders reserve for only the most high-value and persistent customers.<sup>3</sup> Furthermore, individuals must be persistent to obtain compensation on insurance claims due to insurers’ “rationing by hassle” through delay-and-ignore tactics.<sup>4</sup> In addition, merchants may ration remedies and cut costs by using the SWS to limit remedies for purchase complaints.<sup>5</sup> They know that relatively few consumers are aware of available remedies, and even fewer seek assistance.<sup>6</sup>

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1. See *infra* Part II.B.2.

2. Of course, “squeaky wheel” is not my term, and others have referred to the general dynamic in the workplace as the “squeaky wheel system.” See, e.g., Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 132–35 (2000). However, this system is rarely discussed in consumer contexts, and I am using SWS for ease of reference.

3. See *Unique Envelope Corp. v. GS Am., Inc.*, 331 F. Supp. 2d 643, 654 (N.D. Ill. 2004) (noting a debtor’s testimony regarding the need to pay “the next squeaky wheel” creditor); *Eide v. Nat’l City Capital Corp. (In re Riversideworld, Inc.)*, 366 B.R. 34, 41 (Bankr. N.D. Iowa 2007) (discussing the debtor in financial trouble paying only the squeaky wheels); Matthew T. Smith, *Being the Squeaky Wheel: A Proactive Approach to Representing Creditors in Chapter 11 Litigation*, in CREDITORS’ RIGHTS IN CHAPTER 11 CASES: LEADING LAWYERS ON NAVIGATING THE REORGANIZATION PROCESS, EXERCISING CREDITORS’ RIGHTS, AND UNDERSTANDING THE IMPACT OF CURRENT DEVELOPMENTS 109–29 (Aspatore 2009) (highlighting the importance of “being the squeaky wheel” in the bankruptcy process as a means for getting paid on debts).

4. See Richard Lewis, *Property Insurance 101*, in INSURANCE LAW 2006: UNDERSTANDING THE ABC’S, at 61, 100 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 741, 2006) (noting the need to be a “squeaky wheel” in order to get paid on insurance claims due to insurance companies’ “rationing by hassle”).

5. 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 sellers choose to use “less stringent quality control practices” and simply compensate those that complain about defective products).

6. *Id.* at 711–12 (finding that only 39.7% of consumers who experience purchase problems complain to the company, report it to a third party, or take any sort of action).

Furthermore, out of the consumers who take any action, only a very small handful have the requisite confidence and resources to become squeaky wheels who capture businesses' attention and obtain remedies.<sup>7</sup>

Through this SWS rationing, businesses may maximize their profits while eluding legitimate complaints and perpetuating a system of status-based treatment.<sup>8</sup> They may control public information by quieting the squeaky wheel consumers and perhaps hiding health and safety information regarding their products.<sup>9</sup> Companies also may use the SWS to capitalize on continued freedom to impose fees and one-sided contract terms on the consumer masses that remain uninformed about their rights or the availability of benefits.<sup>10</sup> The SWS can effectively prevent the minority of informed consumers from spreading information to others about products and other purchase problems.<sup>11</sup>

This means that economists' proposed "informed minority" fails to police the fairness of contract terms and business practices.<sup>12</sup> Economists posit that regardless of whether most consumers ignore contract terms, a minority of consumers will police fairness for the good of all consumers by notifying others of unfair practices and threatening to go elsewhere if companies do not make appropriate changes.<sup>13</sup> This theory, however, is based on questionable assumptions and unfounded facts.<sup>14</sup>

7. See *infra* Part II.B. Admittedly, it is unclear how persistent a consumer must be to become a squeaky wheel who is likely to obtain what he seeks. This will depend on company policies and norms in a given context. Nonetheless, the squeaky wheels discussed in this Article are generally individuals who are proactive in asserting their needs and who will persist in seeking assistance despite an initial denial.

8. 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).

9. See *Trouble with Recalls*, CONSUMER REP., Feb. 2011, at 14 (highlighting 2010 survey findings indicating that "[o]nly a fifth of U.S. adults were aware of having purchased food, medication, or a product (other than a car) that was recalled in the past three years," and the reasons for this lack of information).

10. See Cruz & Hinck, *supra* note 8, at 674–75 (noting that with respect to latent defects not covered by pro-seller warranty terms, sellers often provide repairs for complaining customers to stop them from creating "bad will for sellers," while they continue to deny such repairs for the "uninformed masses who simply bear the loss").

11. See discussion *infra* Part III.A.

12. See Cruz & Hinck, *supra* note 8, at 647–50 (explaining and questioning the informed minority argument); 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 through a discussion of the "marginal set of informed consumers").

13. See 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) ("Thus, if

As an initial matter, there is no evidence that a sufficient number of “informed” consumers read or shop for purchase terms beyond price and a few other provisions particular to their needs.<sup>15</sup> Furthermore, even if some level of informed minority exists, only a handful of the consumers in this group pursue contract complaints.<sup>16</sup> In addition, the members of the informed minority who obtain assistance through their persistence have little to no incentive to share information about rationed benefits with the uninformed masses who subsidize the SWS through their inaction.<sup>17</sup> Businesses know they generally can quiet the informed squeaky wheels by giving them “special” assistance and emphasizing the businesses’ inability to provide everyone with these benefits.<sup>18</sup> This, in turn, perpetuates the SWS and businesses’ manipulation of contract terms and dispute resolution.<sup>19</sup>

These SWS dynamics highlight the importance of what I have termed the consumer “contracting culture.”<sup>20</sup> This conception of culture goes beyond common notions of culture based on ethnicity, and encompasses broad contextual economic and non-economic factors that affect parties’ bargaining powers and contracting behaviors.<sup>21</sup> For example, the B2C contracting culture is generally more “extra-communal” than business-to-business (B2B) contexts because consumers usually do not share bargaining

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enough searchers exist, firms have incentives both to compete for their business and to offer the same terms to nonsearchers. When the preferences of searchers are positively correlated with the preferences of nonsearchers, competition among firms for searchers should tend to protect all consumers.”).

14. See Cruz & Hinck, *supra* note 8, at 664–76 (concluding that the informed minority argument is based on faulty assumptions).

15. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 1–26 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 09-40, 2009), available at <http://ssrn.com/abstract=1443256> (studying the Internet browsing of 45,091 households and finding that only one or two in 1000 shoppers studied online software merchants or accessed their websites). Even proactive shoppers usually focus on only price and a few other terms particular to their needs. LARRY A. DiMATTEO ET AL., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION 28–30 (2007).

16. See *infra* Part III.A.

17. See *infra* notes 247–56 and accompanying text.

18. See Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 895–97 (2008) (discussing how businesses may discriminate in favor of sophisticated consumers by reducing fees and foregoing enforcement of terms in their form agreements that are otherwise “prejudicial to customer interests”).

19. See *id.*

20. See Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123 (2007).

21. See, e.g., Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511 (2009) (tracing ways to use culture as means for infusing law into societal consciousness); John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991) (discussing the application of social science and empirical research in the law); Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOTIATION J. 249, 250–53 (1991) (highlighting the importance of cultural differences relating to ethnicity or nationality, and recognizing similar differences due to race, gender, and age).

power, experience, and understandings with businesses that draft form contracts.<sup>22</sup> In contrast, parties to more “intra-communal” B2B transactions often share relatively equal bargaining power and contract experience.<sup>23</sup>

The SWS is less problematic in “intra” versus “extra” communal contexts because parties in intra-communal transactions usually have less ability to control the SWS to ration information and remedies. For example, contractors and subcontractors in B2B construction transactions usually understand their rights at the outset because they use accepted industry contracts.<sup>24</sup> In addition, trade organizations provide strong means and incentives for sharing information, thereby creating an informed *majority* to help police the fairness of business practices.<sup>25</sup> This largely alleviates the need for public regulations to address the problematic effects of the SWS in these intra-communal—as opposed to extra-communal—contexts.

In contrast, the lack of shared contract understandings and power fuels the force of the SWS in B2C exchanges.<sup>26</sup> This system allows businesses to ration remedies and discriminate in favor of sophisticated squeaky wheel consumers with the requisite information and resources to protect their interests and pursue purchase complaints.<sup>27</sup> All consumers then shoulder the passed-on costs of appeasing these squeaky wheels, regardless of whether their complaints are legitimate.<sup>28</sup> Furthermore, the consumers with the least power and resources withstand the worst of these costs and rarely know about, let alone enjoy, the rationed benefits.<sup>29</sup> In summary, this creates a need for consumer protections that the broken market has failed to provide.<sup>30</sup>

This Article uncovers the salience of the SWS in B2C exchanges, and explores its impacts on contract regulation and purchase practices in the consumer marketplace. Part II discusses companies’ impetus to appease squeaky wheels, as well as the behavioral, practical, and social factors that

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22. See, e.g., Schmitz, *supra* note 20, at 123–35 (explaining my contracting culture spectrum analysis).

23. See *id.* at 158 (describing the commercial construction context as an example of intra-communal B2B transactions).

24. See, e.g., *id.* at 156–57 (noting that the Associated General Contractors of America’s Short Form is a “typical standard form construction contract”).

25. See, e.g., *id.* at 155–58 (discussing use by a prominent trade organization, the American Institute for Architects (AIA), of form contracts requiring dispute resolution that allows parties to manage their reputations and resolve disputes).

26. See *infra* Part II.B.

27. See *supra* note 9 and accompanying text.

28. See *infra* notes 247–56 and accompanying text.

29. See *infra* notes 160–66 and accompanying text.

30. See *infra* Part IV.B.

affect consumers' likelihood and ability to pursue complaints and remedies. It also provides a snapshot of empirical data from my e-survey of Colorado consumers that is relevant to SWS dynamics. Part III then discusses consequences of the SWS with respect to B2C practices, leading to Part IV's proposal for proportional and efficient means for consumers to access purchase information and contract remedies. Part V concludes with a call for further development of such remedy mechanisms aimed to diffuse the SWS, narrow the divide between the consumer "haves" and "have-nots," and foster better regulation of the fairness of companies' contract and claims assistance practices.

## II. CONVERGING FORCES FAVORING SQUEAKY WHEELS

We learn from an early age that it is wise to be persistent in a world where "sometimes only 'the squeaky wheel gets the grease.'"<sup>31</sup> For the most part, this fosters efficient allocation of assets to those who value them most and appropriately rewards individuals for expending resources to pursue their needs.<sup>32</sup> Nonetheless, companies' profit incentives and consumers' behavioral tendencies often converge to allow the SWS to curb consumer rights and foster favoritism for those with the most resources and power.<sup>33</sup>

### A. Companies' Impetus to Grease the Wheels

Dominant forces push companies to change contract terms *ex ante*, and to provide purchase remedies *ex post* to only the squeaky wheels or to those who ask for assistance or complain the loudest.<sup>34</sup> Furthermore, companies with tight budgets in this tough economy may ration their assistance to the consumers who have the requisite resources to make more and larger purchases to the disadvantage of those with the least resources. These business propensities then converge with individual behavioral tendencies and biases to foster companies' manipulations of the SWS and widen the divide between the informed minority and uninformed majority of consumers.<sup>35</sup>

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31. ROBERTO ARON ET AL., TRIAL COMMUNICATION SKILLS § 34.24 (2d ed. 1996). *See also* Marsh Buggies, Inc. v. Weems Geophysical, Inc., No. CIV.A. 98-2767, 1999 WL 638592, at \*2 (E.D. La. Aug. 18, 1999) ("[T]he notion that the squeaky wheel gets the oil is as applicable at the end of the twentieth century as it was at the end of the nineteenth.").

32. *See* Cruz & Hinck, *supra* note 8, at 673–75 (discussing benefits received by customers who are invested and informed).

33. *See infra* Parts II.A–II.B.3.

34. *See* Cruz & Hinck, *supra* note 8, at 674 (discussing companies changing contract terms for well-informed and outspoken customers).

35. *See id.* at 674–75.

### 1. Prevailing Reasons for Appeasing Complainers

The SWS has become familiar in the workplace, especially in low- information environments in which employees “in the know” reap all the available benefits.<sup>36</sup> For example, some law faculties operate on a SWS to the extent that school deans ration special research and travel funding to only those who are aware of, and therefore become persistent in seeking, such benefits.<sup>37</sup> Furthermore, risk-averse employees generally lose out in the SWS because they fear repercussions of asking for benefits or complaining about work conditions.<sup>38</sup> They may remain quiet due to fear that asking would appear greedy or uncooperative, which could jeopardize their jobs and reputations.<sup>39</sup> Companies also may foster this dynamic by strategically informing favored or “insider” employees regarding available benefits to the detriment of those who lack this inside information.<sup>40</sup>

Such SWS dynamics are also alive and well in the low-information environment of B2C exchanges. Merchants generally assist and focus their attention on only those consumers that proactively pursue their complaints and contract needs.<sup>41</sup> They may “grease” the squeaky wheel consumers to retain them as customers and prevent them from informing other consumers about purchase problems.<sup>42</sup> Furthermore, sellers know that consumers will complain to them before bringing their complaints to third parties such as the Better Business Bureau (BBB) or the courts, and therefore may use the SWS to monopolize complaint resolution to their benefit.<sup>43</sup> This allows businesses to avoid providing redress or making consumer-friendly contract

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36. See Carbado & Gulati, *supra* note 2, at 132–35 (explaining the “squeaky wheel system” in the employment context in particular).

37. Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 676–77 (2006) (highlighting how this can harm women in seeking paid family leave).

38. See Carbado & Gulati, *supra* note 2, at 132–35. Workers may be especially risk-averse in this poor economy due to fear of lay-offs.

39. See *id.* at 132.

40. *Id.* at 133. See also Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 213–15 (2005) (discussing how “management greases the squeaky wheel” in the workplace, and explaining how this can promote positive feedback gathering initiatives where employers encourage constructive criticism); Kessler, *supra* note 37.

41. See Cruz & Hinck, *supra* note 8, at 674–75.

42. Best & Andreasen, *supra* note 5, at 701, 727 (noting study findings showing that satisfaction rates for complaint resolution for frequently purchased products were higher than those for infrequently purchased goods, although rates for products generally were higher than those for services).

43. *Id.* at 713–15 (highlighting how few consumers bring complaints to third parties such as the BBB or the courts, and companies’ “monopoly on complaint handling”).



or policy changes with respect to the masses who fail to voice their complaints.<sup>44</sup> In this way, businesses may manage their reputations, ration benefits, limit liability, and boost profits.<sup>45</sup>

Businesses understand that most consumers do not exert the time and energy necessary to pursue their purchase complaints. Research indicates that only 20.1% of frequently purchased products and 20.9% of services generate formal consumer complaints, but that this is only the “tip-of-the-iceberg” to the extent that many consumers, especially those of lower socioeconomic status, do not realize their rights to complain.<sup>46</sup> Furthermore, “buyers suppress complaints concerning about two-thirds of the problems they perceive,” and a very small percentage of the one-third that take any action persistently assert their complaints or report them to third parties.<sup>47</sup> Businesses therefore may ration remedies by assisting only the few persistent complainers.<sup>48</sup>

At the same time, businesses focus on persistent customers in order to get the “most bang for their buck.”<sup>49</sup> Businesses get more mileage out of “wowing” current customers by providing special assistance or making exceptions, than expending resources to attract new customers.<sup>50</sup> It is roughly five times harder to attract new customers than to retain current ones, and businesses “can increase profits by 25 to 85 percent merely by retaining 5 percent more of [their] current customers.”<sup>51</sup> Studies also show that customers who obtain satisfactory resolution of their complaints are more loyal to a business than customers who never experience disputes.<sup>52</sup>

Furthermore, appeased complainers are more apt than others to recommend a business to friends and family.<sup>53</sup> However, customers who are not satisfied with resolution of their complaints are likely to both leave and denounce that business. One complaining consumer is likely to share his or

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44. *Id.* at 716–20.

45. *Id.* at 721–22.

46. *Id.* at 701–08 (reporting study results and highlighting significant differences in problem perception rates based on socioeconomic status and race).

47. *Id.* at 709–12, 727–30 (providing study results regarding consumers’ responses to perceived problems by purchase categories).

48. *Id.* at 702–03.

49. See Cruz & Hinck, *supra* note 8, at 674–75 (noting that sellers will address complainers’ concerns out of fear that the complainers will create bad will for them).

50. WOLF J. RINKE, DON’T OIL THE SQUEAKY WHEEL: AND 19 OTHER CONTRARIAN WAYS TO IMPROVE YOUR LEADERSHIP EFFECTIVENESS 133–38 (2004) (discussing the importance of the “wow” factor in providing customer assistance, even if it comes only in the wake of complaints).

51. *Id.* (providing business leadership advice).

52. Lenden Webb, *Brainstorming Meets Online Dispute Resolution*, 15 AM. REV. INT’L ARB. 337, 357–58 (2004) (citing studies). See also Tibbett L. Speer, *They Complain Because They Care*, AM. DEMOGRAPHICS, May 1996, at 13 (discussing how “grouchers are likely to remain loyal” and recommend a retailer to others if the retailer is attentive to their complaints).

53. See RINKE, *supra* note 50, at 136–38; Speer, *supra* note 52, at 13.

her negative experiences with roughly twenty-one others.<sup>54</sup> Moreover, the Internet allows unhappy customers to tell scores of others about their experiences by posting negative comments on blogs and online social networking websites.<sup>55</sup> From this perspective, “the squeaky wheel is worth a lot of grease.”<sup>56</sup>

## 2. Tempered Reluctance to Relinquish Power

Dominant forces push companies to grease squeaky wheels who are persistent in pursuing their purchase complaints.<sup>57</sup> That said, businesses have become less generous in heeding consumers’ requests for changes to B2C form terms, and many companies include unilateral amendment provisions in their form contracts that hinder consumers’ incentive to shop for or negotiate form contracts.<sup>58</sup> Consumers understandably see no reason to negotiate terms *ex ante* knowing that companies can change the terms *ex post*.<sup>59</sup> Furthermore, companies’ use of “shrouding” (through mass mailings or confusing online presentations) to slip provisions into form contracts further hinders consumers from noticing, let alone negotiating around, onerous provisions.<sup>60</sup>

Consumers therefore voice powerlessness against merchants’ form contracts. For example, the consumers who participated in the focus groups I held in Denver complained about their lack of power in consumer purchases and their general distrust of merchants.<sup>61</sup> Participants in the groups also felt they had no choice but to accept form terms despite an

54. See RINKE, *supra* note 50, at 138.

55. See JANELLE BARLOW & CLAUS MOLLET, A COMPLAINT IS A GIFT 202–16 (2008) (noting how customers now may post negative comments on the Internet to reach global audiences); PETE BLACKSHAW, SATISFIED CUSTOMERS TELL THREE FRIENDS, ANGRY CUSTOMERS TELL 3,000, at 1–10 (2008) (noting how an upset customer posted his recording of his negative experience seeking to cancel AOL service on the Internet, thereby spreading his complaint to at least 62,827 others).

56. Webb, *supra* note 52, at 357–58.

57. See *supra* Part II.A.1.

58. See David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 478–79 (2009) (highlighting how drafters have incentives to adhere to form contract terms).

59. See *Douglas v. U.S. Dist. Court*, 495 F.3d 1062 (9th Cir. 2007) (holding a unilateral change provision in a cellular phone contract unenforceable); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 648–52 (2010) (explaining the inefficiency and anti-bargaining effects of unilateral amendment provisions).

