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Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses

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FUNDAMENTALLY UNFAIR: AN EMPIRICAL ANALYSIS OF SOCIAL MEDIA ARBITRATION CLAUSES

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Michael L. Rustad[‡]

ABSTRACT

Our systematic examination of 329 of the world's largest social media providers reveals that 29 percent of these providers require users to submit to predispute mandatory arbitration as a condition of using their services. Forced consumer arbitration clauses are principally a U.S. phenomenon. Forty-two percent of the 188 U.S.-based social media providers contain forced arbitration clauses—in sharp contrast to only 13 percent of the 141 providers headquartered in foreign nations. Forty of the social networking websites (SNS) specify the American Arbitration Association (AAA) as the provider and nineteen specify JAMS, the two largest arbitration companies. We compare the fifty-nine social media terms of use (TOU) against the due process fairness tests that have been adopted by these two providers to mitigate the inevitable power imbalance in consumer arbitration proceedings. Our central finding is that the arbitration clauses of providers that specify the AAA and JAMS clearly fail the majority of the provisions of these two arbitral providers' consumer due process fairness tests. Arbitration clauses employed by social media have numerous “gotcha” provisions such as hard damage caps that place an absolute dollar limit on recovery that is significantly below the cost of filing an arbitral claim

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with either the AAA or JAMS. Our secondary analysis of AAA and JAMS arbitration reports establishes that consumer arbitration agreements have a deterrent effect, blocking all but a handful of social media users from filing claims. In effect, social media providers, encouraged by the U.S. Supreme Court’s endorsement of mandatory consumer arbitration, have constructed a liability-free zone where social media users have rights without remedies if social media providers breach their TOU, invade their privacy, or infringe their intellectual property rights. These aggressive arbitration clauses are unlikely to be enforced in the European Union, or even accepted by the most commonly specified arbitral providers, so social networking sites need to draft more balanced TOU that pass due process fundamental fairness rules.

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INTRODUCTION

Imagine a profoundly unfair legal world in which businesses redirect consumer lawsuits away from state and federal courts into secret tribunals, in which a privately hired judge decides cases without precedents and with only limited grounds for an appeal.¹ Under secretive forced arbitration, the social media service² determines the arbitral provider and selects the rules that govern disputes with consumers. Visualize further that social media providers place legally binding terms of use (TOU) “agreements” that are seldom, if ever, read. Even if they are read, the TOU are composed of unnecessarily complex terminology, which is drafted at the comprehension level of a typical college graduate. In this dystopian legal world, users are required to waive their constitutional right to a jury trial, the right of liberal

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1. Under section 2 of the Federal Arbitration Act, a party may seek revocation of an arbitration agreement “upon such grounds as exist at law or in equity for the revocation of any contract” including “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quoting 9 U.S.C. § 2) (citations omitted); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (stating that a court’s review of an arbitration is “highly circumscribed,” and “the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole.”). *Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C.*, 183 S.W.3d 741, 752 (Tex. App. 2005) (stating that judicial “[r]eview is so limited that a court may not vacate an arbitration award even if it is based upon a mistake of fact or law.”).
 2. Edmond Dantès, *Social Networking Service*, <http://www.scribd.com/doc/53943621/Social-Networking-Service> (last visited Sept. 19, 2014) (“A social networking service is an online service, platform, or site that focuses on building and reflecting of social networks or social relations among people, e.g., who share interests and/or activities. A social network service essentially consists of a representation of each user (often a profile), his/her social links, and a variety of additional services. . . . Online community services are sometimes considered as a social network service, though in a broader sense, social network service usually means an individual-centered service whereas online community services are group-centered. Social networking sites allow users to share ideas, activities, events, and interests within their individual networks.”).

discovery, and the right of appeal by agreeing to “take-it-or-leave it” terms of use.³

This is not a law professor’s far-fetched hypothetical. This legal dystopia is already here. The users of social networking websites (SNS) currently acquiesce to anti-class action waivers, damage caps, shortened statutes of limitations, “loser pays” rules, and choice-of-forum clauses that are buried thousands of words deep in poorly indexed boilerplate. A New York University Law School research team concluded that only one or two in a thousand consumers that accessed a major website actually read its TOU.⁴ A growing number of social media platforms contain predispute mandatory arbitration clauses specifying that hearings be conducted in the provider’s home forum, which shifts the cost of air travel, hotels, and other expenses onto the consumer. These SNS are “rolling contracts” that reserve the right to unilaterally change or modify the rules of the game “at any time without further notice.”⁵ Forced arbitration, under these imbalanced TOU, creates a liability-free zone for an increasing number of social media providers.