60. See Horton, *supra* note 59, at 649–57.

61. See Transcript, Consumer Focus Group in Denver, Colorado (Nov. 18, 2006) (unpublished transcript) (on file with author) [hereinafter Focus Group Transcript]. Over the course of two days in November 2006, I held three focus group discussions in Denver regarding contracting issues.

ostensible freedom to “shop around.”<sup>62</sup> One consumer lamented how she felt trapped to accept a disclaimer of liability her dentist gave her immediately before undergoing a major dental procedure.<sup>63</sup> Other consumers also recounted instances in which representatives told them that form terms were not subject to any alteration, or salespersons said that they lacked power to change company terms.<sup>64</sup>

Many companies also have become stingier in providing *ex post* purchase remedies to those that complain. One study found that only 56.5% of consumers who voiced non-price complaints regarding their purchases were satisfied with their complaints’ resolutions.<sup>65</sup> Companies may ignore consumers with legitimate complaints, and brush aside those customers they view as less powerful or desirable. Some suggest that companies also have cut back on customer assistance to help weather the economic downturn.<sup>66</sup>

It is nonetheless unwise to simply focus on squeaky wheels.<sup>67</sup> One business leadership manual entitled *Don’t Oil the Squeaky Wheel* warns that employers may waste time and money seeking to appease whiners, while neglecting the truly valuable, but quiet, employees.<sup>68</sup> Similarly, businesses busy placating complainers may assume erroneously that non-complainers are content and will remain loyal customers. Studies suggest that only 4% of unhappy customers provide feedback directly to the company, while 96% of these customers silently take their business elsewhere.<sup>69</sup> “Voting with the feet is the American way.”<sup>70</sup> Unhappy customers also typically tell eight to

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62. *Id.*

63. *Id.* (further explaining that her uncle had recommended the dentist to her, which helped her trust his competence).

64. *Id.*

65. Best & Andreasen, *supra* note 5, at 726–27.

66. See Alana Semuels, *Credit or Debit, Human?: Robots and Other Machines Are Increasingly Edging Out People for Jobs in the Retail Sector*, L.A. TIMES, Mar. 4, 2011, at A1 (discussing companies’ use of automated systems instead of personal service); *Businesses Balance Customer Service With Job Cuts*, NATIONAL PUBLIC RADIO (Mar. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=102492766> (noting how companies seeking to cut costs in this tough economy have curbed customer service staff).

67. See *Testa v. Town of Madison*, No. Civ.04-185-B-W, 2005 WL 2365319, at \*17 (D. Me. Sept. 26, 2005), *aff’d*, Civ.04-185-B-W, 2005 WL 2864785 (D. Me. Nov. 1, 2005) (rejecting an employee’s claim that she was a protected whistleblower simply because she was “a squeaky wheel [who] is supposed to get the grease”); Charles A. Edwards & Lovic A. Brooks, III, *The “Squeaky Wheel” Employee: To Grease or to Replace and the Costs of Each*, 32 MERCER L. REV. 479 (1981) (discussing employees’ uses of squeaky wheel tactics to harass management).

68. RINKE, *supra* note 50, at 107–14 (focusing on pitfalls of appeasing “whiners,” while neglecting the highest performing employees and saddling the diligent, but quiet, workers with extra burdens from accommodating the whiners who may never be satisfied).

69. See Jerry Plymire, *Complaints as Opportunities*, 5 J. SERVICES MARKETING 61 (1991) (discussing a study conducted by T.A.R.P., a customer service research firm, and explaining why customers rarely provide feedback directly to companies).

70. *Id.* at 63 (further explaining how and why companies should encourage complaints to assist them in improving their practices and growing their customer bases).

ten others about their negative experiences even if they had never voiced their concerns to the company directly.<sup>71</sup>

Merchants also may be reluctant to grease overly squeaky wheels who excessively return or exchange purchased items.<sup>72</sup> Some merchants therefore oust, instead of grease, these customers by barring future returns.<sup>73</sup> This is wise to the extent it combats improper consumer practices such as return fraud, which cost retailers an estimated \$9.6 billion in 2009 alone.<sup>74</sup> Companies seeking to establish enforcement of their form contracts also may be reluctant to heed consumer complaints for fear they will waive future insistence on those terms.<sup>75</sup>

Some consumers complain, however, that this perpetuates high-pressure sales and punishes consumers for helping to expose merchants' improper practices.<sup>76</sup> In addition, some businesses have transformed reluctance to assist complaining consumers into a delay-and-hassle tactic for containing costs and boosting profits.<sup>77</sup> As mentioned above, some insurance companies "ration by hassle" to limit their payments on insurance claims.<sup>78</sup> For example, some insurance companies have used "sweeping denials" and

71. *Id.* at 61–65. Other sources indicate that unhappy customers share their complaints with eight to sixteen others. Janis Dietz, *Keep the 'Silent Majority' Mum*, *MARKETING NEWS*, Oct. 27, 1997, at 20 (highlighting the "silent majority" of dissatisfied customers that complain to friends but not to the company directly).

72. See RICHARD K. MILLER & KELLI WASHINGTON, *CONSUMER MARKETING* 160–62 (2009) (discussing how companies ban known "wardrobers" who buy products such as dresses for fancy parties or televisions for the Super Bowl); Ariana Eunjung Cha, *Some Shoppers Find Fewer Happy Returns*, *WASH. POST* (Nov. 7, 2004), <http://www.washingtonpost.com/ac2/wp-dyn/A30908-2004Nov6> (noting the use of electronic monitoring to track excessive returns).

73. See, e.g., Cha, *supra* note 72 (explaining that due to excessive returns customers are sometimes declined when they try to return items).

74. See Press Release, National Retail Federation, *Retailers Find Balance as Return Policies Assist Honest Shoppers, Fight Fraud* (Oct. 29, 2009), available at [http://www.nrf.com/modules.php?name=News&op=viewlive&sp\\_id=814](http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=814).

75. See *Buffalo Molded Plastics, Inc. v. Omega Tool Corp.* (*In re Buffalo Molded Plastics, Inc.*), 344 B.R. 394, 406 (Bankr. W.D. Pa. 2006) (finding company could not rely on payment terms in the applicable contract because they were not followed in the industry).

76. See, e.g., Stan Sutter, Editorial, *When a Customer Is Wrong*, *MARKETING MAG.*, July 28, 2003, at 22 (commenting on the battle two sisters had with Filene's Basement after they were banned for excessive returns).

77. See, e.g., *infra* note 79 and accompanying text.

78. See Lewis, *supra* note 4; see also *supra* notes 61–64 and accompanying text (recounting consumer stories).

“mad dog defense tactics” following catastrophes to limit liability and prolog interest accruals on amounts owed to policyholders.<sup>79</sup>

Lastly, even companies that are usually reluctant to assist consumers are prone to assist the squeakiest wheels—often out of fear that these consumers will bring claims or share negative stories with others.<sup>80</sup> Moreover, these business practices converge with individuals’ behavioral tendencies and biases to allow companies to manipulate the SWS to their advantage.<sup>81</sup> It also works to advantage the most powerful and desirable consumers, thereby fostering contractual discrimination and widening the gap between the consumer “haves” and “have-nots.”<sup>82</sup>

### *B. Factors Impacting Consumer Complaints*

Most consumers have purchase complaints that they never assert against a company,<sup>83</sup> especially when the consumers rely on the company for its services.<sup>84</sup> The data supports theories suggesting that behavioral tendencies, socialization, and limited resources often work together to hinder consumers’ pursuit of complaints.<sup>85</sup> Furthermore, empirical data from my e-survey confirms that consumers lack information regarding their rights, generally fail to protect their contract needs, and are relatively disinterested in non-price contract terms.<sup>86</sup>

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79. See Kelsey D. Dulin, *The Disaster After the Disaster: Insurance Companies’ Post-Catastrophe Claims Handling Practices*, 61 OKLA. L. REV. 189, 196–201 (2008) (highlighting these tactics and insurance companies’ use of delay policies to capitalize on the time-value of money).

80. See Dietz, *supra* note 71, at 20 (highlighting the importance of appealing complainers); Speer, *supra* note 52, at 13 (noting how complaining customers are those most likely to remain loyal and recommend a business to others if it satisfies the complaints).

81. See Cruz & Hinck, *supra* note 8, at 672–76.

82. See Best & Andreasen, *supra* note 5, at 730.

83. See *id.* at 701 (noting how the complaints individuals voice are only the “tip-of-the-iceberg” and “represent only a fraction of the problems they perceive concerning those purchases”).

84. See Colette Thayer & Gerard Rainville, *Consumer Financial Protection: Opinion of People Aged 50+: State Surveys*, AM. ASS’N RETIRED PEOPLE (AARP) (Apr. 2010), [http://www.aarp.org/money/scams-fraud/info-04-2010/finprotect\\_states.html](http://www.aarp.org/money/scams-fraud/info-04-2010/finprotect_states.html) (reporting results of studies in Arkansas, Indiana, Maine, South Dakota, and Wisconsin of individuals over fifty years old regarding the need for reforms and consumer protections in the areas of investing, banking, and lending). Recent surveys of individuals over fifty indicated overwhelming support for reforms and protections with respect to investment firms, banks and lending practices. However, the surveys used leading questions. For example, one question asked whether investment companies should be required to disclose information “using plain language and a user-friendly format.” Colette Thayer & Chuck Rainville, *Consumer Financial Protection: Opinion of People Aged 50+ in Arkansas*, AM. ASS’N RETIRED PEOPLE (AARP) (Apr. 2010), [http://assets.aarp.org/rgcenter/consume/finprotect\\_ar.pdf](http://assets.aarp.org/rgcenter/consume/finprotect_ar.pdf).

85. See Best & Andreasen, *supra* note 5, at 710–15 (finding that only 39.7% of the consumers in one study reported taking some kind of action with respect to purchase problems, and only 30.7% of that group said they voiced their complaints to a seller).

86. See *infra* text accompanying notes 206–07.

## 1. Inertia, Over-Optimism, and Rule-Following Tendencies

Behavioral and cognitive theorists have illuminated individuals' propensities to improperly assess the importance of purchases and contract terms.<sup>87</sup> Most individuals lack the knowledge structures to understand and digest the often long and complex form contracts that have become common in the consumer marketplace.<sup>88</sup> Individuals also may be overly optimistic about their contracts and fail to foresee potential problems, which may help explain why so many consumers fall prey to high costs and adjustable rate mortgages.<sup>89</sup> Similarly, individuals may make economically inefficient or unwise contract choices due to the sunk-cost effect, cognitive dissonance, confirmation bias, and low-ball techniques.<sup>90</sup>

As Professor Russell Korobkin has proposed, individuals often suffer from contracting inertia to the extent they accept preprinted terms, even if the terms defy industry practice or legal defaults.<sup>91</sup> They also may skim contracts merely to confirm assumptions or salespersons' promises, and readily accept sales representatives' explanations regardless of their plausibility.<sup>92</sup> Consumers invest in their purchasing decisions and seek

87. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–22 (discussing cognitive biases); 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 and proposing that “buyers are boundedly rational rather than fully rational decision makers,” and therefore market forces often will lead to inefficient terms in sellers' form contracts).

88. See Debra Pogrund Stark & 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).

89. See *id.* at 100–01; 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, 1607–09, 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) (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”).

90. Full discussion of these psychological and behavioral patterns is beyond the scope of this Article, but I invite you to see Becher, *supra* note 89, at 124–35 for further explanation of these various patterns.

91. See Korobkin, *supra* note 89, at 1586 (advancing the “inertia theory” that parties prefer default contract provisions).

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

confirmations that their decisions are sound.<sup>93</sup> This, along with low expectations regarding their purchases, may help explain study results indicating that many consumers fail to perceive problems with their purchases.<sup>94</sup> Individuals' rationality is therefore "bounded" to the extent that they do not properly assess contract provisions or take initiative to protect their long-term economic interests.<sup>95</sup>

Many individuals also feel morally obligated to follow through and comply with the contracts they sign, even when contract terms defy fairness norms.<sup>96</sup> Despite contract law's economic elements, behavioral and psychological theories, as well as empirical evidence, suggest that individuals believe there is a moral element to contract performance.<sup>97</sup> Contracting parties form a "psychological contract" to the extent that they become sensitive to breaches as influencing their interpersonal trust and cooperation.<sup>98</sup>

Although this sense of duty to follow contracts is most prevalent in intra-communal exchanges, it also can be true in B2C contexts.<sup>99</sup> Consumers may feel obligated to abide by form contract terms regardless of whether they understood and consciously agreed to the terms *ex ante*. Therefore, they may assume they have no recourse on their complaints based on remedy limitations that they were unaware of at the time of purchase. Consumers also may feel ashamed that they made purchases or agreed to services without reading the contracts. Most consumers who first read their

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93. See Stark & Choplin, *supra* note 88, at 101–04 (discussing various biases and cognitive tendencies that contribute to these effects).

94. Best & Andreasen, *supra* note 5, at 703–10 (reporting findings on problem perception rates and articulating possible responses to perceived purchase problems).

95. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–81, 1545–47 (1998) (also indicating hope that economists and lawyers would incorporate empirical findings into their assumptions). *But see* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72–74, 125–32 (2002) (critiquing the behavioral law and economics view as based on only limited empirical research and failing to precisely apply data to account for variations among decision-makers).

96. See Patrick Devlin, *Morals and the Law of Contract*, in THE ENFORCEMENT OF MORALS 43 (1965) (discussing roles of morality in contract law); Andrew Phang, *Positivism in the English Law of Contract*, 55 MOD. L. REV. 102 (1992) (also noting moral aspects of contract law).

97. See Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 638–49 (2010) (discussing the moral impetus to follow through with contract terms).

98. *Id.* at 640–42 (emphasizing how people believe that breach is morally problematic and that resistance to breach is a kind of "moral heuristic"). See also Barbara Mescher, *Business Ethics and the Law of Contract*, 8 J.L. & FIN. MGMT. 8, 11 (2009) (highlighting moral impulses to comply with contract promises). *But see* Sandra L. Robinson et al., *Changing Obligation and the Psychological Contract: A Longitudinal Study*, 37 ACAD. MGMT. J. 137 (1994) (explaining psychological contracts in employment relationships and how employees' perceived obligations to their employers decrease over time).

99. See Wilkinson-Ryan, *supra* note 97, at 639–40.

contracts and learn of remedy limitations when problems transpire “will lament their bad luck and foolishness for not checking earlier.”<sup>100</sup>

Consumers also are usually inert both pre- and post-contract and are unlikely to seek contract changes or assert their complaints because they assume they have no choice but to accept and abide by form terms.<sup>101</sup> This is especially true when consumers would have to return products or give up services to pursue their complaints.<sup>102</sup> Furthermore, although some consumers voice their complaints, most are unlikely to expend the necessary time and other resources, especially if they are embarrassed by an unwise purchasing decision.<sup>103</sup>

## 2. Resource and Patience Limitations

A lack of resources often fuels and coincides with behavioral tendencies in hindering consumers from seeking remedies regarding their purchase problems.<sup>104</sup> Individuals’ tendencies to remain inert escalate with the time and resources necessary for proactive contracting and seeking redress.<sup>105</sup> Consumers busy with work and family obligations usually ignore fine print in standard contracts and may pay bills automatically without reviewing invoices for unexpected charges. For example, most consumers pay for telephone services without noticing relatively small charges tacked on to their bills each month by third-party “crammers” who make millions of dollars from adding charges for fax, Internet, and other services without customers’ express authorization.<sup>106</sup>

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100. See Cruz & Hinck, *supra* note 8, at 674; see also *id.* at 675–76 (explaining the various arguments).

101. See Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 212–17 (2010) (analyzing consumer responses to form contracts both pre- and post-contract, and noting how consumers assume that standard form terms are binding).

102. See Best & Andreasen, *supra* note 5, at 715 (observing that greater consumer inconvenience reduces the probability that consumers will voice their complaints about a product or service).

103. See *id.* at 717–19 (demonstrating that consumers are more likely to complain about objective defects in a product than subjective dissatisfaction).

104. *Id.* at 711–13 (discussing study findings regarding consumer complaints).

105. *Id.* at 714–16 (emphasizing how the difficulty of asserting rights affects complaint rates).

106. See *Beat the New ‘Cramming’ Scams*, CONSUMER REP., Aug. 2010, at 13 (“‘Crammers make a lot of money because only half of all consumers ever catch the small charges and complain.’”).



Furthermore, consumers are likely to give up in pursuing complaints when companies ignore their initial requests for assistance.<sup>107</sup> Anger may lead a consumer to take the time to send an e-mail or letter regarding unexpected or unfair contract terms or charges. However, most consumers are likely to capitulate after receiving no response or blanket refusal to provide redress.<sup>108</sup> This is particularly true where the contested charges or expenses are relatively small.<sup>109</sup>

Indeed, it often is not worth it from a consumer's perspective to expend time and resources pursuing a relatively small claim.<sup>110</sup> For example, one law student reported how he was subjected to a \$9.99 fee for "daily horoscope texts" on his cellular phone bill after applying for what appeared to be a scholarship.<sup>111</sup> This student never ordered any horoscopes and did not see the extra charges until he got his bill at the end of the month.<sup>112</sup> Although this determined law student chose to contest the charge, he lamented his frustration with spending more than the \$9.99 in his time and resources in the battle.<sup>113</sup> He concluded that most consumers do not detect or contest the charges, especially with automatic payment of bills through banks and credit cards.<sup>114</sup>

Companies also may hinder consumers' pursuit of claims by making it very unpleasant or stressful for consumers to seek redress. For example, one consumer reported that after he submitted his information to receive a "free" credit report from [www.freecreditreport.com](http://www.freecreditreport.com), he began noticing charges on

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107. See Best & Andreasen, *supra* note 5, at 715 (noting that increasing complexity in the consumer complaint process is related to the likelihood that a consumer will voice their complaint).

108. See *id.*

109. *Id.* at 711–17 (reporting findings indicating that the cost of a product or service and the way problems are dealt with weigh heavily in determining complaint rates).

110. See *id.*

111. E-mail from Richard Emil Masana, Graduate, University of Colorado Law School, to author (May 31, 2010, 23:10 MST) (on file with author) (documenting his experience with a scholarship application that required him to provide his basic information, including his cellular phone number, and which resulted in \$9.99 of charges on his phone bill for horoscopes he never ordered).

112. *Id.*

113. *Id.*; E-mail from Richard Emil Masana, Graduate, University of Colorado Law School, to author (June 1, 2010, 10:12 MST) (on file with author).

114. *Id.* The consumer I interviewed also noted how the company sent this scholarship application to a university e-mail list, and simply asked for name, address, and cellular phone number. *Id.* Furthermore, the charges suddenly appeared on a regular phone bill with a major carrier and were ostensibly pursuant to hidden terms in the application. *Id.* See also E-mail from Richard Emil Masana, Graduate, University of Colorado Law School, to author (June 1, 2010, 10:24 MST) (on file with author) (answering questions the author asked about the charges, and highlighting how most students would not notice or contest such charges in a seemingly legitimate scholarship application); E-mail from Richard Emil Masana, Graduate, University of Colorado Law School, to author (Nov. 28, 2011, 2:22 MST) (on file with author) (confirming interview remarks).

his credit card.<sup>115</sup> When he called the customer service representative to complain, the representative insisted that his submission for a free report required him to sign up for a paid subscription for credit monitoring.<sup>116</sup> The representative also made it nearly impossible for the consumer to cancel the subscription by ensnaring him in a lengthy “tug-of-war.”<sup>117</sup> Ultimately, the very persistent consumer cancelled the subscription and further charges, but he remained liable for the initial subscription charge, which he begrudgingly paid to avoid any more hassle.<sup>118</sup>

Similarly, a “[w]eb-savvy personal finance editor” reported how she had to endure a long battle with her credit card company in seeking to reverse charges for “free trial” offers for facial products.<sup>119</sup> After she signed up for the “free trial” and received the initial products, she properly cancelled as required to escape charges.<sup>120</sup> However, the product sellers billed her for over \$200.<sup>121</sup> She spent significant time making multiple calls and sending letters to the sellers and her credit card company before she eventually cleared her account.<sup>122</sup> Ultimately, she concluded: “Was it worth it? Of course not. Worse, I think the whole ordeal gave me a new wrinkle.”<sup>123</sup>

It is true that some consumers may broadcast negative information about companies’ practices through blogs or social networking websites.<sup>124</sup> However, consumers already exhausted from unsuccessfully seeking

115. Memorandum from Nathan Vassar, Graduate, University of Texas School of Law, to author (Apr. 26, 2010) (on file with author) (documenting his experience with <http://www.freecreditreport.com>).

116. *Id.* A very astute law professor relayed a similar story. He and his wife were each being charged a \$15 monthly fee after innocently checking their credit reports through the same site. E-mail from David Horton, Assoc. Professor, Loyola Law School, Los Angeles, to author (Sept. 3, 2010, 16:46 MST) (on file with author). They had no notice of the charge and faced fierce resistance when they tried to cancel the imposed subscription. *Id.*

117. *See* Memorandum from Nathan E. Vasser to author, *supra* note 115.

118. *Id.* The consumer concluded: “I ended up hassled and frustrated by the entire experience, as I had to pay for one month’s subscription, and endured a lengthy and difficult phone conversation in order to release myself from the automatic monthly charge.” *Id.*

119. Julie Sherrier, *How I Won My Wrinkle Cream Face-Off*, TAKING CHARGE: A CREDITCARDS.COM BLOG (Oct. 14, 2009), <http://blogs.creditcards.com/2009/10/got-the-free-trial-offer-blues.php>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.*; *see also* David Segal, *A Guide to Complaints That Get Results*, N.Y. TIMES (May 22, 2010), <http://nytimes.com/2010/05/23/your-money/23haggler.html> (regular column, *The Haggler*, that chronicles consumers’ submitted stories of complaints and how they did or did not get remedies).

assistance are unlikely to invest additional time or energy posting their grievances. Furthermore, consumers may not realize that their contracts defy legal regulations or standards.<sup>125</sup> Companies perpetuate this lack of information by burying terms in confusing fine print and managing publicity by quietly appeasing the few sophisticated consumers who complain.

### 3. Socialization and Biases

Socialization and biases texture the meaning of the objective “reasonable person” that contract law often assumes with respect to economic transactions.<sup>126</sup> Research indicates that despite legal assumptions, social stereotypes influence consumers’ negotiations and propensities to assert their rights.<sup>127</sup> As an initial matter, American culture generally frowns on complainers and calls on consumers to maintain a “[s]tiff upper lip.”<sup>128</sup> Stereotypes and socialization also guide when we speak, what we say, and how others perceive our communications.<sup>129</sup> For example, employees may use speaking opportunities at work to signal certain characteristics such as strength or intelligence, while employers may screen employees’ statements to assess whether an employee possesses characteristics the employer values.<sup>130</sup>

With respect to gender, society teaches women from an early age to be relational and cooperative, and to display more interest in fostering relationships than pursuing economic goals.<sup>131</sup> This may lead women to be constrained by a “psychological straitjacket” that hinders them from complaining, asking for what they need, or otherwise asserting themselves.<sup>132</sup> Research generally indicates that women often achieve less

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125. See Marco B.M. Loos, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe* 5–7 (Ctr. for the Study of Eur. Contract Law Working Paper Series, Paper No. 2010/01), available at <http://ssrn.com/abstract=1535819> (noting how a lack of information about enforcement rights and options may squelch consumers’ enforcement of their rights).

126. Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 LEWIS & CLARK L. REV. 1285, 1285–89, 1310–11 (2010).

127. *Id.* at 1286–90 (discussing behavioral and psychological research indicating how stereotypes influence contracting).

128. Plymire, *supra* note 69, at 61–62 (noting cultural propensities).

129. See Carbado & Gulati, *supra* note 2, at 107–10, 113–15, 133–35 (discussing how fear of stereotypes may impact employees’ propensities to make requests at work).

130. *Id.* at 107–10 (using this scenario).

131. Alice F. Stuhlmacher & Amy E. Walters, *Gender Difference in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653, 653–58 (1999) (highlighting research suggesting that women are more cooperative and relationship-focused in negotiations, but noting that it is unclear whether this affects negotiation outcomes).

132. See LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT* (2008) (suggesting strategies to help women better evaluate their worth and assert themselves in ways that comport with their personalities); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 302 (1999) (discussing gender in negotiations); Laurie

favorable outcomes in negotiations because they feel less entitled to ask for what they want.<sup>133</sup> One study indicated that men pursue negotiations to further their own interests about four times more often than women do.<sup>134</sup> Survey results also suggest that women are much less likely than men to recognize opportunities to negotiate.<sup>135</sup>

Women also tend to express self-doubt and use equivocal language in negotiations, while men display more confidence and initiative in asserting their rights.<sup>136</sup> Women fearful of appearing “pushy” may refrain from asserting their rights.<sup>137</sup> Of course, this is not true for all women, and some research indicates no significant difference between men and women with respect to complaint frequency.<sup>138</sup> Nonetheless, the data overall suggests that women ask for assistance or complain less often than men do.<sup>139</sup>

Similarly, research shows that race significantly affects problem perception and reporting rates within the same socioeconomic groups.<sup>140</sup> In one study, black consumers were much less likely than white consumers to perceive purchase problems or to complain regarding products and services of the same quality, thereby indicating that black consumers had lower expectations.<sup>141</sup> Accordingly, the black and white consumers’ relatively equal reported purchase satisfaction rates did not necessarily indicate that

A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 629–31 (1998) (explaining socialized behavioral differences between men and women, and expectations that women should be more “community oriented” and less proactive in protecting their own economic interests).

133. See BABCOCK & LASCHEVER, *supra* note 132, at 1–4 (addressing the “voice” inside many women’s heads telling them they should be happy with what they have and not greedily ask for more); Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 116–20, 125–26 (2008) (discussing research regarding gender in negotiations).

134. BABCOCK & LASCHEVER, *supra* note 132, at 4.

135. *Id.* at 41 (noting how women were 45% more likely to score low on a rating scale assessing whether people saw their situations as open to change via negotiations).

136. Stuhlmacher & Walters, *supra* note 131, at 653–77 (reviewing findings from studies on gender in negotiations).

137. See also *infra* notes 144–48 and accompanying text (discussing evidence that women often do not “get the grease” in contract negotiations or the workplace).

138. Bård Tronvoll, *Complainer Characteristics When Exit is Closed*, 18 INT’L J. SERVICE INDUSTRY MGMT. 25, 33–35 (2007) (noting research regarding gender).

139. See *supra* notes 131–35 and accompanying text (discussing evidence that women ask for things less frequently than men).

140. Best & Andreasen, *supra* note 5, at 707, 723–24 (reporting study findings).

141. See *id.* at 723–24.

the consumers received equal treatment.<sup>142</sup> Instead, the evidence overall suggested that black consumers generally did not receive the same purchase benefits because they did not know they deserved or could get these benefits.<sup>143</sup>

Stereotypes and biases also may affect how company representatives and customer service agents react to consumers who complain or ask for assistance. For example, company representatives may have preconceived biases based on gender that affect their behaviors.<sup>144</sup> Representatives may view female consumers as “bitchy” if they complain, or weak and easily brushed aside if they are not assertive.<sup>145</sup> In one study, researchers coached male and female actors to remain “cooperative and pleasantly assertive” while working with test groups.<sup>146</sup> Afterwards, group participants described the men as having “more ability, skill, and intelligence,” but saw the women behaving in the same manner as “emotional, bossy, and domineering.”<sup>147</sup> The participants nonetheless denied having any sex biases when asked directly about their attitudes.<sup>148</sup>

Studies similarly suggest that individuals often deny that they are biased but nonetheless harbor subconscious negative associations with members of minority groups.<sup>149</sup> This may cause company representatives to respond negatively or offer lesser deals to minority consumers. For example, Professor Ayres found in his study of Chicago car sales that white women had to pay 40% higher prices than white men did, and black consumers had to pay over twice the markup paid by all other customers, regardless of market competition that should have eliminated such discrimination.<sup>150</sup> Surprisingly, this was true although the car dealerships steered the tester-

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142. *See id.* at 707, 727.

143. *Id.* at 727.

144. *See infra* text accompanying notes 145–59.

145. *See* Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 68–69 (2004) (“Women quite rightfully worry about being labeled ‘the Bitch’ if they become the squeaky wheel about compensation or if they ‘grand stand’ about their accomplishments.”).

146. BABCOCK & LASCHEVER, *supra* note 132, at 61.

147. *Id.*

148. *Id.* *See also* Wendy Reiboldt, *Factors That Influence a Consumer Complainer’s Rating of Service Received from a Third Party Complaint-Handling Agency—The Los Angeles Department of Consumer Affairs*, 16 J. CONSUMER SATISFACTION, DISSATISFACTION AND COMPLAINING BEHAVIOR 166, 166–67, 171–74 (2003) (reporting survey results regarding complaint handling by an agency in California and finding that race, income, gender, and other similar factors impacted rating of service).

149. *See* Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513, 526 (2010) (highlighting prejudice at the unconscious level).

150. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819, 822–43 (1991) (noting others’ animus-based theories of discrimination and providing further detail regarding the research methodology and findings).

buyers to salespersons who shared the buyers' gender and race characteristics.<sup>151</sup>

Research in lending contexts also indicates that company representatives provide the best deals to white male consumers.<sup>152</sup> Evidence suggests that men obtain more attractive mortgages than women do, and lenders steer minorities and women toward subprime and less desirable loans although they could qualify for prime mortgages.<sup>153</sup> The National Community Reinvestment Coalition found in a 2003 field test that lenders treated black testers, especially black female testers, less favorably than white testers even though the black testers had better credit profiles.<sup>154</sup> Similarly, a 2006 Consumer Federation of American study concluded that lenders were five times more likely to saddle upper-income black women than upper-income white men with a subprime mortgage.<sup>155</sup>

Contractual discrimination was likely at the core of the dealings at issue in *Williams v. Walker-Thomas Furniture Co.*<sup>156</sup> In that case, the furniture seller imposed an onerous cross-collateralization term on consumers in poor minority neighborhoods, assuming consumers in such neighborhoods present higher credit risks.<sup>157</sup> Ms. Williams was an African-American woman with limited income, and was not a sophisticated consumer to the extent that she did not detect the onerous cross-collateralization provision in her purchase contract.<sup>158</sup> Unlike most consumers in her position, however, she chose to "speak up" and bring a lawsuit that is now famous for presenting a "paradigmatic example of an unfair bargain."<sup>159</sup>

151. White men were offered the best deals from white female sellers; white women received the best prices from black salesmen; black males received the best deals from white saleswomen; and black females received the best prices from white men. *Id.* at 840–42. *But see* Best & Andreasen, *supra* note 5, at 727 (finding no statistically significant correlation between socioeconomic status and satisfactory resolution of consumer complaints, but noting that this is subject to data that those of lower status are less likely to perceive or raise complaints).

152. Stuhlmacher & Walters, *supra* note 131, at 653–77.

153. *See* Carol Necole Brown, *Women and Subprime Lending: An Essay Advocating Self-Regulation of the Mortgage Lending Industry*, 43 IND. L. REV. 1217, 1217–22 (2010) (compiling and citing research regarding discriminatory lending). The research has left many asking "[w]hy would people who could qualify for prime mortgage loans end up with subprime loans?" *Id.* at 1217.

154. *See id.* at 1219–20 (discussing the study and findings).

155. *Id.* at 1221.

156. 350 F.2d 445 (D.C. Cir. 1965).

157. *See* DiMATTEO ET AL., *supra* note 15, at 205–06, 237–40 (discussing discrimination in the *Williams* case).

158. *See* Alces & Hopkins, *supra* note 18, at 897–99 (discussing the case).

159. DiMATTEO ET AL., *supra* note 15, at 203–04.

Companies continually tailor their B2C practices based on “worthiness” predictions.<sup>160</sup> Companies gather information about consumers through online registrations and by tracking consumers’ buying practices to target consumers who frequently make high-value purchases, and to avoid or drop consumers who lack resources for high expenditures.<sup>161</sup> Companies also may discriminate against these “low-value, low-sophistication consumers” who lack resources by ignoring their needs while attending to “high-value, high-information consumers” that are proactive in seeking contract changes and benefits.<sup>162</sup> A company may provide these “sophisticated” high-value consumers with waivers, exemptions, and other benefits in hopes of growing its revenues by gaining their loyalty and hindering them from spreading negative company reviews.<sup>163</sup>

Overall, these studies suggest that white men, especially those who companies consider “high-value,” have a significant advantage in the SWS.<sup>164</sup> They are more likely than other consumers, especially women and black men, to get what they want.<sup>165</sup> This leaves the majority of consumers to bear costs associated with providing benefits to the high-value squeaky wheels. Although power and context may discount some study results, the evidence is nonetheless troubling and highlights the need for further research regarding contract bias.<sup>166</sup>

#### 4. My Survey Findings Regarding Contract Irrelevance

Along with the above factors, findings from my own survey research help provide contextual background for exploring the SWS. Survey research is subject to perception and reporting biases, and individuals’ propensities to

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160. See *infra* notes 161–63 and accompanying text.

161. See Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384 (discussing transaction-based versus debt-based credit card issuers, and explaining how transaction-based issuers seek to maximize the number of cardholders who make frequent high-value purchases).

162. See Alces & Hopkins, *supra* note 18, at 900–02 (explaining this argument).

163. *Id.* Nonetheless, some credit card companies may prefer customers they expect to be less informed or vigilant in their contracting, such as young and low-income consumers with little credit history or contracting experience. See *id.* These consumers are prone to unknowingly pay extra charges without complaint. *Id.* (depicting how issuers make their money from late fees and interest instead of interchange fees); Karin Braunsberger et al., *The Effectiveness of Credit-Card Regulation for Vulnerable Consumers*, 18 J. SERVICES MARKETING 358, 358–70 (reporting credit card companies’ direct mail solicitations to college students and low-income populations in hopes of attracting new customers with limited credit card experience).

164. See *supra* text accompanying notes 144–63.

165. See *supra* note 150 and accompanying text.

166. Stuhlmacher & Walters, *supra* note 131, at 656–74 (noting mixed studies but highlighting cause for concern as it relates to workplace negotiations).

report fiscally and socially responsible behavior.<sup>167</sup> Nonetheless, it sheds light on what consumers care about and how they behave in making purchases and dealing with purchase problems. Although my survey asked many questions about consumers' contracting behaviors and perceptions, this Article focuses on questions pertaining to consumers' actions and understandings related to seeking contract changes and remedies.

I administered a survey of Colorado consumers that produced a sample of 306 completed surveys, with roughly one-third male respondents and two-thirds female respondents.<sup>168</sup> About half of these respondents were married, 7.5% lived with domestic partners, and the remaining respondents were single, separated, or widowed.<sup>169</sup> The sample identified as three-quarters Caucasian or white, and reported varying levels of education; 43% had a Bachelor's or post-graduate degree, 44% completed some college but had no degree, and the rest had a high school diploma or less.<sup>170</sup> Forty-two percent reported full-time employment, 16% reported part-time jobs, and the rest reported no employment outside the home.<sup>171</sup>

As an initial matter, the survey responses revealed general skepticism regarding remedies for purchase claims. When asked to assess perceived fairness of dispute or settlement agreements, 32.7% replied "completely" or "usually" fair, 44.6% were "neutral," and the remainder said "usually" or

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167. See Thea F van de Mortel, *Faking It: Social Desirability Response Bias in Self-Report Research*, 25 AUSTL. J. ADVANCED NURSING 40 (2008) (discussing "social desirability bias" which leads survey respondents to present a favorable image of themselves and answer questions in ways that conform with social values and norms).

168. See Amy J. Schmitz, *Consumer Survey Data and Notes* (2007 to present) (unpublished survey) (on file with author) [hereinafter *Survey Notes*]. I worked with the Institute for Behavioral Science (IBS) at the University of Colorado and Survey Sampling International (SSI) in order to ensure confidentiality and to receive full approval by the Human Research Council at the University of Colorado. The survey was sent to roughly 10,000 Colorado residents over the age of eighteen in SSI's research panel in October and November of 2007 in order to ultimately produce a sample of 306 properly completed surveys. Prior to that time, we had dropped from our sample any partial responses or responses that were otherwise faulty due to skipped questions, "flat-lined" responses, and other indications that the respondent "cheated" in some way. Through our attempts to gather more male responses, we learned that women are much more receptive to answering online surveys.

169. See *infra* app. A, at p. 334.

170. See *infra* app. A, at pp. 334–36. The sample identified as 74.5% white, 14.7% did not specify race or ethnicity, and the remainder identified as black, Hispanic, Asian, Indian, Pacific Islander, or multiple races. See *infra* app. A, at p. 336.

171. See *infra* app. A, at p. 334. Many did not identify themselves with respect to occupation. Of the 82% of those that reported income, roughly 30% stated under \$29,999, 30% stated \$30,000–\$49,000, 19% stated \$50,000–\$74,999, 9.6% stated \$75,000–\$99,999, and 11.2% reported over \$100,000. See *infra* app. A, at p. 333.



“completely” unfair.<sup>172</sup> Respondents nonetheless replied “usually” or “completely” fair at much higher rates regarding nearly all of the other types of contracts listed in the same question. This included warranties (62%), car sales (57.4%), employment terms (68.5%), and companies’ standard form contracts (57.9%).<sup>173</sup> Only gym memberships generated more negative responses, with 31% reporting “completely” or “usually” unfair.<sup>174</sup>

The survey also asked consumers to check all the terms, if any, they “found to be important at some point with respect to a complaint or dispute” about a purchase.<sup>175</sup> This was followed by a list of terms, including those for price, warranties, fees and other penalties, returning items, cancelling services, “freebies” or incentives, other and “N/A; I have never had a claim or dispute.”<sup>176</sup> Overall, respondents did not report “yes” for many terms to indicate that they were important in dealing with purchase complaints.<sup>177</sup> Nonetheless, they indicated importance at the greatest percentages with respect to terms covering warranties (56.9%), returns (50%), and cancelling services (46.7%).<sup>178</sup>

Furthermore, response data confirmed research and theory suggesting that education influences consumer complaints. There was a significant positive association between education level and likelihood to notice anything about arbitration in consumer purchase terms.<sup>179</sup> In addition, there was a statistically significant positive association between education level and the likelihood to find warranty terms important regarding consumer complaints, suggesting that those with more education were more likely to

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172. See *infra* app. B, at p. 343. The survey asked consumers to “think broadly about how fair (using [their] own sense of ‘fairness’) [they] view different contracts and purchase terms, regardless of whether [they] have relevant personal experiences.” See *infra* app. B, at p. 337.

173. See *infra* app. B, at pp. 337–43.

174. See *infra* app. B, at p. 337. The percentages reporting “usually” or “completely” fair with respect to the remaining contracts listed were as follows: loan contracts 52.5%, apartment leases 51.3%, credit card terms 39.1%, Internet purchase terms 44.6%, cell phone contracts 37.2%, contracts with friends 40%, and contracts with family 41.2%. See *infra* app. B, at pp. 337–43.

175. See *infra* app. C, at p. 343.

176. See *Survey Notes*, *supra* note 168, at pt. III, question 6.

177. See *infra* app. C, at p. 343.

178. See *infra* app. C, at p. 343. With respect to the other terms, respondents answered “yes” to importance in percentages as follows: price (19.9%), fees/penalties (37.3%), interest rate/credit payment (21.6%), freebies/incentives (8.8%), and disclaimers/waivers (17.6%). See *infra* app. C, at p. 343.