Snapchat, an application that “lets users exchange photos, videos or text messages that are claimed to vanish within 10 seconds after they

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3. “U.S.-style terms of use (‘TOU’) are ‘take it or leave it’ waivers, masquerading in the clothing of contract and divesting consumers of important procedural and substantive rights.” Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1085 (2012).
 4. *Hearing on Aggressive Sales Tactics on the Internet and Their Impact on American Consumers Before the S. Comm. on Commerce, Sci., & Trans.*, 111th Cong. 24 (2009) (statement of Florencia Marotta-Wurgler) (testifying that her research is drawn from a statistical analysis of the online browsing behavior of more than 45,000 households accessing sixty-six websites).
 5. Approximately 67 percent (66.6%) of the 329 social media TOU structured their contract as a rolling contract, where the provider reserves the right to revise, add, or delete a term, at a later time, at its discretion. For the 59 TOU reported in this article, 73% (N=43) incorporated a rolling contract provision in their TOU. See, e.g., Klout, Terms of Use, <https://klout.com/corp/terms> (last visited Feb. 7, 2015) (“We reserve the right, at our sole discretion, to change or modify portions of these Terms of Service at any time without further notice. You should periodically visit this page to review the current Terms of Service so you are aware of any revision to which you are bound. If we do this, we will post the changes to these Terms of Service on this page and will indicate at the top of this page the date these terms were last revised. Your continued use of the Services after any such changes constitutes your acceptance of the new Terms of Service. If you do not agree to abide by these or any future Terms of Service, do not use or access (or continue to use or access) the Services. It is your responsibility to regularly check the Site to determine if there have been changes to these Terms of Service and to review such changes.”).

have been viewed,”⁶ provides a good illustration of the impact of one-sided TOU. Snapchat’s TOU forecloses the rights of millions of its registrants whose privacy was invaded by a cyberattack that was enabled by the website’s negligent security.⁷ On January 1, 2014, hackers “published 4.6 million Snapchat usernames and redacted phone numbers on a website.”⁸ Shortly after this cyberattack, Snapchat issued an apology to its customers and an update that decoupled their users’ usernames from their phone numbers.⁹ The Federal Trade Commission (FTC) entered into a settlement with Snapchat because of its substandard security and inadequate privacy protection that required the provider to “implement a comprehensive privacy program that will be monitored by an independent privacy professional for the next 20 years.”¹⁰ Snapchat agreed to stop “falsely claiming that messages are truly disappearing” and to cease and desist making other misrepresentations.¹¹

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6. Richard Adhikari, *Security Firm Spills the Beans on Snapchat Vulnerabilities*, TECHNEWSWORLD (Dec. 28, 2013, 5:00 AM), <http://www.technewsworld.com/story/79705.html>.
 7. *Id.* (“One of these was a flaw in the ‘Find friends’ function that let hackers easily create a database of the usernames and phone numbers of Snapchat app users. Another was a denial of service exploit.”).
 8. Paddy Wood, *Snapchat to Boost Security After Breach*, THE AUSTRALIAN (Jan. 3, 2014, 1:35 PM), <http://www.theaustralian.com.au/news/latest-news/snapchat-to-boost-security-after-breach/story-fn3dxiwe-1226794336966>.
 9. *Find Friends Improvements*, SNAPCHAT (Jan. 9, 2014), <http://blog.snapchat.com/post/72768002320/find-friends-improvements> (explaining that Snapchat “released a Snapchat update for Android and iOS that improves Find Friends functionality and allows Snapchatters to opt-out of linking their phone number with their username”).
 10. *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False*, FED. TRADE COMM’N (May 8, 2014), <http://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were> (“Snapchat, the developer of a popular mobile messaging app, has agreed to settle Federal Trade Commission charges that it deceived consumers with promises about the disappearing nature of messages sent through the service. The FTC case also alleged that the company deceived consumers over the amount of personal data it collected and the security measures taken to protect that data from misuse and unauthorized disclosure. In fact, the case alleges, Snapchat’s failure to secure its Find Friends feature resulted in a security breach that enabled attackers to compile a database of 4.6 million Snapchat usernames and phone numbers.”).
 11. Kia Kokalitcheva, *Snapchat Pays Up Over Privacy Allegations, Gets Slapped With 20-year Probation*, VENTUREBEAT (May 8, 2014, 12:16 PM), <http://venturebeat.com/2014/05/08/snapchat-pays-up-over-privacy-allegations-gets-slapped-with-20-year-probation/> (charging Snapchat with negligent security in its Find Friends Features because “Snapchat failed to verify users’ phone numbers during registration, many users, while thinking they were messaging friends, have unknowingly sent

Snapchat's millions of users have no realistic remedy to compensate them for the fraudulent misrepresentations, the consequences of negligent security, or any other cause of action because the website's TOU eliminate every conceivable category of damages, disclaim all warranties, and require the user to hold the provider harmless. Snapchat's limitation of liability clause states that if the social media site "is found liable to you for any damage or loss which arises out of or is in any way connected with your use of the Services or any content, Snapchat's liability shall in no event exceed \$1.00."¹² Snapchat's TOU impose mandatory arbitration, requiring consumers to waive their right to litigate and appear before an arbitrator in Los Angeles County, no matter where they reside.¹³ The basic filing fee with JAMS—Snapchat's designated arbitral provider—in a consumer case is 250 times the total possible recovery of one dollar, which is the provider's hard cap on recovery.¹⁴ Snapchat users may not initiate or join class actions against the provider, even though the potential recovery is a minuscule fraction of the cost of filing a consumer arbitration and of journeying to Los Angeles to engage in the arbitral hearing.¹⁵ The Snapchat TOU represent that "[o]ther than class procedures and remedies discussed below, the arbitrator has the authority to grant any remedy that would

messages to strangers who had registered with phone numbers that did not belong to them" and also failed to secure its site which "led to a recent security breach, and attackers were able to gather a database of 4.6 million usernames and phones").