179. This question asked generally whether respondents had “seen or noticed anything about ‘arbitration’” in any of their consumer purchase terms. See *infra* app. M, at p. 363. We used Kendall’s tau to assess association between noticing arbitration terms (dichotomous variable) and education levels ranging from some college, college degree, some postgraduate, to master’s/Ph.D./etc. (ordinal variable). The association was significant at .154. See Amy J. Schmitz, *Consumer Survey Data Analysis Backup* (2007 to present) (unpublished memos and notes with statistical accounting) (on file with author and *Pepperdine Law Review*) [hereinafter *Analysis Backup*].

empower themselves in consulting warranty terms to address purchase problems.<sup>180</sup> There also was a significant, but weak, negative association between education level and the likelihood to mark “never had a dispute.”<sup>181</sup> This comports with other research indicating that consumers with less education are less likely to perceive purchase problems or assert their complaints.<sup>182</sup>

Survey findings also confirmed consumers’ inertia and general failure to take initiative in negotiating contract terms when making consumer purchases. Thirty-eight percent of respondents reported “never” and 27.4% stated “rarely” when asked how often they “try to negotiate or change” form contracts or terms in making consumer purchases.<sup>183</sup> Only 8.6% said that they “frequently” or “nearly all the time” seek such purchase term changes.<sup>184</sup> Furthermore, 71.3% of female respondents, as compared with 53.4% of male respondents, reported that they “never” or “rarely” try to negotiate form terms, which comports with other research suggesting that women are less assertive in pursuing their contract interests.<sup>185</sup>

Out of the 182 respondents who reported trying to change contract terms, 42.9% said that they “never” or “rarely” succeed in getting merchants to change their terms.<sup>186</sup> Furthermore, only 15.9% of the 182, or 29 of the 306 total survey sample, reported that they were successful “frequently” or “nearly all the time” in changing contract terms.<sup>187</sup> In addition, respondents indicated very little success in changing particular terms, with the highest for price at 36.3%.<sup>188</sup> The percentages for changing other listed terms were as

180. We again used Kendall’s tau to assess association between education level and noting warranty terms as important with respect to a complaint in Part III, Question 6. The association was significant at .038, but the level of association was quite low at only .11—with zero being no association and 1 or -1 being perfect association. See *Analysis Backup*, *supra* note 179.

181. See *id.*

182. See *id.* Using Kendall’s tau, we found a correlation that was significant at .019. This provided some evidence that those with less education were more likely to say they never had a contract dispute. *Id.*

183. See *infra* app. D, at p. 346. Analysis is focused on “valid percent” (percent of those who answered the question) to account for “missing data” (i.e., those who did not answer that question). See *Analysis Backup*, *supra* note 179; *Harvard-MIT Data Center’s Guide to SPSS*, [http://hmdc.harvard.edu/projects/SPSS\\_Tutorial/spsstut.shtml](http://hmdc.harvard.edu/projects/SPSS_Tutorial/spsstut.shtml) (last visited Dec. 24, 2011).

184. See *infra* app. D, at p. 346.

185. See *infra* app. E, at p. 346.

186. See *infra* app. F, at p. 347.

187. See *infra* app. F, at p. 347. This was a mere 9.4% of the 306 total respondents. See *infra* app. F, at p. 347.

188. See *infra* app. G, at p. 347. The survey question asked: “What types of terms have you been able to get changed in form contracts? Check **all** that apply.” See *infra* app. G, at p. 347.

follows: warranties (13.4%), fees (19.9%), interest rates for credit payment (15%), returns (13.1%), cancelling service (10.5%), arbitration (2.3%), incentives (11.8%), and disclaimers/waivers of liability (5.6%).<sup>189</sup>

This lack of success in negotiating contract changes impacts contract expectations. When asked their level of agreement with various statements regarding form purchase terms, 66.2% of respondents said they “strongly agree” or “somewhat agree” that they “assume [they] cannot get a seller to change form terms.”<sup>190</sup> Nonetheless, most of the respondents indicated awareness that it is prudent to read form terms.<sup>191</sup> A total of 71.1% of respondents indicated that they “somewhat disagree” or “strongly disagree” that “it is a waste of time to read form terms.”<sup>192</sup> Similarly, 74.4% reported that they “somewhat disagree” or “strongly disagree” that they “don’t see why” they should read form terms, and 79.3% said they “strongly agree” or “somewhat agree” that it is “very important to read” purchase terms.<sup>193</sup>

At the same time, 30.8% of respondents said that they “strongly agree” or “somewhat agree” with the statement that they “started reading terms after [they] had problems with consumer purchases,” while 18.8% selected “strongly agree” or “somewhat agree” with the statement that they “only read form terms after [they] have a problem” with a purchase.<sup>194</sup> Furthermore, there was a significant positive correlation between contract experience outside of one’s consumer role and disagreement with both of these statements, suggesting that those respondents with more contract experience were significantly more likely to read terms even if they had not experienced a purchase problem.<sup>195</sup>

In addition, only 20.8% of respondents reported that they “frequently” or “nearly all the time” have “gone back to review terms [they] had previously read or skimmed because of a complaint or dispute” regarding a purchase.<sup>196</sup> Of the rest, 33.2% said “sometimes” and 8.7% said “half the

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189. See *infra* app. G, at p. 347.

190. See *infra* app. H, at p. 350; see also *Survey Notes, supra* note 168, at pt. II, question 6b.

191. See *infra* app. H, at p. 350.

192. See *infra* app. H, at p. 350; see also *Survey Notes, supra* note 168, at pt. II, question 6h.

193. See *infra* app. H, at p. 351.

194. See *infra* app. H, at p. 352; see also *Survey Notes, supra* note 168, at pt. II, question 6g.

195. Again, using Kendall’s tau, we found a significant positive association at .105 between level of disagreement with the Part II, Question 6g statement and level of experience reported in Part IV, Question 2 (coded 0 to 4 for “very uncomfortable with contracts,” “know less than the average person,” “average,” “know more than the average person,” or “expert or specialist”). Similarly, we found a Kendall’s tau association at .154 between level of disagreement with Part II, Question 6k and Part IV, Question 2, reported experience. See *Survey Notes, supra* note 168. This may suggest that those with more experience are more likely to read contracts regardless of whether or not they have complaints.

196. See *infra* app. J, at p. 354. The remainder of respondents stated “never” (5.4%), “rarely” (23.2%), or “n/a; never had a complaint or dispute” (8.7%). See *infra* app. J, at p. 354.

time.”<sup>197</sup> Furthermore, only 15.8% of respondents said “frequently” or “nearly all the time,” as compared with 40.6% reporting “never” or “rarely,” when asked how often they read contract terms “for the first time only after complaints or disputes arose” regarding a purchase.<sup>198</sup>

These responses overall suggest that respondents generally do not look to contract terms in confronting purchase problems, and those who read contract terms at all generally do so regardless of complaints.<sup>199</sup> This is especially true for respondents who reported greater contracting experience.<sup>200</sup> Instead of focusing on contract terms to address purchase problems, consumers prefer to seek assistance through personal appeals and informal communications.<sup>201</sup> They hope that companies will help them in order to preserve goodwill and prevent negative publicity.<sup>202</sup>

That said, consumers also may ignore purchase terms because they are unaware of or do not understand the terms’ significance in a given situation. For example, all but five (1.6%) of the survey respondents said that they would want more explanation of at least some form contract terms when asked to “check all the terms that [they] would want the salesperson to explain” in a car purchase scenario.<sup>203</sup> Respondents checked that they would want an explanation in the following percentages: terms requiring that they “resolve claims through a private means such as ‘arbitration’ instead of bringing claims to court” (55.9%),<sup>204</sup> incentives (48.7%), general boilerplate (41.5%), technical/legal words (60.1%), price (72.5%), warranties (92.2%), fees/penalties (84%), returns (76.1%), and disclaimers (75.2%).<sup>205</sup>

Respondents also indicated their focus on price and only a few key contract terms when asked how important they viewed various terms and factors in making consumer purchases. Respondents stated “very important”

197. See *infra* app. J, at p. 354.

198. See *infra* app. I, at p. 353. The remainder of respondents stated “sometimes” (22.1%), “half of the time” (12.4%), or “n/a; never had a complaint or dispute” (9.1%). See *infra* app. I, at p. 353.

199. See *supra* text accompanying notes 175–78.

200. See *supra* note 195 and accompanying text.

201. See *supra* notes 54–56 and accompanying text.

202. See *supra* text accompanying notes 53–56.

203. See *infra* app. K, at p. 357.

204. This accounted for 57.1% of female and 53.4% of male respondents. See Memorandum from Heather Park, Research Assistant, to author (Dec. 1, 2011) (on file with author) (documenting statistical accounting using SPSS); *Survey Notes*, *supra* note 168.

205. See *infra* app. K, at pp. 354–57; see also *Survey Notes*, *supra* note 168, at pt. III, question 3.

or “somewhat important” at the greatest rate for price (99.3%).<sup>206</sup> They next indicated “very” or “somewhat important” as follows: non-price contract terms (86.5%), store reputation (84.1%), availability (81.9%), brand or label (71.4%), financing terms (78.5%), and friendly salesperson[s] (69.3%).<sup>207</sup> Furthermore, 64.8% of respondents indicated “very” or “somewhat important” with respect to family or friend recommendations and 67.1% indicated the same for “consumer reviews” in publications or on the Internet.<sup>208</sup> This was higher than like indications for “personal relationship to seller” (40.6%), “gut feeling” (53.8%), and “just want it” (56.6%).<sup>209</sup> Accordingly, many consumers do consider shared information and may seek the advice of other informed consumers.

Statistical analysis of survey responses also showed some association between respondents’ demographic information and their indications of importance with respect to reviews and recommendations in making purchases.<sup>210</sup> Respondents with higher incomes were more likely to find consumer reviews important, perhaps suggesting greater access to reviews and purchase resources.<sup>211</sup> There also was a significant correlation between a respondent’s gender and attribution of importance to friend or family recommendations, with 68.8% of female versus 56.9% of male respondents indicating “very” or “somewhat important” for these recommendations.<sup>212</sup> This may confirm theory and other data suggesting that women are more relational and family-focused than men in making purchases.<sup>213</sup> In a sense, women may listen to “squeaky wheels” more often than men do when making purchase choices.

Overall, the data suggested that consumers rely mainly on price and price-related factors in making purchases, and place relatively little

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206. See *infra* app. L, at pp. 359–62. The survey listed specific contract terms and non-contract factors, and used “non-price” terms as a catchall for the general terms and conditions that were not otherwise parsed out in the list. See *Survey Notes*, *supra* note 168, at pt. I, question 3.

207. See *infra* app. L, at pp. 358–63.

208. See *infra* app. L, at pp. 360–62.

209. See *infra* app. L, at pp. 358, 360–62.

210. See *infra* app. N, at pp. 364–65.

211. See *infra* app. N, at pp. 364–65. Using Kendall’s tau, we found a significant correlation of  $-.109$  between reported income (coded in escalating order starting with 1 for less than \$20,000) and an indication of importance (coded 1 to 4 for “very important,” “somewhat important,” “minor importance,” and “not important”). See *Analysis Backup*, *supra* note 179.

212. See *infra* app. O, at p. 366. Female respondents were therefore significantly more likely to find these recommendations important per a Kendall’s tau of  $-.121$  between gender (coded 1 for male and 2 for female) and an indication of importance (coded 1 to 4 for “very important,” “somewhat important,” “minor importance,” and “not important”). See *Analysis Backup*, *supra* note 179.

213. See *supra* notes 131–35 and accompanying text (noting how women tend to focus more on relationships than men do in their exchanges).

emphasis on contract terms that they often do not read or understand.<sup>214</sup> Furthermore, consumers may myopically focus on price and fail to consider the full panoply of information that would assist them in making wise buying decisions.<sup>215</sup> They also may carry this myopia forward and fail to consult their contracts when problems arise. Consumers therefore may forfeit contract rights that could assist their assertion of post-purchase complaints.<sup>216</sup>

At the same time, consumers have voiced dissatisfaction with companies' remedy mechanisms. Consumers in my survey reported relatively negative perceptions of dispute settlements.<sup>217</sup> This, in turn, may increase their skepticism and further hinder their impetus to pursue contract remedies. Furthermore, this hesitance to assert claims may be even stronger for those with less economic or social power in the marketplace, especially when they fear repercussions of stereotypes and biases.<sup>218</sup>

### III. CONSEQUENCES OF THE SWS IN THE CONSUMER CONTEXT

These business and consumer behaviors and attitudes converge to fuel the SWS's interference with contract regulation and allowance for contractual discrimination to the detriment of the least informed and most vulnerable consumers.<sup>219</sup> Merchants know that most consumers are uninformed regarding their rights, and may use the SWS to prevent the informed minority from alerting others about purchase problems and merchants' practices.<sup>220</sup> Merchants therefore may heed demands of the informed squeaky wheels with the resources to persistently pursue their rights, while continuing to impose onerous provisions and withhold benefits

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214. See *infra* app. L, at pp. 358–63 & app. H, at pp. 350–52.

215. See *infra* app. L, at pp. 358–63 & app. H, at pp. 350–52.

216. See *infra* app. J, at p. 354.

217. See *infra* app. B, at p. 343 (only 32.7% of survey respondents indicated “completely fair” or “usually fair” with respect to settlements).

218. As with any survey research, it is subject to interpretation differences as well as perception and other cognitive biases. People read and interpret questions differently, regardless of how “clear” or sanitized the questions are. Furthermore, people have a natural propensity to believe that their views are the “normal” views even when they are not. See Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1269, 1280–300 (2008) (explaining false consensus bias and how it applies in contract interpretation contexts).

219. See *infra* Part III.A–C.

220. See *infra* notes 302–10 and accompanying text.

for the silent masses.<sup>221</sup> This thwarts market regulation and consumer protection, and creates an economically unhealthy consumer caste system.<sup>222</sup>

#### A. Silenced “Informed Minority”

Law and economics proponents and other defenders of the market propose that freedom of contract results in optimal allocation of resources, assuming that rational consumers will buy the optimal quality and quantity of goods and services under competitive terms.<sup>223</sup> Critics of this proposition argue that most consumers do not have perfect information, and do not read or understand the complicated terms commonly in form contracts.<sup>224</sup> Consumers therefore fail to purchase optimal quantities or bargain for competitive and efficient terms.<sup>225</sup> This, in turn, leaves companies free to take advantage of consumers’ lack of information and bargaining power.<sup>226</sup> The market therefore fails to police the fairness or efficiency of consumer contracts.<sup>227</sup>

Market defenders respond, however, that regardless of whether most consumers read or bargain for efficient terms, a sufficiently knowledgeable and noisy “informed minority” will police the fairness of merchants’ policies and practices.<sup>228</sup> They propose that companies will cater their contracts to appease these consumers who read contracts and spread negative information about company practices, even if it means that the companies must offer favorable terms to all consumers.<sup>229</sup> Accordingly, the informed minority of consumers will speak up for the uninformed masses to police merchants’ contract terms.<sup>230</sup>

Empirical data nonetheless raises serious questions regarding existence of this “informed minority.”<sup>231</sup> For example, researchers studied consumers’ Internet browsing behavior with respect to sixty-six online software companies’ websites to explore the veracity of the “informed minority”

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221. See *infra* notes 302–10 and accompanying text.

222. See *infra* text accompanying notes 312–14.

223. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 3–28 (7th ed. 1992) (explaining the economic model and the usefulness of economic theory in analyzing law).

224. See Cruz & Hinck, *supra* note 8, at 635–54 (explaining the various arguments).

225. See *id.* at 639.

226. *Id.* at 635–47 (setting forth arguments and critiques of economists’ assumptions).

227. See *id.* at 671.

228. See *id.* at 646–62; see also Schwartz & Wilde, *supra* note 13, at 637–39 (discussing this theory).

229. See Cruz & Hinck, *supra* note 8, at 646.

230. *Id.* at 636 (explaining the economists’ argument “that if a sufficient number of consumers read and understand latent terms and thereby become informed, then they will demand efficient terms, and the producers will in turn provide those terms to all consumers”).

231. See Bakos et al., *supra* note 15, at 36–37.

argument and the factors that lead consumers to access companies' standard form contracts (referred to as end-user software license agreements, or "EULAs").<sup>232</sup> The researchers found that only one or two in one thousand shoppers accessed the studied software EULAs for at least one second.<sup>233</sup> Furthermore, they found that shoppers rarely accessed product reviews or other substitute information sources.<sup>234</sup> This left researchers doubtful that an "informed minority" of Internet shoppers exists, let alone takes the time to bargain for fair or efficient terms or otherwise drive the content of software companies' contracts.<sup>235</sup>

Similarly, research suggests the unlikelihood that a sufficient number of proactive consumers will regulate merchant practices by spreading information and taking action *ex post* regarding purchase problems.<sup>236</sup> One European study found that only 7% of consumer cases ended with a resolution in court or an alternative proceeding.<sup>237</sup> The researchers also found that 45% of launched complaints ended with no agreement or decision, suggesting that consumers who took initial action on their complaints nonetheless gave up their pursuits along the way.<sup>238</sup> Although some of these complaints may have lacked merit, this indicates that even initially proactive consumers run out of time and resources to pursue their claims.

Meanwhile, there is plenty of evidence that most consumers remain inert and uninformed regarding their contract rights.<sup>239</sup> This is not surprising in light of the high costs of obtaining information and pursuing contract claims.<sup>240</sup> In addition, advertising and disclosure laws generally fail to correct for imperfect information, especially when disclosures add to the information overload that already clouds consumers' abilities and

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232. *Id.* at 15–17 (studying the browsing habits of 45,091 Internet users).

233. *Id.* at 3.

234. *Id.* at 33.

235. *Id.* at 1–5. The researchers nonetheless found that older and higher income consumers are more likely to access EULAs, and shoppers are more prone to access EULAs with respect to "free" or otherwise suspect products. *Id.* at 10–26.

236. See Loos, *supra* note 125, at 2–14 (discussing the need for reform to increase consumers' private enforcement of European contract regulations).

237. *Id.* at 4 (citing a Dutch survey).

238. *Id.*

239. See, e.g., *supra* notes 231–35 and accompanying text.

240. See Loos, *supra* note 125, at 3.



inclinations to read and understand their contracts.<sup>241</sup> In a *Consumer Reports* survey, nearly two-thirds of respondents claimed that they read all of the disclosures regarding a new loan or credit card they obtained in the prior year, but only 16% of these readers said they found the disclosures understandable.<sup>242</sup> It may take a consumer nearly three hours just to read the lengthy fine print that usually comes with a car purchase agreement.<sup>243</sup>

Furthermore, businesses may boost these anti-information impacts by using especially complicated fine print in their form contracts and teaser promotions to “shroud,” or effectively hide, the true costs of contracts.<sup>244</sup> For example, lenders have used negative amortization loan structures and seemingly benign add-ons for credit insurance that are difficult, if not impossible, for even the most educated consumers to detect or understand.<sup>245</sup> Furthermore, such preprinted form terms have become so widespread that consumers no longer notice them or assume they must be valid.<sup>246</sup> This perpetuates businesses’ abilities to profit from consumers’ myopia.

Companies also may manipulate more formal complaint resolution processes due to consumers’ lack of awareness or experience using such processes.<sup>247</sup> This allows merchants to keep claims out of the public eye and further limit their provision of remedies to relatively few proactive consumers.<sup>248</sup> Merchants may then continue to impose onerous fees and one-sided terms on the uninformed majority.<sup>249</sup> For example, it surfaced in congressional hearings that a credit card issuer that inexplicably raised all of its customers’ interest rates by two percent apologized and rescinded the rate

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241. See Stark & Choplin, *supra* note 88, at 86–95, 113–26 (discussing the inability of disclosure laws to protect consumers from predatory lending, and proposing counseling to ease this lack of protection).

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

243. Stark & Choplin, *supra* note 88, at 96 (discussing a case in which the court noted that it took the consumer two hours and forty-five minutes to read the contract). See also Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* 1, 7–20, 40–55 (Chi. Law Sch. John M. Olin Law & Econ. Working Paper, 2d Series, No. 516, 2010), available at <http://www.law.uchicago.edu/files/file/516-obs-disclosure.pdf>.

244. See Alces & Hopkins, *supra* note 18, at 889–903 (discussing “shrouding”).

245. See Stark & Choplin, *supra* note 88, at 90–95 (explaining the various predatory practices that are difficult for consumers to understand or digest).

246. See *id.* at 98–103 (discussing consumers’ lack of knowledge structure to properly assess terms and their propensity to thus accept terms without question); see also *supra* Part II.B.4 (noting how my survey findings confirm this sentiment).

247. Best & Andreasen, *supra* note 5, at 710–17.

248. See Cruz & Hinck, *supra* note 8, at 673–75. “Cases abound where parties—informed consumers—have simply changed standard form contracts to suit their preferences.” *Id.* at 674.

249. See *id.* at 674–75.

increase for only the few customers who complained.<sup>250</sup> “For everyone else—those who were not sophisticated enough to call—the increase stuck.”<sup>251</sup>

The sophisticated consumers then have no reason to inform the masses about merchants’ practices or the availability of purchase assistance; instead, these consumers may be “complicit in the exploitation of the myopic because the welfare loss that is born by the myopic redounds to the benefit of the sophisticated.”<sup>252</sup> Companies have more resources for assisting the sophisticated squeaky wheels when they continue to profit from imposing onerous terms on the consumer masses.<sup>253</sup>

Furthermore, even if an informed minority exists, this minority may not typify or advocate for other consumers.<sup>254</sup> Consumers have different buying and contracting needs, and may not be economically rational in the traditional sense.<sup>255</sup> Moreover, even informed consumers that read contract terms may agree to onerous or ostensibly unfair terms for various personal reasons.<sup>256</sup>

### B. Contractual Discrimination

Psychological and social theories suggest that consumers acquiesce to a low-power status that leads them to accept poor treatment by merchants with superior economic and bargaining power.<sup>257</sup> This is especially true in markets dominated by relatively few companies or involving limited supply

250. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 22 (2008) (discussing how companies appease only those who complain, while leaving the masses in the dark regarding their potential rights).

251. *Id.*

252. Alces & Hopkins, *supra* note 18, at 890. *See also id.* at 885–97 (discussing businesses’ willingness to make exceptions and provide waivers only for the consumers who seek waivers and exemptions).

253. *See id.*

254. *See Cruz & Hinck, supra* note 8, at 670–72 (highlighting how marginal consumers are not necessarily the average consumers, and how sellers differentiate among consumers).

255. *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 of those considerations); William H. Redmond, *Consumer Rationality and Consumer Sovereignty*, 58 REV. SOC. ECON. 177 (2000) (discussing how consumer choice is a prime example of suboptimal decision-making).

256. *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 738–50 (2008) (critiquing the informed minority argument and explaining how it is false to assume that an informed minority will result in efficient terms).

257. Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L L. REV. 1, 29–33 (2002).

goods or services.<sup>258</sup> In addition, sellers may use their power to capitalize on consumers' over-confidence regarding their purchases and failures to properly weigh and consider contract risks and information.<sup>259</sup> Powerful lenders, for example, may impose one-sided terms on consumers who rely on these lenders for much needed credit.<sup>260</sup> Stories of this power dynamic and consumers' lack of protection pervade politics and our current consumer psyche.<sup>261</sup>

Nonetheless, informed consumers have the potential to harness their power by inspiring collective action.<sup>262</sup> This relies, however, on consumers taking action based on what they learn about companies' faulty products and practices. The SWS hinders this consumer empowerment by suppressing information sharing and consumers' pursuit of contract claims. This is especially true for consumers with low socioeconomic status or claims that involve personal judgment or low-cost items.<sup>263</sup>

A consumer caste system thus develops, with the average uninformed consumer falling in the lower class. "[T]he actual complaining customer" is a rarity,<sup>264</sup> and consumers who are most vulnerable to feelings of powerlessness are least likely to complain.<sup>265</sup> Research indicates that complainers have not only greater "consumer sophistication" in terms of knowledge and experience regarding their contract rights, but also higher incomes and educational resources than average consumers.<sup>266</sup> These sophisticated consumers also have higher quality and service expectations, and less fear of humiliation from complaining.<sup>267</sup> They generally are more confident, and thus enjoy more success, in seeking remedies when

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258. See Adi Ayal, *Harmful Freedom of Choice: Lessons from the Cellphone Market*, 74 *LAW & 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").

259. See Becher, *supra* note 89, at 136–78 (noting consumers' failure to properly assess low-probability risks, the likelihood of future incidents, and information buried in impenetrable forms).

260. See DiMATTEO ET AL., *supra* note 15, at 93–96 (discussing power in the marketplace and the subtleties of power with respect to bargaining).

261. See, e.g., *id.*

262. See, e.g., *id.* (emphasizing how power can appear in unexpected ways).

263. Best & Andreasen, *supra* note 5, at 730.

264. Speer, *supra* note 52, at 14.

265. See DiMATTEO ET AL., *supra* note 15, at 95–98.

266. See Tronvoll, *supra* note 138, at 25–51 (2006) (discussing "consumer sophistication" and reviewing research literature regarding characteristics of consumers who complain about their purchases).

267. *Id.* at 33–35.

dissatisfied with their purchases.<sup>268</sup> This is especially true with respect to expensive purchases.<sup>269</sup>

In contrast, consumers with lower socioeconomic status often become accustomed to poor treatment and have lower expectations regarding their purchases.<sup>270</sup> They therefore are less likely to perceive purchase problems, let alone to complain to the company.<sup>271</sup> One study suggested that a combination of reported perception and complaint rates showed that “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.”<sup>272</sup> Consumers in the lowest category likely have less confidence and fewer resources with which to assert their complaints.<sup>273</sup> They also often lack financial education and may face hurdles created by limited English proficiency.<sup>274</sup>

Income and education therefore play significant roles in determining consumers’ likelihood to complain and pursue their rights with respect to their purchases.<sup>275</sup> Research also suggests that politically active consumers and those with high-status jobs are more likely to complain.<sup>276</sup> Furthermore, most studies indicate that younger consumers are more likely to assert their contract rights.<sup>277</sup> To be fair, research is mixed regarding demographic differences in complaint frequencies, and some studies indicate that the price of the purchase, the probability of winning the complaint, and the frequency of the purchase type overshadow demographics in predicting the likelihood of complaints.<sup>278</sup> Nonetheless, the bulk of the evidence suggests that the

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268. *See id.*

269. *See id.* at 34.

270. *Id.* at 33.

271. *See* Best & Andreasen, *supra* note 5, at 727 (discussing the role of socioeconomic status in complaints).

272. *Id.* at 723.

273. *See* Tronvoll, *supra* note 138, at 33.

274. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-518, FACTORS AFFECTING THE FINANCIAL LITERACY OF INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY 1, 9 (2010), *available at* <http://www.gao.gov/new.items/d10518.pdf> (reporting the extent to which limited English proficiency—along with income and education—impact financial education, and the ability to make informed judgments and take effective actions regarding contracts and money management).

275. *See* Tronvoll, *supra* note 138, at 33–34 (gathering research).

276. *Id.*

277. *Id.*

278. However, at least one study has suggested that consumers over fifty-five are more likely than consumers under thirty-five to seek contract changes or pursue complaints. *See* Speer, *supra* note 52, at 13. This may explain why a lack of understanding and facility to rectify adjustable rate mortgage issues has been most pervasive among young, low-income, and uneducated consumers.

SWS perpetuates a divide between the high-power “haves” and low-power “have-nots” based on income, education, and age.<sup>279</sup>

In addition, the SWS further disadvantages minorities and women due to stereotypes and biases.<sup>280</sup> As discussed above, customer representatives’ subconscious associations and biases may affect how they negotiate with consumers, and lead them to offer the worst deals to minorities and women.<sup>281</sup> Representatives already prone to resist complaints as attacks on their self-esteem also may be especially resistant when the complaints come from individuals against whom they harbor conscious or subconscious negative associations.<sup>282</sup>

At the same time, some consumers may perpetuate their low-power status by failing to assert their rights based on stereotypical assumptions.<sup>283</sup> *Ex ante*, some consumers may fear that seeking contract changes will backfire or “rock the boat,” and cause a seller to revoke an offer.<sup>284</sup> For example, a consumer fearful of being labeled as economically weak or less worthy based on her gender, race, or residence in an impoverished neighborhood, is unlikely to question, negotiate, or even read credit card terms if she fears that the lender will then deny her an extension of credit.<sup>285</sup>

*Ex post*, bias concerns also may influence consumers’ impetus to complain or seek redress. Using female consumers as an example, women may refrain from complaining about their purchases or contracts due to fear that they will appear rude or inappropriately masculine.<sup>286</sup> Furthermore, the

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*See Stark & Choplin, supra note 88, at 98–99 (noting research); see also Sharon Oster, The Determinants of Consumer Complaints, 62 REV. ECON. & STAT. 603, 605–06 (1980) (discussing a study linking complaint frequency with purchase type); Tronvoll, supra note 138, at 33–35 (noting research regarding gender).*

279. *See supra* text accompanying notes 264–78.

280. *See DIMATTEO ET AL., supra note 15, at 237–40 (discussing contractual discrimination based not only on economics, but also on perceptions and attitudes based on factors such as race).*

281. *See supra* text accompanying notes 144–55 (discussing data regarding contractual discrimination based on race and gender).

282. Plymire, *supra* note 69, at 61–62 (explaining the emotional components of complaint discussions).

283. *See Carbado & Gulati, supra note 2, at 108–10 (discussing how an employee’s statements at work may confirm or disconfirm stereotypes and the propensity for minority employees to refrain from complaining due to stereotype concerns); see also supra* text accompanying notes 144–55 (discussing the role of stereotypes in the SWS).

284. *See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55, 60–64 (1963) (explaining how “detailed negotiated contracts can get in the way of creating good exchange relationships between business units”); Loos, supra note 125, at 5–7 (explaining how negotiators may avoid potentially deal-breaking departures from status quo contract terms).*

285. *See supra* text accompanying notes 156–66 (discussing *Williams* and contractual discrimination based on such status).

286. *See Carbado & Gulati, supra note 2, at 109–10 (providing the example of a female Latino employee in a white, male-dominated workplace who may be more cautious in criticizing*

more concerned a consumer is about affirming negative labels, the greater the likelihood that she will feel constrained in her communications.<sup>287</sup> This gives companies greater leeway in perpetuating the SWS to raise costs and risks for outsiders in seeking contract changes or other assistance.<sup>288</sup>

That said, consumers also bear fault for not voicing their contract needs and complaints.<sup>289</sup> Some consumers' inertia may prevent them from taking initiative to assert their needs, while other consumers may be "biased" against companies to the extent that they assume that companies are heartless or will necessarily refuse to consider their complaints.<sup>290</sup> Consumers in the focus groups I held in Denver seemed to coalesce around this assumption after one consumer opined that with contract or purchase disputes, consumers feel: "Hey, I ain't gonna win no matter what. It's just a matter of luck if I can get through this transaction and not get screwed."<sup>291</sup> She voiced a presumption that there is no reason to ask companies for assistance since most consumers are "at middle and below."<sup>292</sup>

To some extent, it is fair for companies to reward those who take initiative to seek assistance and other benefits.<sup>293</sup> However, stereotypes and biases can make it disproportionately difficult for some consumers to get desired results.<sup>294</sup> Companies may use hasty assumption in deciding which squeaky wheels are worthy of assistance.<sup>295</sup> As discussed, companies may differentiate among consumers based on income, job status, race, and gender, and offer different deals based on their biases, perceptions, and assumptions.<sup>296</sup> They generally favor consumers they deem high-value,

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institutional policies due to a stereotype of female Latinos being hostile or less loyal than white male counterparts).

287. See *id.* at 114–22, 133–39 (also explaining how "[o]utsiders who perceive there to be negative stereotypes of them are likely to lose out" in a SWS at work).

288. *Id.* at 133–42 (further explaining how employers may exploit outsider vulnerabilities in a SWS).

289. See *supra* text accompanying notes 87–103.

290. See *supra* text accompanying notes 87–103.

291. See Focus Group Transcript, *supra* note 61.

292. *Id.*

293. See Cruz & Hinck, *supra* note 8, at 674–75 (discussing how companies engaged in this behavior benefit from cost savings).

294. See *supra* Part II.B.3.

295. See generally Carbado & Gulati, *supra* note 2, at 135 (discussing how sometimes, in the employer–employee context, employees may be too quick to label someone as a complainer whose comments do not deserve attention).

296. See *supra* Part II.B.3.

while ignoring the majority of consumers without resources to recognize or assert their complaints or needs.<sup>297</sup>

Furthermore, stereotypes may cloud public perception of some consumers' complaints. For example, the public may quickly brush aside a female consumer's blog post stated in emotive language.<sup>298</sup> Contractual discrimination under the SWS thus deepens a divide between squeaky wheels with the power and resources to pursue their needs, and the majority of consumers, who subsidize rationed remedies provided to the high-value minority by quietly paying fees and enduring onerous terms.<sup>299</sup>

### C. Under-Enforcement of Consumer Protections and Stifled Public Voice

As noted above, an extremely small percentage of consumer complaints reach third parties, thereby allowing businesses to control complaint resolution and hinder both consumer remedies and education with respect to faulty goods and services.<sup>300</sup> Public litigation and class actions serve important functions in enforcing public protections and giving voice to "little guys" who could never achieve redress through individual actions.<sup>301</sup> However, the SWS impedes these functions by quieting consumers with the resources to either lead class actions or otherwise initiate public mechanisms for enforcing consumer protections and other legal regulations.

Some companies target squeaky wheels who threaten class actions with settlement offers in order to shut down such public proceedings.<sup>302</sup> For example, in *Hill v. Gateway 2000, Inc.*,<sup>303</sup> Gateway offered to waive a contractual thirty-day return limit and give the Hills a full refund in hopes of shutting down their attempt to lead a class action regarding Gateway computer problems.<sup>304</sup> The case history evidences how the SWS allows

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297. See *supra* text accompanying notes 160–63.

298. See *supra* text accompanying note 145. Nonetheless, the public should ignore Internet complaint postings that are abusive or unfounded.

299. See Horton, *supra* note 59, at 605–09 (2010) (noting how contract adherents have no reason to expend time and resources shopping for terms that companies may unilaterally change, while companies feel no pressure to change form procedural terms to suit adherents' preferences).

300. Best & Andreasen, *supra* note 5, at 728–29.

301. See, e.g., Jeffrey I. Shinder, *In Praise of Class Actions*, NAT'L L.J., Apr. 5, 2010, at 39 (discussing the importance of class actions to give voice to "little guy" consumers who have been wronged by credit card merchants).

302. See 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, 284 (2000) (discussing when settlement offers are made before filing of class certification motions to moot a named plaintiff's claim); David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 789 (2003) (addressing defendants' use of settlement offers to preclude plaintiffs from leading class actions).

303. 105 F.3d 1147 (7th Cir. 1997).

304. See Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 707–09 (discussing the case and its exemplification of this dynamic).

companies to quiet public lawsuits, thereby hindering development of the law and leaving most consumers uninformed and perhaps without redress regarding product defects.<sup>305</sup>

Similarly, in *Green Tree Financial Corp.-Alabama v. Randolph*, the court used Green Tree's post-hoc offer to pay the consumers' costs of arbitration in justifying its enforcement of an arbitration clause in Green Tree's form consumer contracts.<sup>306</sup> In that case, the consumer sought to invalidate the arbitration clause in order to lead a class action alleging that Green Tree violated the Truth in Lending Act (TILA) and other laws.<sup>307</sup> The United States Supreme Court rejected the consumers' arbitration clause challenge, however, finding that the consumer did not prove that she would not be able to vindicate her rights due to high arbitration costs.<sup>308</sup> The Court seemed to rely on Green Tree's offer during oral arguments to cover any unaffordable costs.<sup>309</sup> This allowed the company to use the SWS, coupled with arbitration, to prevent a class action and public exposure that may have forced the company to change its contracts for the benefit of all consumers.<sup>310</sup>

The SWS is therefore similar to arbitration and other private settlement processes in that it allows companies to privatize or internalize complaint resolution.<sup>311</sup> It also hinders development of the law and limits public access to information regarding faulty products and company improprieties.<sup>312</sup> The SWS also leaves parties without direction regarding future behavior.<sup>313</sup>

305. *Id.* at 707 (also noting how the Hills may have been "less vocal victims of corporate avarice" or possibly "mendacious malcontents").

306. *See* 531 U.S. 79, 90–92 (2000); *id.* at 92–97 (Ginsburg, J., concurring in part and dissenting in part).

307. The consumer claimed that she could not vindicate her statutory rights under the form clause that called for the parties to split arbitration costs, which could equal or exceed any damages she stood to collect on her small claim. *Id.* at 90–91 & n.6 (majority opinion).

308. *Id.* at 91–92.

309. *See id.* at 93–95 (Ginsburg, J., concurring in part and dissenting in part) (stating how counsel for Green Tree merely "offered a hint" during oral arguments in the direction that it would pay the consumer's arbitration costs, but there was "no reliable indication in [the] record that [the consumer's] claim will be arbitrated under any consumer-protective fee arrangement").

310. *See id.*; *see also* Coneff v. AT & T Corp., 620 F. Supp. 2d 1248, 1257–60 (W.D. Wash. 2009) (highlighting the functions of class actions).

311. *See generally supra* text accompanying notes 302–10.

312. *See* Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1093–97 (1999) (claiming that judicial adjudication, in contrast to arbitration, can stimulate legal development and create public values largely because courts communicate with each other and the public through recorded opinions).

313. *See id.* at 1095–97 (noting how arbitration does not create precedent or speak to the public).



That is not to say that private settlements and arbitration agreements are necessarily bad.<sup>314</sup> They can be beneficial when fairly and properly monitored and administered, especially in basic contract disputes or intra-communal contexts in which parties share power and understandings.<sup>315</sup> Privatization of claims resolution can nonetheless be troubling with respect to discrimination, consumer protection, and other claims affecting public health or safety.<sup>316</sup> Public proceedings and judicial opinions shed light on these issues and may spark further investigations and policy initiatives.<sup>317</sup> Courts are “equipped to expose manufacturers who manipulate and hide behind the law.”<sup>318</sup>

For example, public action often is necessary to uncover product recall and complaint information. Consumers generally must take initiative to register purchased products to receive notification of recalls, and must file Freedom of Information Requests to obtain information regarding product complaints.<sup>319</sup> *Consumer Reports* found in its 2010 survey of 2,005 adults that only a fifth of the respondents were aware of recalls regarding products they had purchased in the past three years.<sup>320</sup> Furthermore, less than a quarter of respondents said they researched product recalls, and nearly a third of those who learned of recalls took no action on the recalls.<sup>321</sup> “[A]n additional 15 percent simply threw the product in the trash rather than returning it for a refund, an exchange, or a free repair.”<sup>322</sup> Nonetheless, policymakers hope that a new Consumer Product Safety Commission (CPSC) database, launched in March 2011, will address this lack of

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314. See Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 299 (1995) (discussing the benefits of arbitration to consumers, including speed and cost).

315. See *id.*

316. See *id.* at 318 (arguing that arbitration denies consumers statutory protections due to limited discovery, lack of class action procedures, and absence of written opinions). But see Meredith W. Nissen, *Class Action Arbitrations*, DISP. RESOL. MAG., Summer 2005, at 19, 21 (explaining AAA class arbitration rules requiring that reasoned awards be made publicly available).

317. See Christopher Placitella & Justin Klein, *The Civil Justice System Bridges the Great Divide in Consumer Protection*, 43 DUQ. L. REV. 219, 223–35 (2005) (emphasizing the uneven power structure in pharmaceutical cases and the need for civil litigation to protect consumer interests).

318. *Id.* at 231. For example, the courts played an important role in exposing the inadequacy of fabric flammability standards. *Id.* at 231–34 (discussing how consumers had to prosecute court claims regarding flammable children’s clothing in the 1980s to make the public aware of flammability regulations’ inadequacies and companies’ manipulations of these regulations).

319. *Iffy Product? Now a Way to Tell*, CONSUMER REP., Feb. 2011, at 16, 16–17 [hereinafter *Iffy Product*] (highlighting the difficulties of obtaining information regarding complaints and companies’ power in blocking information); *Trouble with Recalls*, *supra* note 9, at 15 (advising consumers to register products to receive recall information).