12. *Terms of Use*, SNAPCHAT, <https://www.snapchat.com/terms/> (last updated Dec. 20, 2013) [hereinafter SNAPCHAT].
13. *Id.* ("You and Snapchat agree to arbitrate any dispute arising from these Terms or your use of the Services, except that you and Snapchat are not required to arbitrate any dispute in which either party seeks equitable and other relief for the alleged unlawful use of copyrights, trademarks, trade names, logos, trade secrets, or patents. ARBITRATION PREVENTS YOU FROM SUING IN COURT OR FROM HAVING A JURY TRIAL. You and Snapchat agree (a) that any arbitration will occur in Los Angeles County, California; (b) that arbitration will be conducted confidentially by a single arbitrator in accordance with the rules of JAMS; and (c) that the state or federal courts of Los Angeles County, California have exclusive jurisdiction over any appeals of an arbitration award and over any suit, if any, between the parties not subject to arbitration. Other than class procedures and remedies discussed below, the arbitrator has the authority to grant any remedy that would otherwise be available in court. WHETHER THE DISPUTE IS HEARD IN ARBITRATION OR IN COURT, YOU AND SNAPCHAT WILL NOT COMMENCE AGAINST THE OTHER A CLASS ACTION, CLASS ARBITRATION OR REPRESENTATIVE ACTION OR PROCEEDING.").
14. *Consumer Arbitration Minimum Standards*, JAMS, <http://www.jamsadr.com/consumer-arbitration/> (last visited Sept. 19, 2014).
15. SNAPCHAT, *supra* note 12.

otherwise be available in court.”¹⁶ Contrary to its assertion about the arbitrator’s power to order equivalent remedies, Snapchat uses contract law to eliminate every category of damages and, in any event, does not permit the arbiter to award more than one dollar.¹⁷

This Article empirically explores whether Snapchat’s TOU are broadly representative of fine print contracts in the social media industry.¹⁸ The policy debate over binding mandatory arbitration is being waged in a data vacuum, primarily through exchanges of competing anecdotes and unsupported generalities about fairness, efficiency and lower costs.¹⁹ Our findings demonstrate conclusively that

16. *Id.*

17. *Id.* (“Except where prohibited by law, in no event will Snapchat or the Snapchat Parties be liable for any indirect, special, punitive, incidental, exemplary or consequential damages that result from (a) the use of, or inability to use, the Services; (b) the provision of the Services or any materials available therein; or (c) the conduct of other users of the Services, even if Snapchat has been advised of the possibility of such damages Snapchat’s liability shall in no event exceed \$1.00.”).

18. Facebook claims more than 1.39 billion users. Facebook, <https://www.facebook.com/Gisttvmedia/posts/1068312803195877> (last visited Feb. 7, 2015). Facebook is followed by Twitter with 560 million, Google+ with 400 million, LinkedIn with 240 million, and Pinterest with 70 million. Shea Bennett, *Pinterest, Twitter, Facebook, Instagram, Google+, LinkedIn—Social Media Stats 2014*, MEDIABISTRO (Jan. 20, 2014, 9:00 AM) http://www.mediabistro.com/alltwitter/social-media-stats-2014_b54243.

19. *See, e.g.*, Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 810 (2008) (“The vast majority of ordinary, lower- and middle-income employees (essentially, those making less than \$60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. . . . Their only practical hope is the generally cheaper, faster, and more informal process of arbitration.”); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 826 (2008) (“The majority (if not the substantial majority) of survey respondents (51%–89%) stated that arbitration was ‘less expensive’ or ‘more cost effective’ than litigation.”); Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 236 (2008) (“It is not a hyperbole to state that civil justice or adjudication in the United States . . . is achieved primarily through arbitration.”); *cf.* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1633–34 (2005) (“At the same time, mandatory arbitration has its advocates. While few, if any, would defend the most unfair arbitration clauses in which companies impose nonneutral arbitrators or greatly limit possible recoveries, some contend that fair binding arbitration is better for claimants than the alternative of litigation. They urge that when companies include arbitration in form contracts, they help consumers and employees by providing them with a forum that is cheaper, quicker, and more accessible than litigation. Such defenders also urge that to the extent companies reduce their own dispute resolution costs, market

imbalanced forced arbitration TOU mandates are not rogue outliers but are typical of the one-sided boilerplate “agreements” imposed on consumers by the social media industry.

To date, there has been little empirical evidence on the contracting practices of online providers.²⁰ The Consumer Protection Financial Bureau (CPFB), which has published preliminary results for a study of consumer arbitration mandated by the Dodd-Frank Act, is a notable exception.²¹ The Director of the CPFB notes that the supporters of consumer arbitration describe it as a “better alternative” to the court system—“more convenient, more efficient, and a lower-cost way of resolving disputes,”²² but their preliminary results suggest the existence of anti-consumer imbalances. Systematic data are needed to determine whether consumer arbitration clauses should be prohibited or reformed by enacting mandatory consumer protection clauses.

This Article transcends the heated rhetoric over whether forced arbitration limits justice to provide an empirical assessment of the content and effects of social media arbitration clauses, where the AAA and JAMS were chosen by social media as exclusive arbitral providers.²³

forces will ensure that they pass on such savings to their workers in the form of higher wages, and to their customers in the form of lower prices.”).

20. See, e.g., Drahozal, *supra* note 19; Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1052–53 (2009) (using data to conclude that “the consumer arbitration process provides a more pro-consumer environment for claims adjudication than does the traditional court system.”).
21. Consumer Financial Protection Bureau, Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148 (Apr. 27, 2012) (“Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (the ‘Dodd-Frank Act’) requires the Bureau of Consumer Financial Protection (the ‘Bureau’) to ‘conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services’ (the ‘Study’).”); 12 U.S.C. § 5518 (2012) (provision of Dodd-Frank requiring a study and report to Congress regarding consumer agreements with arbitration clauses). See also Richard Cordray, *Prepared Remarks of Director Richard Cordray at the Field Hearing on Arbitration*, CONSUMER FINANCIAL PROTECTION BUREAU (Dec. 12, 2013), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-director-richard-cordray-at-the-field-hearing-on-arbitration/> (outlining the responsibilities of the CFPB under the Dodd-Frank Act and procedures for determining if arbitration agreements should stand).
22. Cordray, *supra* note 21.
23. See Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 292 (2012) (“The leading arbitration providers, the American Arbitration Association (‘AAA’) and JAMS (formerly the Judicial Arbitration and Mediation Service), have

No prior study has conducted a content analysis of social media arbitration clauses to determine whether they conform to AAA and JAMS consumer due process protocols and the degree to which providers suppress arbitral claims by harsh terms.²⁴ The only previous study of consumer arbitration concluded that arbitration clauses largely complied with due process.²⁵ In sharp contrast, the consumer arbitration clauses we studied are so sharply skewed in favor of the provider that they clearly violate the rules of due process “fundamental fairness” required by the two major providers, AAA and JAMS.²⁶

I. EMPIRICAL STUDY OF ARBITRATION CLAUSES EMPLOYED BY SOCIAL MEDIA

The popular wisdom is that consumers do “reasonably well” in arbitration, when administered by the AAA, JAMS, and other sound arbitral providers.²⁷ Corporations benefit as well because “[r]elative to

both promulgated due process protocols governing consumer and employment arbitrations.”).

24. There is a growing body of studies of consumer arbitration in other contexts. *See generally*, Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536 (2012) (presenting an empirical study on consumer arbitration in the context of credit card agreements).
25. Drahozal & Zyontz, *supra* note 23, at 341 (“In the case file sample of AAA consumer arbitrations, the majority of consumer arbitration clauses (229 of 299, or 76.6%) fully complied with the Consumer Due Process Protocol as applied by the AAA. We found no statistically significant difference in how frequently clauses violated the Protocol between cases seeking \$75,000 or less (which were subject to AAA protocol compliance review) and cases seeking over \$75,000 (which were not).”).
26. *See id.* at 305 (“The protocols do not make clear whether ‘fundamental fairness’ is an independent requirement that must be satisfied or whether complying with the other requirements of the protocols constitutes fundamental fairness. The Commentary to the Consumer Due Process Protocol suggests the latter, explaining that the other principles in the Protocol ‘identify specific minimum due process standards which embody the concept of fundamental fairness.’”).
27. *See* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1366 (2012) (“[W]hile the evidence is mixed, there are empirical studies that show consumers fare reasonably well in some important types of consumer arbitration. Reputable organizations like the American Arbitration Association (AAA) have incentives to provide reasonably fair arbitration procedures in order to preserve a reputation for evenhandedness.”); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 472 (2011) (“[I]n the vast majority of consumer arbitrations, consumers pay fewer fees than they would in court, obtain results faster than they would in court, and win greater relief than they would likely win in court.”). *But cf.* PUBLIC CITIZEN, THE ARBITRATION

litigation, arbitration provides opportunities for a business to save on its dispute-resolution costs²⁸ and because they avoid bad publicity by requiring their customers to submit to non-public alternative dispute resolution (ADR) procedures.²⁹ The opponents of mandatory predispute consumer arbitration, in rebuttal, “argue that arbitration clauses deprive consumers of certain legal protections available in court, and may serve to quash a dispute rather than provide an alternative way to resolve it.”³⁰ Forced arbitration, critics contend, disadvantages consumers by creating a repeat player bias, capping award size, allowing evidence to be concealed, employing clandestine proceedings, suppressing claims and prohibiting an appellate court review to reverse or modify an arbitrator’s erroneous decision.³¹ This empirical study provides the first content analysis of mandatory arbitration clauses in SNS, drawing upon the largest sample of social media providers ever assembled.

A. Sample of Social Media Sites

SNS may be broadly defined as platforms that enable members to create, manage, and share interests online. These social media websites enable interactivity among users such as the construction of profiles or instant messaging capabilities in order to share interests such as family, dating, friendship, or hobbies. The number and size of SNS have exploded over the past decade. Nearly two-thirds of SNS containing consumer arbitration clauses were founded after 2007.

TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 2 (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf> (finding that businesses win 94% of National Arbitration Forum arbitrations); Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WK. (June 4, 2008) (reporting that consumers win only .2% of the time), <http://www.businessweek.com/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins>.

28. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (2001).
29. Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876, 894–95 (2008) (reporting that “[o]ver three-quarters of the studied companies’ consumer agreements provided for mandatory arbitration of disputes. Yet less than 10% of their negotiated nonconsumer, non-employment contracts included arbitration clauses” and that arbitration is “a way to save money by avoiding aggregate dispute resolution.”); see generally ALLIANCE FOR JUSTICE, ARBITRATION ACTIVISM: HOW THE CORPORATE COURT HELPS BUSINESS EVADE OUR CIVIL JUSTICE SYSTEM (2011), available at www.afj.org/wp-content/uploads/2013/12/Arbitration-Activism-Report-12162013.pdf (discussing how the Supreme Court’s decisions regarding mandatory arbitration protect big business and its interests at the expense of consumers).
30. Cordray, *supra* note 21.
31. ALLIANCE FOR JUSTICE, *supra* note 29, at 5.

We identified 329 of the largest SNS worldwide and then chose the 29 percent (N=94) whose TOU contained predispute arbitration clauses for detailed analysis. The sample of the world's most prominent SNS was compiled using multiple sources that included Wikipedia's list of Social Network Sites, Alexa's Top Websites, a compilation of top social media sites, a list of publicly traded SNS, numerous articles reporting about the leading social media websites worldwide, and information provided by JD and LLM students from countries in Asia, Europe, and Latin America.

Social media sites are rarely free. At a minimum, social networks commodify the personal data and user-generated content of their users. If the providers do not directly charge for subscriptions or premium features, or sell virtual or real goods, mobile applications, or games, the providers sell personal information supplied by users, which means that there is a quid pro quo in these mass-market licenses. Fifty-six percent of the SNS sample mandating arbitration employed a revenue model based upon users paying for either a basic subscription or for premium features (N=29).

Three of the fifty-nine SNS raised revenue by selling virtual or tangible property. Greater than one in three SNS also relied upon advertising paid by third parties (N=20, 34%). Meetup, a meetings social network, for example, charges its users twelve to twenty dollars per meeting while also deriving revenues from advertising, the sale of virtual currency, and subscriptions. The dating sites conditioned access on paying subscriptions.

B. Sample of Mandatory Arbitration Clauses

Forty of the ninety-four social media providers that included arbitration clauses chose the AAA as the provider (42.5%). Twenty-five social media providers specified arbitration but did not choose an arbitral provider (26.6%). Nineteen of the ninety-four clauses specified JAMS (20%). Three providers chose the ADR Institute of Canada. Other arbitral providers included the United States Arbitration & Mediation (USAM), Singapore International Arbitration Centre (SIAC), China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, South African Arbitration Commission, and the European Arbitration Association.

Only eighteen of the 141 foreign SNS selected mandatory arbitration—13 percent versus 42 percent of the U.S. providers. Seventy-six of the ninety-four SNS choosing forced arbitration were founded in the United States, followed by six headquartered in Canada and five in China. Two SNS originating in India chose mandatory arbitration as did single sites in Finland, Hong Kong, South Africa, Switzerland, and the United Kingdom. Some non-U.S. SNS selected foreign arbitration providers such as SIAC (Hong Kong), the China International Arbitration Association, the European Arbitration Association, and the Beijing Arbitration Commission. None of these

providers gave the social media registrant a link or other source of information as to basic procedural issues such as what rules would apply or the financial costs of arbitration.

Arbitration clauses selected by Chinese SNS tended to be cryptic and provided almost no information on arbitral rules and procedures. Douban's arbitration clause is fairly typical:

The use of this protocol and the relationship between you and Douban are governed by the laws of People's Republic of China. Any disputes arising out of or relating to the service, the protocol or other relevant matters shall first be resolved through friendly consultations. In case that no consensus is reached, it should be submitted to the China International Economic and Trade Arbitration Commission for arbitration, the arbitral award is final, binding on both parties.³²

Jiayuan, China's equivalent to Match.com, includes an arbitration clause in its user agreement that states the following:

The implementation, interpretation and dispute resolution regarding the registration provisions are governed by the current laws of the People's Republic of China. Any disputes arising out of the provisions shall be submitted to the Beijing Arbitration Commission for arbitration. The arbitral award is final. In the case that some of the registration provisions are invalid because of a conflict with the current laws of the People's Republic of China, the validity of other provisions shall not be affected.³³

Few U.S. users would be at ease arbitrating with such a provider given that the site does not provide a link to where the consumer can learn more about how Chinese arbitration works. Chinese users of Snapchat may feel equally as hesitant to appear in an arbitration hearing held under unfamiliar rules in Los Angeles County. The cost of air travel alone would far exceed what is at stake. Many social media users agree to arbitration before the social media provider determines which providers' rules of arbitration apply. Greater than one in four social media sites out of the ninety-four required users to acquiesce to arbitration without disclosing the name of the arbitral provider (27%, N=25).

Six social media sites selected the ADR Institute of Canada (6%). Here again, social media clauses did not provide users with basic information on the rules of arbitration, and only a few provided a link

32. *Use Agreement*, DOUBAN, <http://www.douban.com/about/agreement> (last visited Feb. 7, 2015).