320. *Trouble with Recalls*, *supra* note 9, at 14 (also noting that recalls usually involve food or medications).

321. *Id.*

322. *Id.*

enforcement by providing consumers and manufacturers with a central portal for reporting and learning about product problems.<sup>323</sup>

#### IV. NEW AVENUES FOR INFORMATION AND REMEDIES

The confluence of these economic, behavioral, and social factors has allowed the SWS to limit consumer information and remedies regarding purchase problems.<sup>324</sup> The SWS has elevated merchants' private dispute resolution practices above the law in determining consumer complaints.<sup>325</sup> However, the Internet and computer-mediated communication (CMC) provide hope for consumers to break free from the barriers of the SWS, and may fuel policy initiatives for expanded consumer remedy mechanisms.<sup>326</sup> These mechanisms should be designed to increase consumer education regarding contract rights, and ease the costs and burdens of accessing remedies.<sup>327</sup> They also should seek to address B2C power imbalances, and level the playing field for all consumers—regardless of wealth, education, race, or age.<sup>328</sup> Specifically, policymakers should capitalize on the benefits of CMC to create and regulate Online Dispute Resolution (ODR) processes that are free or low-cost for consumers.<sup>329</sup>

##### A. Utility of Online Communications in the Digital Age

The expansion of CMC and online mechanisms has had important influences in the SWS. Digital dogma boasts the promise of the Internet,

323. *Iffy Product*, *supra* note 319, at 16–17 (discussing the new database and other technology upgrades contemplated by the CPSC).

324. See Best & Andreasen, *supra* note 5, at 727–34.

325. *Id.* at 730.

326. See Llewellyn Joseph Gibbons, *Creating a Market for Justice: a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 3 (2002) (discussing consumer use of the Internet to access information and utilize dispute resolution).

327. See Amy J. Schmitz, "Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 240–43 (2010).

328. Best & Andreasen, *supra* note 5, at 730–31.

329. See Schmitz, *supra* note 327 (discussing how online arbitration, what I term "OArb," opens new avenues for consumers to obtain remedies on their contract complaints); see also Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 308–10 (2008) (noting use for consumer small claims); Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 327–29 (2008) (discussing how use of online ADR can foster efficient dispute resolution and maximize the growth of e-commerce in England and abroad).

wireless telephones, and continually emerging technologies.<sup>330</sup> However, the growth of CMC also raises concerns regarding relational isolation, diminished creativity, and increased deception.<sup>331</sup> CMC has inspired a new generation that communicates through text messages instead of telephone calls, and socializes through chat rooms, blogs, and networks like Facebook and Twitter.<sup>332</sup> Handwritten letters and personal phone calls have become rarities.<sup>333</sup> Nonetheless, the benefits of CMC outweigh its drawbacks for consumers seeking to make wise purchases and access remedies when problems arise.

### 1. Reservations Regarding Use of CMC

CMC and e-contracting have created benefits and burdens for consumers.<sup>334</sup> Companies have nearly eliminated face-to-face (F2F) customer assistance. They often make it very difficult for consumers to locate merchant telephone contact numbers, let alone reach a live representative capable of handling one's concerns.<sup>335</sup> E-contracting also has allowed companies to shroud form terms in computer links and confusing website configurations, and to continually modify provisions *ex post*.<sup>336</sup> Many merchants routinely reserve the right to make post-contract changes to their standard e-contracts, and to post changes on their websites without sending alerts to those affected.<sup>337</sup> Consumers visiting brick-and-mortar

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330. Schmitz, *supra* note 327, at 180.

331. Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125 (2009) (discussing "dogmas" of communication via the Internet in resolving disputes). Like Kravec, I am using "dogma" in this context to refer to a "generally held set of formulated beliefs that a group holds to be true." *Id.* at 126.

332. See Betsy Israel, *The Overconnecteds*, N.Y. TIMES (Nov. 5, 2006), <http://www.nytimes.com/2006/11/05/education/edlife/connect.html?scp=1&sq=The+Overconnecteds&st=nyt>.

333. See *id.* Please excuse the nostalgia, but this loss is significant from social and psychological perspectives.

334. See 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).

335. See Sheri Carder & Larry Gunter, *Can You Hear Me? Corporate America's Communication with Dissatisfied Customers*, J. AM. & COMP. CULTURES, Fall 2001, at 109, 110 (finding, in a study of consumer complaints, that many consumers are unable to receive adequate assistance through telephone calls).

336. See Budnitz, *supra* note 334, at 1169–71 (highlighting e-contracting and dangers of using online contracts subject to modification).

337. See *id.* (noting that while courts enforce such post-contract changes, there is debate as to the proper method of notice of the changes).

stores also find it very difficult, or impossible, to find staff at those stores with the authority to make contract changes or provide redress.<sup>338</sup>

Companies also may use CMC in their rationing-by-hassle tactics to avoid consumers' claims.<sup>339</sup> Some companies ignore e-mails or send automated replies that lead consumers to give up pursuit of their complaints.<sup>340</sup> While CMC usually is convenient, it also lacks the intimacy and social cues that enhance F2F interactions.<sup>341</sup> This was why many of the consumers in my Denver focus groups voiced complaints with companies' online communications, and concluded that they often prefer to discuss complaints and claims in person with a manager or other company representative.<sup>342</sup> They also were unaware of companies with more formal online complaint mechanisms.<sup>343</sup>

The anonymity of CMC also allows for "cyber bullying."<sup>344</sup> "It's easier to fight online, because you feel more brave and in control."<sup>345</sup> CMC negotiators may become overly aggressive by adopting negative emotional styles due to the social and physical distance created through Internet communications.<sup>346</sup> CMC may diminish empathy, which may hinder dispute

338. However, consumers also reported great difficulties in attempting to contact company representatives by telephone or e-mail to negotiate terms or resolve complaints. This was especially true when purchasing goods or services via the Internet. See Focus Group Transcript, *supra* note 61.

339. See Lewis, *supra* note 4, at 100 (noting the use of hassle tactics to avoid claims).

340. Carder & Gunter, *supra* note 335, at 110.

341. See Kravec, *supra* note 331, at 125–30 (discussing and questioning social connections and contextual cues in online mediation).

342. See Focus Group Transcript, *supra* note 61.

343. *Id.*

344. Ann Epstein & Jeffrey Kazmierczak, *Cyber Bullying: What Teachers, Social Workers, and Administrators Should Know*, 3 ILL. CHILD WELFARE 41, 42 (2006–2007), available at <http://www.illinoischildwelfare.org/archives/volume3/icw3-3.pdf>.

345. 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?emc+etal&pagewanted=print> (discussing "cyberbullying," defined by the Cyberbullying Research Center as "'willful and repeated harm' inflicted through phones and computers"). See also Epstein & Kazmierczak, *supra* note 344, at 41–45 (citing cyber bullying incidents); Nancy S. Kim, *Website Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1006–15 (discussing cyber harassment and cyber bullying); *Parents: Cyber Bullying Led to Teen's Suicide*, ABCNEWS.COM (Nov. 19, 2007), <http://abcnews.go.com/GMA/story?id=3882520&page=1> (reporting a teenage suicide prompted by malicious Internet postings).

346. See JARON LANIER, *YOU ARE NOT A GADGET: A MANIFESTO* 60–63 (2010) (noting the anti-human approach fostered by the expansion of Internet life); 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, 137–38 (2003) (discussing the allowance for negative or rude communications through CMC, and its relation to "flaming" biases).

resolution.<sup>347</sup> Internet communications also are more vulnerable to misinterpretations than F2F discussions to the extent that speakers cannot immediately clarify their comments.<sup>348</sup> Nonetheless, regular use and common acceptance has helped standardize many textual cues, and this trend is likely to continue with increasing use of CMC.<sup>349</sup>

## 2. Overriding Benefits of CMC for Accessing Remedies

Despite these concerns regarding the growth of CMC, most agree that CMC's benefits outweigh its drawbacks. Online contracting fosters efficiencies that generate time and money savings for companies and consumers.<sup>350</sup> Companies enjoy cost savings from standardization and inexpensive administration of online contracts and communications, and may pass these savings on to consumers through lower prices and higher quality goods and services.<sup>351</sup> Consumers also enjoy the conveniences of managing accounts, paying bills, and communicating with companies online with relatively little cost or time.<sup>352</sup> Many companies also are more responsive to requests and questions sent through e-mails or their own website's chat or other message systems.<sup>353</sup>

Moreover, CMC has lowered hurdles and broadened means for consumers to seek remedies on their purchase complaints. The relative anonymity, privacy, and comfort of communicating from behind one's computer or smartphone often alleviate some of the social and power pressures of F2F communications that otherwise hinder many from asserting their complaints.<sup>354</sup> Visual contact alone creates stress and tensions for

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347. Matt Richtell, *Attached to Technology and Paying a Price*, N.Y. TIMES (June 6, 2010), <http://www.nytimes.com/2010/06/07/technology/07brain.html?src+me&ref=technology>.

348. See LANIER, *supra* note 346, at 60–63 (discussing dehumanizing impacts of the Internet).

349. See Bastress & Harbaugh, *supra* note 346, at 118–26 (detailing the trends of increased use of CMC in lawyering).

350. 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 money for vendors and increase consumer confidence).

351. See *id.* at 310.

352. 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, 64 (2001) (noting how customers increasingly send companies e-mails for a number of reasons).

353. See *id.* at 65 (indicating that responses to e-mails are quicker than responses to postal mail correspondence).

354. 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 that F2F communications can result in “negative emotion”).

some, especially if they fear stereotypes or biases based on appearance.<sup>355</sup> Despite reports of cyber bullying, many are actually less defensive or adversarial online than in-person.<sup>356</sup> In addition, CMC has become less sterile over time, as individuals have developed means for virtually building rapport with others and expressing their emotions over the Internet.<sup>357</sup>

The Internet also has opened avenues for consumers to share information about their purchase experiences.<sup>358</sup> This has given rise to online watchdog websites such as the Utility Consumers Action Network (UCAN). UCAN provides an online forum for consumers to alert others regarding contract dangers and to offer suggestions for avoiding or responding to consumer issues.<sup>359</sup> Furthermore, the Internet opens doors for consumers to research their purchases.<sup>360</sup> Some individuals also are more cautious in composing e-mails because they know that it has become very difficult to completely erase or retract them.<sup>361</sup>

355. *Id.* at 125–26 (noting how online dispute resolution allows parties to focus on the substantive issues, although this lack of F2F contact also has its drawbacks for facilitative processes).

356. 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, 141 (2008) (explaining evidence that less bullying occurs through online communication than F2F).

357. *Id.* 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 risks for cyber bullying).

358. See Budnitz, *supra* note 314, at 1180–81 (noting how technology can enhance consumer protection by providing portals for consumers to share information regarding companies and products).

359. See UCAN, <http://www.ucan.org> (last visited Jan. 1, 2012) (describing itself as a “non-profit, public interest consumer advocacy” group focusing on energy, communications, and water, and providing a complaint forum along with additional resources); see also Mike Scott, *Cell Phone Companies Changing Contract Terms*, THE FINE PRINT: UCAN’S CONSUMER WATCHDOG BLOG (Nov. 12, 2007), [http://www.ucan.org/blog/telecommunications/wireless/contract\\_change/cell\\_phone\\_companies\\_changing\\_contract\\_terms](http://www.ucan.org/blog/telecommunications/wireless/contract_change/cell_phone_companies_changing_contract_terms) (alerting others of changes in contracts that many would not catch); Vince, *Cancel Your Sprint/Nextel Contract Without an Early Termination Fee, Telecommunications*, UCAN (Jan. 2, 2008), [http://www.ucan.org/telecommunications/wireless/cancel\\_your\\_sprint\\_nextel\\_contract\\_without\\_early\\_termination\\_fee](http://www.ucan.org/telecommunications/wireless/cancel_your_sprint_nextel_contract_without_early_termination_fee) (providing advice on how to avoid cancellation charges).

360. See Gibbons, *supra* note 326, at 3 (discussing how the Internet is used by consumers to research prices). Although some individuals are not sufficiently careful in communicating online, there is some evidence that a growing number of online users are becoming more cautious in light of privacy and other concerns. Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (Blaise Cronin ed., 2002) (noting how Internet users are becoming more careful in their online communications due to concerns about privacy threats).

361. See Herring, *supra* note 360, at 145.

CMC also has given rise to more formalized ODR. ODR generally has included online mediation, arbitration, and other dispute resolution processes that minimize or dispel the need for F2F communications by utilizing website message systems, e-mails, and other CMC platforms.<sup>362</sup> These ODR processes can be relatively inexpensive, and allow for flexible scheduling, asynchronous communication, and real-time dialogue.<sup>363</sup> They also may be faster and less intrusive than in-person dispute resolution processes.<sup>364</sup> Furthermore, many predict that ODR will grow in coming years due to its ability to transcend borders and escape the constraints of other legal processes less suited for resolution of e-commerce and international disputes.<sup>365</sup>

Nonetheless, the limited ODR processes currently offered for consumer claims are usually non-binding, only applicable if the consumer agrees to use the merchant's own ODR process, and rarely used due to companies' failures to notify consumers about their ODR rights. For example, the Internet Corporation for Assigned Names and Numbers (ICANN) administers a non-final ODR process under the Uniform Dispute Resolution Procedures (UDRP) that parties may use in resolving domain name disputes if they agree in advance to use the process.<sup>366</sup>

The social networking website Facebook also has implemented an ODR mechanism through TRUSTe for resolution of consumers' privacy

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

363. See Gilliéron, *supra* note 329, at 328–34 (explaining how use of ODR provides beneficial and efficient avenues for communication that may transcend benefits of the F2F environment in traditional ADR).

364. This prompted the Federal Trade Commission's (FTC) 2000 public workshop and 2001 roundtable discussions exploring expanded use of ODR for resolution of consumer disputes regarding online transactions. Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, 65 Fed. Reg. 7831 (Feb. 16, 2000); Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts, 66 Fed. Reg. 7491 (Jan. 23, 2001). It appears from the FTC website and other research that little has happened since these events.

365. See, e.g., Int'l Inst. for Conflict Prevention & Resolution, *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).

366. Jason M. Osborn, Note, *Effective and Complementary Solutions to Domain Name Disputes: ICANN's Uniform Domain Name Dispute Resolution Policy and the Federal Anticybersquatting Consumer Protection Act of 1999*, 76 NOTRE DAME L. REV. 209, 214 (2000). The UDRP was adopted on August 26, 1999, and the implementation documents were approved on October 24, 1999. *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy*, ICANN, <http://www.icann.org/en/udrp/udrp-schedule.htm> (last modified Aug. 13, 2010); Internet Corporation for Assigned Names and Numbers (ICANN): Rules for Uniform Domain Name Dispute Resolution Policy, 39 I.L.M. 952 (2000); *WIPO Arbitration Rules*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/amc/en/arbitration/rules/index.html> (last visited Jan. 5, 2012).

disputes.<sup>367</sup> Under the applicable rules, Facebook must comply with TRUSTe determinations regarding misuse of personally identifiable information or violations of privacy. The problem is that consumers are generally unaware of their rights to use the TRUSTe process.<sup>368</sup> This is because such rights are buried in the labyrinth of terms and conditions posted among the links on Facebook.<sup>369</sup> Furthermore, consumers are generally unaware that the BBB also tracks complaints against Facebook.<sup>370</sup>

### *B. Suggestions for Expanding and Equalizing Consumer Assistance*

The time is ripe for commentators and policymakers to consider how the SWS fosters contractual discrimination and corrosion of “informed minority” market regulation, and to design complaint mechanisms that help expand and equalize consumers’ access to remedies.<sup>371</sup> Policymakers should capitalize on the benefits of CMC to craft complaint mechanisms and ODR processes that are transparent, user-friendly, and worth their costs in light of the complexity and possible payout on the claims at issue.<sup>372</sup> In addition, processes should be sufficiently simple for consumers to use without the need for legal assistance, and should allow consumers to obtain neutral claim evaluations and enforceable remedies.<sup>373</sup>

367. See 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 since 2006); see also *File a Privacy Complaint*, TRUSTE, <http://watchdog.truste.com/pvr.php?page=complaint> (last visited Jan. 5, 2012); *Privacy Program Requirements*, TRUSTE, <http://www.truste.com/privacy-program-requirements/> (last visited Jan. 5, 2012); *Watchdog Dispute Resolution Process*, TRUSTE, [http://www.truste.com/why\\_TRUSTe\\_privacy\\_services/online-privacy-watchdog](http://www.truste.com/why_TRUSTe_privacy_services/online-privacy-watchdog) (last visited Jan. 5, 2012).

368. See *Watchdog Dispute Resolution Process*, *supra* note 367 (further explaining the TRUSTe process). Notably however, the process strictly limits eligible claims and allowable remedies, and gives TRUSTe great discretion in applying these limits. *Id.*

369. See Memorandum from Heather Park, Research Assistant, to author (May 25, 2010) (on file with author) (documenting and reporting an informal poll of users indicating that they did not know about the eTrust 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. See also E-mail from David Horton to author, *supra* note 116 (recounting one law professor’s struggle to get out of a contract after overlooking click-wrap on a “free” service); Memorandum from Nathan Vassar to author, *supra* note 115 (reciting one law student’s battle with a company after failing to read e-contract terms).

370. See *BBB Business Review—Facebook*, BETTER BUS. BUREAU, <http://sanjose.bbb.org/Business-Report/Facebook-223670> (last visited Jan. 16, 2012).

371. See *supra* text accompanying notes 160–63.

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

373. See *id.* at 309–18 (noting what works and does not work in dispute resolution mechanisms).



With this in mind, the first step should be to raise awareness regarding available remedies. Individuals gain confidence to pursue their rights and are more proactive in economic choices when they learn what others ask for and obtain with respect to similar complaints.<sup>374</sup> Industry and consumer groups such as the BBB already compile and post general statistics regarding complaints that consumers file with the BBB, but should also post information regarding companies' provision of price and fee reductions to consumers upon request. For example, the BBB could require companies seeking its approval to submit reports stating average fee and price reductions they provide to consumers who ask. Membership fees could cover the relatively low cost of compiling and adding this information to BBB postings. The database could resemble the aforementioned CPSC database for product safety complaints that launched in 2011.<sup>375</sup>

Independent and industry groups should also work together to educate consumers about existing complaint resolution mechanisms. For example, the BBB facilitates mechanisms for resolving consumers' complaints against automobile dealers, cellular phone companies, and most other B2C merchants.<sup>376</sup> These mechanisms help consumers gain companies' attention on their claims, and often lead to dispute settlements. These processes are non-binding unless the parties agree that the result will be final, but companies' reputational concerns often prompt them to provide remedies on claims that the BBB determines valid and supported by adequate information to be worthy of response. Furthermore, these processes help consumers structure their complaints and communications with companies.<sup>377</sup> This can be especially useful for consumers who otherwise lack the education or experience to assert complaints on their own.<sup>378</sup>

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374. See Wang, *supra* note 126, at 1309–11 (proposing that employees gain access to information regarding others' salaries to address gender differences in negotiations and to help women obtain equal pay); Penelope Wang, *7 Secrets to a Richer Retirement*, CNN MONEY (Sept. 22, 2010), [http://money.cnn.com/2010/09/21/retirement/richer\\_retirement.money/mag/index.htm](http://money.cnn.com/2010/09/21/retirement/richer_retirement.money/mag/index.htm) (noting how individuals may increase their saving for retirement when aware of what others are saving).

375. See *supra* note 323 and accompanying text (noting the database launched in March 2011); see also *CPSC's Product Safety Information Database*, SAFER PRODUCTS, <http://www.saferproducts.gov/> (last visited Jan. 1, 2012) (CPSC database launched on March 11, 2011 for reporting harmful products).

376. The BBB has been active in handling consumers' escalating complaints against cellular phone companies. See *US BBB 2009 Statistics Sorted by Complaint*, BETTER BUS. BUREAU, [http://www.bbb.org/us/storage/16/documents/stats%20pdf/us\\_complaint.pdf](http://www.bbb.org/us/storage/16/documents/stats%20pdf/us_complaint.pdf) (last visited Jan. 1, 2012); *US BBB 2008 Statistics Sorted by Complaints*, BETTER BUS. BUREAU, [http://www.bbb.org/us/storage/16/documents/stats%20pdf/us\\_by\\_complaint\\_2008\\_inter.pdf](http://www.bbb.org/us/storage/16/documents/stats%20pdf/us_by_complaint_2008_inter.pdf) (last visited Jan. 1, 2012); *US BBBs Sorted by Complaint 2007*, BETTER BUS. BUREAU, [http://www.bbb.org/us/storage/0/shared%20documents/complaintstats/stat2007/us\\_by\\_complaint\\_2007.pdf](http://www.bbb.org/us/storage/0/shared%20documents/complaintstats/stat2007/us_by_complaint_2007.pdf) (last visited Jan. 1, 2012).

377. Stuhlmacher & Walters, *supra* note 131, at 657–59 (noting research suggesting that constraints on communication modes may reduce gender bias).

378. See *supra* note 44 and accompanying text.

It is no surprise that the BBB has used ODR processes. As noted above, the Internet has opened new avenues for consumers to share purchase and product information, and to assert complaints through ODR mechanisms such as that administered through TRUSTe.<sup>379</sup> When properly regulated to ensure impartiality and fair procedures, such mechanisms may ease cost, time, and bias concerns inherent in F2F dispute resolution.<sup>380</sup> Online processes may also dispel the stresses of seeking assistance by providing a structured, text-based means for communicating needs.<sup>381</sup> They also may give companies more accurate feedback and better information regarding their practices and products.<sup>382</sup>

In addition, expanded use of ODR that provides a binding award (online arbitration, or what I term “OArb”) may be especially effective for quick resolution of consumer claims.<sup>383</sup> While ODR that facilitates voluntary agreements is laudable, it often is unsuccessful in the wake of disputes. By requiring parties to commit to submitting disputes to binding arbitration, OArb prevents parties from allowing anger or delay tactics to waylay resolution and thus access to remedies. OArb also may be more satisfactory and productive than non-binding processes because parties participate knowing that it will end in a final determination.<sup>384</sup>

Nonetheless, OArb commitment must be voluntary and properly regulated to ensure fairness.<sup>385</sup> F2F arbitration has earned a poor reputation for curbing consumer and employee rights due to pro-business procedures

379. See *supra* text accompanying notes 367–68.

380. Stuhlmacher & Walters, *supra* note 131, at 659 (noting studies showing that CMC eases communication bias by reducing social cues and subconscious propensities present in F2F communications).

381. See Jelle van Veenen, *From :( to :-): Using Online Communication to Improve Dispute Resolution* 1–20 (Tilburg Inst. for Interdisciplinary Studies of Civil Law & Conflict Resolution Sys., Working Paper No. 002/2010, 2010), available at <http://ssrn.com/abstract=1618719> (noting how online communications can improve dispute resolution).

382. See *supra* notes 362–70 and accompanying text (noting the benefits of ODR).

383. OArb differs from other ODR because it results in a final third-party determination without the cost and stress of traditional litigation. See Schmitz, *supra* note 327 (proposing expansion of OArb).

384. See *id.* at 193.

385. See David J. Bilinsky, *10 Collaborative Principles for Leading a Successful ODR System Initiative*, ODR & CONSUMERS 2010 (Sept. 1, 2010), <http://www.odrandconsumers2010.org/2010/09/01/10-collaborative-principles-for-leading-a-successful-odr-system-initiative> (guest post by Ben Ziegler) (providing tips for increasing confidence in e-commerce through ODR systems); David J. Bilinsky, *Implementation Consideration for ODR*, ODR & CONSUMERS 2010 (Aug. 2, 2010), <http://www.odrandconsumers2010.org/2010/08/02/implementation-considerations-for-odr> (discussing best practices for ODR); Schmitz, *supra* note 327, at 235–40 (discussing fairness limits and safety measures for OArb).

and administration.<sup>386</sup> Although it is questionable whether F2F arbitration deserves this reputation, it is important to design and regulate neutral and fair OArb procedures that will foster open-minded use of the process.<sup>387</sup>

Accordingly, policymakers should capitalize on CMC's low cost, speed, and accessibility.<sup>388</sup> OArb policies should cap consumers' costs and set strict time limits for companies to respond to complaints. Policies also should allow for sufficient but properly limited discovery, and limit time on evidentiary submissions and awards. Furthermore, arbitrators must be neutral and properly trained, and have power to hold companies responsible for failing to quickly comply with arbitration awards. Regulators should then seek user feedback in order to foster continual system improvements.<sup>389</sup>

OArb regulations also could mimic California's code provisions requiring arbitration administrators to gather and post basic information regarding consumer claims in an easily searchable format.<sup>390</sup> This information includes the names of companies involved, types of disputes, prevailing parties, time from filing to disposition, claim and award amounts, arbitrators' names, and other basic information not properly redacted as confidential.<sup>391</sup> Such postings help increase trust and transparency with respect to the process, and uncover party and award patterns that would suggest an arbitration administrator's bias for repeat-player companies who continually use its services.<sup>392</sup>

At the same time, policymakers should promote neutral and user-friendly means for consumers to safely "vent" and share information

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386. See, e.g., *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867–68 (Ct. App. 2002) (holding that a class action ban in an arbitration agreement was unconscionable where it was likely to preclude most consumers from seeking remedies on their small claims).

387. See Schmitz, *supra* note 327, at 226–44 (proposing regulated ODR for consumer complaint resolution).

388. See *supra* text accompanying notes 367–68.

389. See Schmitz, *supra* note 327, at 226–44; see also Xu Junke, *Development of ODR in China*, 42 UCC L.J. 265, 265–72 (2010) (discussing ODR in China and the need for increased online trust and consumer confidence to boost ODR processes and encourage "self-discipline" of e-commerce); 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), available at <http://colinrule.com/writing/ucclj.pdf> (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 Article, but further discussion may be found in Schmitz, *supra* note 327, at 177–244 (proposing prudent expansion).

390. CAL. CIV. PROC. CODE § 1281.96 (2011).

391. *Id.*

392. Further research and policy discussions should nonetheless guide OArb's development. See Rule et al., *supra* note 389, at 222–30. Debates on ODR have grown on global levels, and hold great promise for consumer claims resolution. See ODR 2012, <http://www.odr2012.org/node?page=1> (last visited Jan. 1, 2012) (announcing the most recent ODR conference).

regarding their purchase complaints.<sup>393</sup> Consumers already connect, share opinions, and spread information regarding company practices and products on websites such as UCAN, noted above.<sup>394</sup> The new CPSC database, also noted above, is part of a larger technology upgrade aimed to provide consumers and others with greater access to complaint information.<sup>395</sup> The *New York Times* and other news sources also maintain online columns for voicing consumer complaints and seeking assistance.<sup>396</sup>

Consumers have power to prompt corporate changes. For example, Facebook retracted onerous changes to its privacy standards after users joined forces on the Internet to complain.<sup>397</sup> Similarly, Musikpitch, a company that facilitates custom song commissions for television and movies, changed its terms in the wake of users' complaints about the terms' requirement that songwriters transfer ownership of their songs to the company.<sup>398</sup> Musikpitch ultimately appeased users by no longer assuming ownership of song rights, and instead allowing users to choose between one of three sets of terms and conditions.<sup>399</sup>

Nonetheless, policy initiatives may be necessary to combat cyber bullying, dehumanization, and anti-normative behavior on the Internet.<sup>400</sup> Organizations that host blogs and review websites should monitor postings to preclude abusive or false comments.<sup>401</sup> Furthermore, regulations should

393. See *supra* note 55 and accompanying text.

394. See UCAN, <http://www.ucan.org> (last visited Oct. 8, 2011); see also *supra* note 359 and accompanying text (discussing postings and advice on UCAN's website).

395. See *Iffy Product*, *supra* note 319, at 16–17 (discussing the database that debuted on March 11, 2011, pursuant to a law passed in 2008).

396. See, e.g., David Segal, *Scammed? Rebuffed? Ignored? Read On*, N.Y. TIMES (May 10, 2009), <http://nytimes.com/2009/05/10/your-money/10haggler.html> (regular column, *The Haggler*); David Segal, *The Refund That Circled Before Landing*, N.Y. TIMES (May 7, 2009), <http://nytimes.com/2010/05/09/business/09haggler.html> (regular column, *The Haggler*, noting the first anniversary of the column, and responding to consumers' submitted questions and complaints).

397. Justin Smith, *Facebook Reverts Terms of Service After Complaints*, INSIDE FACEBOOK, (Feb. 18, 2009), <http://www.insidefacebook.com/2009/02/18/facebook-reverts-terms-of-service-after-complaints> (explaining how consumer protests forced Facebook to ultimately revert to its old terms while it rewrote more consumer-friendly privacy terms).

398. Bruce Houghton, *MusikPitch Responds to Complaints, Revises Terms*, HYPEBOT.COM, <http://www.hypebot.com/hypebot/2010/05/musikpitch-responds-to-complaints-revises-terms.html> (last visited Jan. 1, 2012).

399. See *id.*

400. See van Veenen, *supra* note 381, at 20–23 (discussing how online communications may actually heighten adherence to social norms, reduce the stress of F2F communication, and allow for emotive communications).

401. Charles Starmer-Smith, *Tripadvisor Reviews: Can We Trust Them?*, TELEGRAPH (London) (Oct. 20, 2010), <http://www.telegraph.co.uk/travel/hotels/8050127/Tripadvisor-reviews-can-we>

bar companies from disingenuously promoting their products and services by paying for positive reviews or posting fake reviews (“flogging”) on blogs and review sites.<sup>402</sup>

Website controllers and administrators must adopt policies aimed to protect the integrity and utility of website discussions. Information-sharing mechanisms do not enhance consumer education or inform purchase practices when postings are not trustworthy. Website controllers should be responsible for verifying that reviewers have actually purchased the reviewed goods or services, and allow businesses to respond to complaints.<sup>403</sup> Although controls should not overly infringe on free speech, they should curtail the tone of comments from crossing the line to abuse. Policymakers should also establish means for certifying sites that consumers can rely on for solid purchasing advice.

Still, efforts should continue toward development of remedies for those who lack Internet services due to location or other resource limitations. Non-Internet media should remain available to provide consumer information and access to remedies. Local news channels already do “special investigations” that inform consumers about company improprieties and prompt policy changes. For example, a local news channel’s special investigation inspired a Colorado tanning salon to provide relief to consumers who felt cheated by fine print in the salon’s terms that precluded customers from canceling without paying fifty percent of the remaining balance on their one or two year contracts.<sup>404</sup> The television report became the squeaky wheel for the otherwise myopic majority, and allowed consumers to obtain relief from shrouded contract terms.

In sum, these are merely reform ideas to build on. Furthermore, reforms should increase consumers’ awareness and remedy resources without increasing litigation or government oversight that will augment public and private costs. For example, the new Consumer Financial Protection Bureau (CFPB) established under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) should be careful in establishing

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trust-them.html (discussing fake and spiteful reviews that severely impact businesses, despite the reviews’ lack of verification).

402. Lisa Thomas & Robert Newman, *Social Networking and Blogging: The New Legal Frontier*, 9 J. MARSHALL REV. INTELL. PROP. L. 500, 516–17 (2009) (providing examples of companies faking reviews); Mark Balnaves & James Mahoney, Editorial, *The Illusion of Control in Public Relations*, PUB. REL. RESOURCE CENTER, <http://www.prismjournal.org/global.html> (last visited Nov. 14, 2011) (also discussing companies covert schemes); Starmer-Smith, *supra* note 401 (discussing purchase reviews posted on the popular travel review site).

403. Starmer-Smith, *supra* note 401 (discussing the importance of proper monitoring and noting how eBay and Apple have had success in limiting reviews to those of verified customers).

404. Heidi Hemmat, *Complaints Prompt Changes ‘At the Beach,’* KDVR, FOX 31 DENVER (Dec. 17, 2009), <http://www.kdvr.com/news/kdvr-at-the-beach-folo-121709,0,4746023.story> (describing how a Fox 31 News investigation caused the salon to offer a “courtesy cancellation” to the customer who complained).

consumer protections aimed to end lending abuses.<sup>405</sup> The Bureau may be wise to promulgate regulations that promote use of low-cost CMC to establish and inform consumers about accessible complaint-processing mechanisms with respect to the goods and services they sell.

Transparent and accessible remedy mechanisms are essential to prevent the SWS from perpetuating contractual discrimination and remedy rationing that thrives in low-information environments. However, this does not require complicated disclosures that lead to information overload. Instead, companies could provide customers with a simple chart stating who to contact regarding complaints, and how the complaint processing works. In addition, the CFPB or an independent organization comprised of consumer and industry leaders could gather and centrally post this information with respect to all companies on a searchable website.<sup>406</sup> This central listing could dovetail with the database proposed above for compiling legitimate complaints asserted against companies and the remedies provided. Such transparency should spark companies to improve their complaint handling processes, and help empower consumers to pursue legitimate complaints and protect their rights regardless of status.

## V. CONCLUSION

Consumers should benefit from exerting resources to pursue their purchase complaints, and companies often have benign motives in assisting the squeaky wheel customers. However, the SWS also impedes market regulation of business practices and fosters contractual discrimination.<sup>407</sup> The SWS allows companies to ration consumer remedies and benefits by quietly reserving them for only the relatively few proactive consumers who

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405. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code). *See also* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009) (proposed bill to establish an agency to regulate consumer financial products and services and authorizing the agency to approve pilot programs for effective disclosure of consumer contract terms); *Learn About the Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Jan. 1, 2012). *But see* David S. Evans & Joshua D. Wright, *How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products*, BLOOMBERG L. REP.: RISK & COMPLIANCE, Oct. 2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1491117](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491117) (critiquing the Dodd-Frank Act for advocating broad applications without an adequate evidentiary basis).

406. A full discussion of the options is beyond the scope of this Article. Instead, this Article seeks to spark discussion and creative ideas for educating and empowering consumers in the most efficient and effective manner—which may be through public or private means.

407. *See supra* Part III.A.

have the requisite knowledge and resources to remain persistent in pursuing their rights.<sup>408</sup> This leaves the majority without benefits they may deserve. It also hinders the informed squeaky wheels from sharing their knowledge, and thus the available benefits, with the majority.<sup>409</sup> These proactive consumers therefore fail to fulfill the role of the so-called informed minority, who economists propose will spread information and police contract fairness.<sup>410</sup>

Accordingly, policymakers should work with businesses and consumers to expand and equalize consumers' access to information and assistance with respect to their purchase rights.<sup>411</sup> This should begin with use of low-cost online mechanisms to raise awareness regarding contract rights and remedies, and to create accessible claims procedures designed to diffuse the SWS. Furthermore, companies should expand ODR and OArb for consumers to obtain redress on their legitimate purchase complaints. In addition, the CFPB or an independent organization could assist in these efforts with an aim toward empowering consumers to protect their rights regardless of race, gender, or socioeconomic status.

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408. *See supra* Part III.A.

409. *See supra* Part II.A.

410. *See supra* Part II.A.

411. *See supra* Part IV.B.

Appendix A. *Demographic Information.*Age

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	18–24 yrs. old	19	6.2	6.2	6.2
	25–29 yrs. old	16	5.2	5.2	11.4
	30–39 yrs. old	40	13.1	13.1	24.5
	40–49 yrs. old	73	23.9	23.9	48.4
	50–59 yrs. old	81	26.5	26.5	74.8
	60–69 yrs. old	54	17.6	17.6	92.5
	70 yrs. or over	23	7.5	7.5	100
	Total	306	100	100	

Household Income

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	less than \$20,000	43	14.1	17.1	17.1
	\$20,000–\$29,999	33	10.8	13.1	30.3
	\$30,000–\$39,999	43	14.1	17.1	47.4
	\$40,000–\$49,999	32	10.5	12.7	60.2
	\$50,000–\$59,999	22	7.2	8.8	68.9
	\$60,000–\$74,999	26	8.5	10.4	79.3
	\$75,000–\$99,999	24	7.8	9.6	88.8
	\$100,000– \$149,999	23	7.5	9.2	98
	\$150,000+	5	1.6	2	100
	Total	251	82	100	
Missing	System	55	18		
Total		306	100		



Marital Status

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	single, never married	58	19	19	19
	married	150	49	49	68
	separated/divorced/ widowed	75	24.5	24.5	92.5
	domestic partnership	23	7.5	7.5	100
	Total	306	100	100	

Employment Status

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	full-time	129	42.2	42.2	42.2
	part-time	49	16	16	58.2
	not employed	128	41.8	41.8	100
	Total	306	100	100	

Education Level

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	some HS	5	1.6	1.6	1.6
	HS graduate	34	11.1	11.1	12.7
	some college	135	44.1	44.1	56.9
	college degree	78	25.5	25.5	82.4
	some postgrad	17	5.6	5.6	87.9
	master's degree	27	8.8	8.8	96.7
	Ph.D./law/prof. degree	10	3.3	3.3	100
	Total	306	100	100	

Respondent Occupation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	exec./upper mgmt.	12	3.9	4.5	4.5
	IT/MIS professional	11	3.6	4.1	8.6
	doctor/surgeon	2	0.7	0.7	9.4
	educator	11	3.6	4.1	13.5
	homemaker	33	10.8	12.4	25.8
	student	13	4.2	4.9	30.7
	none of above	168	54.9	62.9	93.6
	small business owner	17	5.6	6.4	100
	Total	267	87.3	100	
Missing	System	39	12.7		
Total		306	100		

Racial/Ethnic Identification

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	unspecified	45	14.7	14.7	14.7
	other	6	2	2	16.7
	Hispanic	6	2	2	18.6
	multi: Hispanic/other	2	0.7	0.7	19.3
	Pacific Islander	2	0.7	0.7	19.9
	Indian	2	0.7	0.7	20.6
	multi: Hispanic/Indian	1	0.3	0.3	20.9
	Asian	3	1	1	21.9
	black	2	0.7	0.7	22.5
	white	228	74.5	74.5	97.1
	multi: white/other	1	0.3	0.3	97.4
	multi: white/Hispanic	4	1.3	1.3	98.7
	multi: white/Pacific/Hispanic	1	0.3	0.3	99
	multi: white/Indian	2	0.7	0.7	99.7
	multi: white/Indian/Hispanic	1	0.3	0.3	100
Total	306	100	100		

Gender

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	male	103	33.7	33.7	33.7
	female	203	66.3	66.3	100
	Total	306	100	100	

Appendix B. S2Q8: Think broadly about how fair (using your own sense of “fairness”) you view different contracts and purchase terms, regardless of whether you have relevant personal experiences. Please indicate how fair you view the following terms.