33. *Use Agreement*, JIAYUAN, <http://reg.jiayuan.com/clause.php> (last visited Feb. 7, 2015).

where users could obtain further information about the fundamental rules for arbitration.³⁴ Companies' strategic use of unbalanced arbitration terms are less likely to be employed in business-to-business disputes than when dealing with consumers.³⁵

C. AAA & JAMS Consumer Arbitration Clauses

This analysis focuses on social media arbitration clauses where social media providers chose either AAA or JAMS rules for arbitration. Together, these two arbitral providers comprise 63 percent of the arbitration sample (59 of 94). Nearly 43 percent of the social media providers selecting compulsory arbitration in order to bypass the court system chose the AAA as the arbitral provider (N=40), followed by 20 percent that selected JAMS (N=19). Fifty-seven out of the fifty-nine SNS choosing either the AAA or JAMS as the arbitral provider were headquartered in the United States while the other two were Canadian social media. Seventeen of the fifty-nine SNS specifying either the AAA or JAMS were paid dating sites. Multimedia sharing sites and shared interest websites tied as the second largest groups, each accounting for one in five of the sites (N=12). Messages/blogs accounted for 14 percent of the sample (N=6), followed by 7 percent classified as social connections websites (N=4).

*D. Applying Commercial Arbitration Rules
for Disputes with Consumers*

The clearest example of due process fundamental unfairness was the SNS that stated or implied that these social media disputes should be decided under commercial arbitration rules. Commercial rules place social media users at a significant disadvantage. For example, the AAA's and JAMS's supplementary consumer rules require companies to heavily subsidize the cost of arbitration, in contrast to the commercial rules where the user and business share costs equally. Providing subsidies to consumers counterbalances the massive advantages held by a corporation when confronting an individual.

The AAA recognizes a dual-track system for arbitration depending upon whether it is business-to-business, where the Commercial Dispute

34. The Federal Arbitration Act's substantive provision only requires that the parties agree to arbitration. Section 2 provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012).

35. Eisenberg et al., *supra* note 29, at 895 (stating that "corporations' selective use of arbitration clauses against consumers, but not against each other, suggests that their use of mandatory arbitration clauses may be based more on strategic advantage" in defending against consumer claims).

Resolution Procedures apply, or business-to-consumer, where Supplementary Procedures for Consumer-Related Disputes are followed.³⁶ The AAA rules state that “[i]f there is a difference between the Commercial Dispute Resolution Procedures and the Supplementary Procedures, the Supplementary Procedures will be used.”³⁷ Under the AAA’s commercial arbitration rules, “the minimum fees for any case having three or more arbitrators are \$1,000 for the Initial Filing Fee; \$2,125 for the Proceed Fee; and \$1,250 for the Final Fee.”³⁸ The commercial fees “do not cover the cost of hearing rooms, which are available on a rental basis” and shared by the parties.³⁹ The AAA charges an annual abeyance fee of \$300 for cases inactive for a year.⁴⁰ JAMS also states that it will not administer consumer arbitration unless its minimum standards of fairness are adopted.⁴¹ Table One (below) compares the AAA and JAMS consumer arbitration rules:

36. THOMAS L. GRAVELLE & MARY A. BEDIKIAN, 8B MICH. PL. & PR., Appendix 62C.XI:N (2d ed. 2013).

37. *Id.*

38. *The American Arbitration Association (AAA) Offers Two Fee Schedules*, AM. ARB. ASS’N 2, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_012009 (last visited Feb. 7, 2015).

39. *Id.*

40. *Cost of Arbitration (Including AAA Administrative Fees)*, AM. ARB. ASS’N 2, [hereinafter *Costs of Arbitration*] https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2020622&RevisionSelectionMethod=LatestReleased (last visited Feb. 7, 2015).

41. *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JAMS 2 (July 15, 2009), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf.

Table One: AAA and JAMS Consumer Arbitration Rules

Cost	AAA	JAMS
Filing Fees	\$200 ⁴²	\$250 ⁴³
What Consumer Pays Toward Arbitrator's Compensation	Nothing, business pays for arbitrator ⁴⁴	Nothing, business pays for arbitrator ⁴⁵
Cost of Arbitrator	"Arbitrators serving on a case with an in-person or telephonic hearing will receive compensation at a rate of \$1500 per day." ⁴⁶ For non-appearance or desk arbitration, arbitrators are paid \$750 per hearing day. ⁴⁷	Silent
Who Pays Arbitral Room Rentals?	Consumer pays nothing, business pays entire sum ⁴⁸	Consumer pays nothing, business pays entire sum ⁴⁹
Who Pays Consumers' Lodging, Travel, and Attorneys' Fees?	Consumer bears these costs	Consumer bears these costs

A few U.S. social media providers have pushed the envelope in attempting to apply commercial arbitration rules to disputes with their

42. *Consumer-Related Disputes: Supplementary Procedures*, AM. ARB. ASS'N 12, [hereinafter *Consumer-Related Disputes*], https://www.adr.org/aaa/faces/aoe/gc/consumer.jsessionid=Gw08TNTYN5sdv96qTpKwN7FgMX51G5kQJpmx2lkptGyG8mv3Tmd0!-429404097?_afLoop=738055142526081&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D738055142526081%26_afWindowMode%3D0%26_adf.ctrl-state%3D4um8szixl_4 (last visited Feb. 7, 2015) (fee listed in table was effective as of March 1, 2013).

43. JAMS, *supra* note 41, at 2 (capping consumer's responsibility for arbitrator fees at \$250).

44. *Consumer-Related Disputes*, *supra* note 42, at 14.

45. JAMS, *supra* note 41, at 2.

46. *Cost of Arbitration*, *supra* note 40, at 1.

47. *Id.*

48. *Id.* at 2.

49. JAMS, *supra* note 41, at 2.

consumers in their arbitration clauses. Gaia Online, for example, imposes the AAA's commercial arbitration rules rather than the provider's supplementary consumer rules.⁵⁰ "Focus, a photo-sharing site, required arbitrations to be conducted in San Francisco under the AAA's commercial law rules."⁵¹ MOG, a music-themed social network, imposes commercial arbitration rules that specify three arbitrators.⁵² It appears hard to justify requiring what is clearly a consumer dispute under commercial arbitration rules. The AAA or JAMS probably would refuse to apply their respective commercial rules to what is clearly a consumer transaction. This is largely a hypothetical question, as consumers rarely file arbitration proceedings against social media providers. The providers' inclusion of commercial arbitration rules, however, is likely to have a chilling impact on users filing claims by creating the possibly false impression that the consumer is liable for paying 50 percent of the considerable cost of hiring an arbitrator, renting a hearing room, and other arbitration expenses.⁵³

E. The Presentation of Arbitral Clauses

Arbitration is a matter of contract law, so, at a minimum, the TOU must reveal that the consumer entered into an agreement to arbitrate disputes.⁵⁴ A case can be made that these terms are too inconspicuous

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50. *Terms of Service*, GAIA ONLINE, <http://www.gaiaonline.com/info/legal/tos> (last updated Feb. 7, 2015) ("In the event of a dispute involving the interpretation or application of these Terms, or based upon, relating to or arising out of these Terms or Gaia Online, you consent that such dispute shall be submitted to final and binding arbitration before a single arbitrator in the State of California, County of Santa Clara in accordance with Commercial Arbitration Rules of the American Arbitration Association (AAA).").
51. Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 666 (2012).
52. *Terms of Use & EULA*, MOG, <https://mog.com/#!/terms> (last visited Feb. 7, 2015) ("The arbitration shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association ('AAA') before a panel of three arbitrators and conducted in the State of California.").
53. The AAA has two fee schedules, the standard fee schedule and the flexible fee schedule. Initial filing fees under the standard schedule range from \$775 to \$12,800 depending upon the dollar amount claimed. Under the flexible schedule, the fees range from \$400 to \$4,500. "The fees described above do not cover the cost of hearing rooms, which are available on a rental basis." AM. ARB. ASS'N, *supra* note 38.
54. See 9 U.S.C. § 2 (2012) ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

and too uninformative to constitute a binding agreement. Forty-six percent of the clauses were inconspicuously presented, as evaluated by applying the tests for conspicuousness followed by the Uniform Commercial Code (N=27).⁵⁵ SNS place arbitration clauses obscurely, toward the end of a long boilerplate document, sometimes under a category misleadingly labeled “Miscellaneous” or “Dispute Resolution.” Registrants would have to read an average of 4,967 words before encountering an arbitration clause in the typical social networking TOU (median=5,100 words). Social media providers included an index in only fourteen of the fifty-nine TOU, making it difficult to locate arbitration clauses buried deep in the interior of the boilerplate. Only two of the fifty-nine arbitration clauses provided users with a box giving the user clear notice that the TOU required users to submit to arbitration.

Social media arbitration clauses generally were very brief, providing almost no basic information about the rules under which arbitration would be conducted. The mean social media arbitration clause was only 372 words in length. Only eighteen of the fifty-nine arbitration clauses provided any explanation of arbitration or its consequences (N=31%). Only fourteen of the fifty-nine social media providers (24%) provided the customer with a link to where they could get additional information about the rules of arbitration. Only eight of the fifty-nine social media providers described how users could initiate arbitration (14%). Roughly one in three social media TOU had either a notice or hyperlinked index with arbitration as an entry (N=20, 34%).

CafeMom’s brief arbitral clause is illustrative of providers giving consumers no information about how the ADR method works or its implications. The arbitration clause, situated in an obscure “Miscellaneous” section near the end of the TOU, gives consumers only the most minimal information about the arbitration process:

You agree that, with the exception of injunctive relief sought by CafeMom for any violation of CafeMom’s proprietary or other rights, any and all disputes relating to these TOS, your

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

55. See Unif. Com. Code § 1-201 (amended 2010), 1 U.L.A. 183–84 (2012) (explaining that “conspicuous,” with reference to a term, means so written, displayed, or presented that “a reasonable person against whom it is to operate ought to have noticed it,” including (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; however, “whether a term or clause is ‘conspicuous’ or not is for decision by the court”).

use of the Site or the Services shall be resolved by arbitration in accordance with the then-current rules of the American Arbitration Association (the “AAA”) before an independent arbitrator designated by the AAA. The location of arbitration shall be New York, New York, USA.⁵⁶

CafeMom does not advise consumers that special consumer rules apply but only specifies that the “then-current rules of the American Arbitration Association” will be utilized.⁵⁷

F. Do Arbitral Clauses Satisfy Consumer Due Process Principles?

Consumers who enter into clickwrap or browsewrap TOU waive their right to a jury trial, discovery, and appeal, without reasonable notice that they are waiving these important rights.⁵⁸ Principle 11 of the Consumer Due Process Protocol requires that SNS give consumers:

- a. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;
- b. reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they

56. *Terms of Service*, CAFEMOM, <http://www.cafemom.com/about/tos.php> (last updated Feb. 7, 2015).