Gym Memberships

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	12	3.9	4	4
	usually fair	80	26.1	26.9	31
	neutral	118	38.6	39.7	70.7
	usually unfair	74	24.2	24.9	95.6
	completely unfair	13	4.2	4.4	100
	Total	297	97.1	100	
Missing	System	9	2.9		
Total		306	100		

Company Standard Form Contracts/Purchase Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	8	2.6	2.7	2.7
	usually fair	164	53.6	55.2	57.9
	neutral	102	33.3	34.3	92.3
	usually unfair	20	6.5	6.7	99
	completely unfair	3	1	1	100
	Total	297	97.1	100	
Missing	System	9	2.9		
Total		306	100		

Employment Contracts and Handbooks

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	34	11.1	11.4	11.4
	usually fair	170	55.6	57	68.5
	neutral	73	23.9	24.5	93
	usually unfair	14	4.6	4.7	97.7
	completely unfair	7	2.3	2.3	100
	Total	298	97.4	100	
Missing	System	8	2.6		
Total		306	100		

Loan Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	24	7.8	8.1	8.1
	usually fair	132	43.1	44.4	52.5
	neutral	86	28.1	29	81.5
	usually unfair	46	15	15.5	97
	completely unfair	9	2.9	3	100
	Total	297	97.1	100	
Missing	System	9	2.9		
Total		306	100		

Apartment Leases

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	19	6.2	6.4	6.4
	usually fair	134	43.8	45	51.3
	neutral	94	30.7	31.5	82.9
	usually unfair	41	13.4	13.8	96.6
	completely unfair	10	3.3	3.4	100
	Total	298	97.4	100	
Missing	System	8	2.6		
Total		306	100		

Vehicle Sales Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	19	6.2	6.4	6.4
	usually fair	152	49.7	51	57.4
	neutral	80	26.1	26.8	84.2
	usually unfair	35	11.4	11.7	96
	completely unfair	12	3.9	4	100
	Total	298	97.4	100	
Missing	System	8	2.6		
Total		306	100		

Credit Card Contracts or Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	18	5.9	6.1	6.1
	usually fair	98	32	33	39.1
	neutral	78	25.5	26.3	65.3
	usually unfair	84	27.5	28.3	93.6
	completely unfair	19	6.2	6.4	100
	Total	297	97.1	100	
Missing	System	9	2.9		
Total		306	100		

Internet Contracts/Purchase Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	12	3.9	4.1	4.1
	usually fair	120	39.2	40.5	44.6
	neutral	139	45.4	47	91.6
	usually unfair	19	6.2	6.4	98
	completely unfair	6	2	2	100
	Total	296	96.7	100	
Missing	System	10	3.3		
Total		306	100		

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	24	7.8	8.1	8.1
	usually fair	160	52.3	53.9	62
	neutral	73	23.9	24.6	86.5
	usually unfair	37	12.1	12.5	99
	completely unfair	3	1	1	100
	Total	297	97.1	100	
Missing	System	9	2.9		
Total		306	100		

Cell Phone Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	16	5.2	5.4	5.4
	usually fair	94	30.7	31.8	37.2
	neutral	83	27.1	28	65.2
	usually unfair	83	27.1	28	93.2
	completely unfair	20	6.5	6.8	100
	Total	296	96.7	100	
Missing	System	10	3.3		
Total		306	100		



Contracts with Friends

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	26	8.5	8.8	8.8
	usually fair	92	30.1	31.2	40
	neutral	151	49.3	51.2	91.2
	usually unfair	15	4.9	5.1	96.3
	completely unfair	11	3.6	3.7	100
	Total	295	96.4	100	
Missing	System	11	3.6		
Total		306	100		

Contracts with Family

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	34	11.1	11.6	11.6
	usually fair	87	28.4	29.6	41.2
	neutral	146	47.7	49.7	90.8
	usually unfair	18	5.9	6.1	96.9
	completely unfair	9	2.9	3.1	100
	Total	294	96.1	100	
Missing	System	12	3.9		
Total		306	100		

Dispute or Claim Settlement Agreements

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	completely fair	17	5.6	5.8	5.8
	usually fair	79	25.8	26.9	32.7
	neutral	131	42.8	44.6	77.2
	usually unfair	60	19.6	20.4	97.6
	completely unfair	7	2.3	2.4	100
	Total	294	96.1	100	
Missing	System	12	3.9		
Total		306	100		

Appendix C. *S3Q6: Now think generally about any complaints or disputes you have had regarding consumer purchases of products or services. What, if any, terms have you found to be important at some point with respect to a complaint or dispute? Check all that apply.*

Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	245	80.1	80.1	80.1
	yes	61	19.9	19.9	100
	Total	306	100	100	

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	132	43.1	43.1	43.1
	yes	174	56.9	56.9	100
	Total	306	100	100	

Fees/Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	192	62.7	62.7	62.7
	yes	114	37.3	37.3	100
	Total	306	100	100	

Interest Rate for Credit Payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	240	78.4	78.4	78.4
	yes	66	21.6	21.6	100
	Total	306	100	100	

Returning Items

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	153	50	50	50
	yes	153	50	50	100
	Total	306	100	100	

Cancelling Services

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	163	53.3	53.3	53.3
	yes	143	46.7	46.7	100
	Total	306	100	100	

Arbitration Requirements

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	271	88.6	88.6	88.6
	yes	35	11.4	11.4	100
	Total	306	100	100	

Freebies/Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	279	91.2	91.2	91.2
	yes	27	8.8	8.8	100
	Total	306	100	100	

Disclaimers/Waivers of Liability

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	252	82.4	82.4	82.4
	yes	54	17.6	17.6	100
	Total	306	100	100	

Other (yes/no)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	299	97.7	97.7	97.7
	yes	7	2.3	2.3	100
	Total	306	100	100	

Appendix D. *S3Q1: Now focus again on your consumer purchases and the form contracts or purchase terms you encounter when buying consumer products and services. Roughly, how often do you try to negotiate or change such form contracts or terms when you purchase consumer products or services?*

How Often You Change Contracts or Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	never	115	37.6	38	38
	rarely	83	27.1	27.4	65.3
	sometimes	65	21.2	21.5	86.8
	half the time	14	4.6	4.6	91.4
	frequently	19	6.2	6.3	97.7
	nearly all the time	7	2.3	2.3	100
	Total	303	99	100	
Missing	System	3	1		
Total		306	100		

Appendix E. *S3Q1: Cross-tabulated with Gender.*

How Often You Change Contracts or Terms x Gender

		never	rarely	sometimes	half the time	frequently	nearly all the time	
Gender	male	26	28	31	6	7	3	101
	female	89	55	34	8	12	4	202
Total		115	83	65	14	19	7	303

Appendix F. *S3Q1A: If you have tried to change form terms, roughly how often have you been able to get the terms changed when you tried?*

How Often You Successfully Change Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	never	24	7.8	13.2	13.2
	rarely	54	17.6	29.7	42.9
	sometimes	53	17.3	29.1	72
	half the time	22	7.2	12.1	84.1
	frequently	22	7.2	12.1	96.2
	nearly all the time	7	2.3	3.8	100
	Total	182	59.5	100	
Missing	System	124	40.5		
Total		306	100		

Appendix G. *S3Q1B: What types of terms have you been able to get changed in form contracts? Check all that apply:*

Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	195	63.7	63.7	63.7
	yes	111	36.3	36.3	100
	Total	306	100	100	

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	265	86.6	86.6	86.6
	yes	41	13.4	13.4	100
	Total	306	100	100	

Fees/Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	245	80.1	80.1	80.1
	yes	61	19.9	19.9	100
	Total	306	100	100	

Interest Rate for Credit Payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	260	85	85	85
	yes	46	15	15	100
	Total	306	100	100	

Terms for Returning

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	266	86.9	86.9	86.9
	yes	40	13.1	13.1	100
	Total	306	100	100	

Terms for Cancelling Services

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	274	89.5	89.5	89.5
	yes	32	10.5	10.5	100
	Total	306	100	100	

Terms for Arbitration Claims

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	299	97.7	97.7	97.7
	yes	7	2.3	2.3	100
	Total	306	100	100	

Terms for Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	270	88.2	88.2	88.2
	yes	36	11.8	11.8	100
	Total	306	100	100	

Disclaimers/Waivers of Liability

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	289	94.4	94.4	94.4
	yes	17	5.6	5.6	100
	Total	306	100	100	



Appendix H. S2Q6: Now think generally about purchase terms that sellers provide in a standard form. Again, as described at the start of Part II, these form terms may be provided at a store, in the mail, in or on product packaging, or on the seller's Web site on the Internet. With this in mind, indicate your level of agreement with the following statements about such form terms.

Assume Cannot Change

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	strongly agree	88	28.8	28.9	28.9
	somewhat agree	114	37.3	37.4	66.2
	neutral	57	18.6	18.7	84.9
	somewhat disagree	32	10.5	10.5	95.4
	strongly disagree	14	4.6	4.6	100
	Total	305	99.7	100	
Missing	System	1	0.3		
Total		306	100		

Waste of Time to Read

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	strongly agree	4	1.3	1.3	1.3
	somewhat agree	22	7.2	7.2	8.6
	neutral	62	20.3	20.4	28.9
	somewhat disagree	82	26.8	27	55.9
	strongly disagree	134	43.8	44.1	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Very Important to Read

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	strongly agree	139	45.4	45.7	45.7
	somewhat agree	102	33.3	33.6	79.3
	neutral	50	16.3	16.4	95.7
	somewhat disagree	9	2.9	3	98.7
	strongly disagree	4	1.3	1.3	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Don't See Why I Should Read

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	strongly agree	3	1	1	1
	somewhat agree	17	5.6	5.6	6.6
	neutral	58	19	19.1	25.7
	somewhat disagree	89	29.1	29.3	54.9
	strongly disagree	137	44.8	45.1	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Read Since Having a Purchase Problem

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	strongly agree	15	4.9	4.9	4.9
	somewhat agree	79	25.8	25.9	30.8
	neutral	79	25.8	25.9	56.7
	somewhat disagree	79	25.8	25.9	82.6
	strongly disagree	53	17.3	17.4	100
	Total	305	99.7	100	
Missing	System	1	0.3		
Total		306	100		

Only Read After a Problem With That Purchase

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	strongly agree	8	2.6	2.6	2.6
	somewhat agree	49	16	16.1	18.8
	neutral	54	17.6	17.8	36.5
	somewhat disagree	86	28.1	28.3	64.8
	strongly disagree	107	35	35.2	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Appendix I. S3Q4: *Now think broadly about your purchases generally. How often have you read contract or purchase terms covering a consumer product or service for the first time only after complaints or disputes arose about the product or service?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	never	34	11.1	11.4	11.4
	rarely	87	28.4	29.2	40.6
	sometimes	66	21.6	22.1	62.8
	half the time	37	12.1	12.4	75.2
	frequently	25	8.2	8.4	83.6
	nearly all the time	22	7.2	7.4	90.9
	n/a; never had a complaint or dispute	27	8.8	9.1	100
	Total	298	97.4	100	
Missing	System	8	2.6		
Total		306	100		

Appendix J. S3Q5: How often have you gone back to review terms you had previously read or skimmed because of a complaint or dispute?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	never	16	5.2	5.4	5.4
	rarely	69	22.5	23.2	28.5
	sometimes	99	32.4	33.2	61.7
	half the time	26	8.5	8.7	70.5
	frequently	46	15	15.4	85.9
	nearly all the time	16	5.2	5.4	91.3
	n/a; never had a complaint or dispute	26	8.5	8.7	100
	Total	298	97.4	100	
Missing	System	8	2.6		
Total		306	100		

Appendix K. S3Q3: Imagine that you are shopping for a car and have found the one you think you want. The salesperson gives you a five page contract with purchase terms, and asks you to sign it in order to finalize the purchase. Please review the list of purchase terms below, and check all the terms that you would want the salesperson to explain to you.

Explain Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	84	27.5	27.5	27.5
	yes	222	72.5	72.5	100
	Total	306	100	100	

Explain Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	24	7.8	7.8	7.8
	yes	282	92.2	92.2	100
	Total	306	100	100	

Explain Fees/Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	49	16	16	16
	yes	257	84	84	100
	Total	306	100	100	

Explain Interest Rate for Payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	76	24.8	24.8	24.8
	yes	230	75.2	75.2	100
	Total	306	100	100	

Explain Terms for Return

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	73	23.9	23.9	23.9
	yes	233	76.1	76.1	100
	Total	306	100	100	

Explain Arbitration Requirements

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	135	44.1	44.1	44.1
	yes	171	55.9	55.9	100
	Total	306	100	100	

Explain Freebies/Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	157	51.3	51.3	51.3
	yes	149	48.7	48.7	100
	Total	306	100	100	

Explain Disclaimers/Liability Waivers

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	76	24.8	24.8	24.8
	yes	230	75.2	75.2	100
	Total	306	100	100	

Explain Boilerplate

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	179	58.5	58.5	58.5
	yes	127	41.5	41.5	100
	Total	306	100	100	

Explain Technical/Legal Words

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	122	39.9	39.9	39.9
	yes	184	60.1	60.1	100
	Total	306	100	100	

Explain Other (yes/no)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	300	98	98	98
	yes	6	2	2	100
	Total	306	100	100	

No Terms Explained

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	301	98.4	98.4	98.4
	yes	5	1.6	1.6	100
	Total	306	100	100	



Appendix L. *SIQ3: When you do “shop around” or compare choices, what leads you to make final purchasing decisions? Think about the factors below, and indicate how important each of the factors generally is to you in deciding what to buy.*

Personal Relationship to Seller

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	35	11.4	11.6	11.6
	somewhat important	88	28.8	29	40.6
	minor importance	114	37.3	37.6	78.2
	not important	66	21.6	21.8	100
	Total	303	99	100	
Missing	System	3	1		
Total		306	100		

Brand/Label

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	43	14.1	14.1	14.1
	somewhat important	174	56.9	57.2	71.4
	minor importance	65	21.2	21.4	92.8
	not important	22	7.2	7.2	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Store Reputation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	101	33	33.4	33.4
	somewhat important	153	50	50.7	84.1
	minor importance	41	13.4	13.6	97.7
	not important	7	2.3	2.3	100
	Total	302	98.7	100	
Missing	System	4	1.3		
Total		306	100		

Financing Options/Interest Rates

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	161	52.6	53.3	53.3
	somewhat important	76	24.8	25.2	78.5
	minor importance	29	9.5	9.6	88.1
	not important	36	11.8	11.9	100
	Total	302	98.7	100	
Missing	System	4	1.3		
Total		306	100		

Contract Terms/Conditions Other Than Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	164	53.6	53.9	53.9
	somewhat important	99	32.4	32.6	86.5
	minor importance	26	8.5	8.6	95.1
	not important	15	4.9	4.9	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Just Want It

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	48	15.7	15.9	15.9
	somewhat important	123	40.2	40.7	56.6
	minor importance	100	32.7	33.1	89.7
	not important	31	10.1	10.3	100
	Total	302	98.7	100	
Missing	System	4	1.3		
Total		306	100		

Friend/Family Recommendations

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	43	14.1	14.1	14.1
	somewhat important	154	50.3	50.7	64.8
	minor importance	87	28.4	28.6	93.4
	not important	20	6.5	6.6	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Consumer Reviews

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	66	21.6	21.7	21.7
	somewhat important	138	45.1	45.4	67.1
	minor importance	83	27.1	27.3	94.4
	not important	17	5.6	5.6	100
	Total	304	99.3	100	
Missing	System	2	0.7		
Total		306	100		

Gut Feeling

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	39	12.7	12.9	12.9
	somewhat important	124	40.5	40.9	53.8
	minor importance	98	32	32.3	86.1
	not important	42	13.7	13.9	100
	Total	303	99	100	
Missing	System	3	1		
Total		306	100		

Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	236	77.1	77.9	77.9
	somewhat important	65	21.2	21.5	99.3
	minor importance	2	0.7	0.7	100
	Total	303	99	100	
Missing	System	3	1		
Total		306	100		

Friendly Salesperson

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	very important	61	19.9	20.1	20.1
	somewhat important	149	48.7	49.2	69.3
	minor importance	79	25.8	26.1	95.4
	not important	14	4.6	4.6	100
	Total	303	99	100	
Missing	System	3	1		
Total		306	100		

Appendix M. *S3Q7: Had you seen or noticed anything about “arbitration” in any consumer purchase contract or terms?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	no	151	49.3	50.5	50.5
	yes	148	48.4	49.5	100
	Total	299	97.7	100	
Missing	System	7	2.3		
Total		306	100		

Appendix N. SIQ3I: How important one views consumer reviews cross-tabulated with income.

		Household income											Total
		less than \$20,000	\$20,000–\$29,999	\$30,000–\$39,999	\$40,000–\$49,999	\$50,000–\$59,999	\$60,000–\$74,999	\$75,000–\$99,999	\$100,000–\$149,999+				
SIQ3I purchase factors: consumer reviews	Count	8	9	7	6	3	4	9	10	56			
	% within SIQ3I purchase factors: consumer reviews	14.30%	16.10%	12.50%	10.70%	5.40%	7.10%	16.10%	17.90%	100.00%			
	% within Household income	18.60%	27.30%	16.30%	19.40%	13.60%	15.40%	37.50%	35.70%	22.40%			
	% of Total	3.20%	3.60%	2.80%	2.40%	1.20%	1.60%	3.60%	4.00%	22.40%			
SIQ3I purchase factors: consumer reviews	Count	16	18	17	17	13	13	9	12	115			
	% within SIQ3I purchase factors: consumer reviews	13.90%	15.70%	14.80%	14.80%	11.30%	11.30%	7.80%	10.40%	100.00%			
	% within Household income	37.20%	54.50%	39.50%	54.80%	59.10%	50.00%	37.50%	42.90%	46.00%			
	% of Total	6.40%	7.20%	6.80%	6.80%	5.20%	5.20%	3.60%	4.80%	46.00%			
SIQ3I purchase factors: consumer reviews	Count	13	4	16	7	6	9	5	5	65			
	% within SIQ3I purchase factors: consumer reviews	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%			
	% within Household income	17.20%	13.20%	17.20%	12.40%	8.80%	10.40%	9.60%	11.20%	100.00%			
	% of Total	17.20%	13.20%	17.20%	12.40%	8.80%	10.40%	9.60%	11.20%	100.00%			

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SIQ3I purchase factors: consumer reviews (cont.)	% within SIQ3I purchase factors: consumer reviews	20.00%	6.20%	24.60%	10.80%	9.20%	13.80%	7.70%	7.70%	100.00%		
	% within Household income	30.20%	12.10%	37.20%	22.60%	27.30%	34.60%	20.80%	17.90%	26.00%		
	% of Total	5.20%	1.60%	6.40%	2.80%	2.40%	3.60%	2.00%	2.00%	26.00%		
SIQ3I purchase factors: consumer reviews (cont.)	Count	6	2	3	1	0	0	1	1	14		
	% within SIQ3I purchase factors: consumer reviews	42.90%	14.30%	21.40%	7.10%	0.00%	0.00%	7.10%	7.10%	100.00%		
	% within Household income	14.00%	6.10%	7.00%	3.20%	0.00%	0.00%	4.20%	3.60%	5.60%		
	% of Total	2.40%	0.80%	1.20%	0.40%	0.00%	0.00%	0.40%	0.40%	5.60%		
Total	Count	43	33	43	31	22	26	24	28	250		
	% within SIQ3I purchase factors: consumer reviews	17.20%	13.20%	17.20%	12.40%	8.80%	10.40%	9.60%	11.20%	100.00%		
	% within Household income	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%		
	% of Total	17.20%	13.20%	17.20%	12.40%	8.80%	10.40%	9.60%	11.20%	100.00%		

Appendix O. *S1Q3H: How important one views friend/family recommendations cross-tabulated with gender.*

			Gender		Total
			male	female	
S1Q3H purchase factors: friend/family recommen- dation	very important	Count	11	32	43
		% within S1Q3H purchase factors: friend/family recommendation	25.60%	74.40%	100.00%
		% within Gender	10.80%	15.80%	14.10%
		% of Total	3.60%	10.50%	14.10%
	somewhat important	Count	47	107	154
		% within S1Q3H purchase factors: friend/family recommendation	30.50%	69.50%	100.00%
		% within Gender	46.10%	53.00%	50.70%
		% of Total	15.50%	35.20%	50.70%
	minor importance	Count	34	53	87
		% within S1Q3H purchase factors: friend/family recommendation	39.10%	60.90%	100.00%
		% within Gender	33.30%	26.20%	28.60%
		% of Total	11.20%	17.40%	28.60%
	not important	Count	10	10	20
		% within S1Q3H purchase factors: friend/family recommendation	50.00%	50.00%	100.00%
		% within Gender	9.80%	5.00%	6.60%
		% of Total	3.30%	3.30%	6.60%
Total	Count	102	202	304	
	% within S1Q3H purchase factors: friend/family recommendation	33.60%	66.40%	100.00%	
	% within Gender	100.00%	100.00%	100.00%	
	% of Total	33.60%	66.40%	100.00%	