57. *Id.*

58. Many social media, including Pheed, a music social media platform, premise contract formation on browsing a website: “PLEASE READ CAREFULLY THE FOLLOWING AGREEMENT. BY ACCESSING, BROWSING, AND/OR OTHERWISE USING THE SERVICE, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTOOD, AND AGREE TO BE BOUND BY THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS, THEN PLEASE DO NOT USE THE SERVICE.” *Terms of Use*, PHEED, <https://www.pheed.com/terms-of-use> (last visited Feb. 7, 2014); *see also*, *Terms and Conditions*, ReverbNation, http://www.reverbnation.com/main/terms_and_conditions#top (last updated Feb. 7, 2014) (“BY ACCESSING AND USING THE SITE AND THE SERVICES, YOU ACKNOWLEDGE AND AGREE TO BE BOUND BY THESE GENERAL TERMS AND CONDITIONS, OUR COPYRIGHT POLICY, OUR PRIVACY POLICY, OUR TRADEMARK POLICY AND OUR SPECIFIC TERMS AND CONDITIONS APPLICABLE TO CERTAIN SERVICES YOU MAY ELECT TO USE (ALL OF WHICH ARE INCORPORATED HEREIN AND COLLECTIVELY REFERRED TO AS THE ‘TERMS AND CONDITIONS’, WHICH SET FORTH THE ENTIRE AGREEMENT PERTAINING TO YOUR USE OF THE SITE AND SERVICES, AND SUPERSEDE ALL PRIOR VERSIONS OF THE TERMS AND CONDITIONS). . . . IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, DO NOT USE THE SITE OR SERVICES.”).

may obtain more complete information regarding arbitration procedures and arbitrator rosters;

c. notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and,

d. a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.⁵⁹

Our empirical data permit us to assess whether SNS are satisfying several of the AAA and JAMS due process principles.⁶⁰ While our data do not allow us to directly measure the “fundamental fairness” of AAA and JAMS arbitral clauses employed by SNS, this section presents several unobtrusive tests by which to assess fairness.⁶¹ An unobtrusive test is an indirect measure “without introducing any formal measurement procedure.”⁶²

1. AAA Principle 1: Fundamentally Fair Process

The AAA’s first due process principle is that “[a]ll parties are entitled to a fundamentally-fair ADR process,” which is a problematic standard to measure objectively.⁶³ Fundamental fairness, after all, is a subjective concept that may be interpreted differently by consumers and providers. Since fairness is not mechanically ascertainable, we must utilize other measures. Table Two (below) presents a number of

59. *Consumer Due Process Protocol*, AM. ARB. ASS’N 3 (Apr. 17, 1998) [hereinafter *Consumer Due Process*], https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014.

60. Because these protocols are functionally equivalent in important respects, our analysis will compare social media arbitration clauses to the principles of the combined protocol. See Drahozal & Zyontz, *supra* note 23, at 306 (“The protocols typically require (1) independent and impartial arbitrators; (2) reasonable arbitration costs; (3) a reasonably convenient hearing location; (4) reasonable time limits for the proceeding; (5) the right to representation; (6) adequate discovery; and (7) a fair hearing. Not all of the provisions of the protocols on these topics are identical, but they are broadly consistent.”).

61. See *id.* at 312 (“Principle 1. Fundamentally Fair Process: As discussed above, the text of the Protocol is not clear whether Principle 1 states a separate requirement of fundamental fairness or whether it merely indicates that the remaining principles of the Protocol protect fundamental fairness. Nonetheless, in reviewing clauses, the AAA is to consider whether the procedures set out in the arbitration clause are unduly one-sided—whether they unduly favor the business in ways not addressed in other principles of the Protocol.”).

62. William M.K. Trochim, *Unobtrusive Measures*, RES. METHODS KNOWLEDGE BASE, <http://www.socialresearchmethods.net/kb/unobtrus.php> (last updated Oct. 20, 2006).

63. *Consumer Due Process*, *supra* note 59, at 1.

unobtrusive measures regarding whether the substance of the arbitration clauses, and their presentation, are fundamentally fair.

Table Two: Unobtrusive Measures of Fundamental Fairness

Unobtrusive Measure of Fundamental Fairness (N=59)	Yes, specified in TOU	Not specified in TOU
Social media provider mentioned consumer arbitration rules	41% (N=24)	59% (N=35).
Social media provider gave link where user could get further info about arbitration	14% (N=8)	86% (N=51)
Social media provider explained what arbitration involves	31% (N=18)	70% (N=41)
Social media provider disclosed that by acceding to arbitration, user waived right to jury trial or court disposition	48% (N=28)	53% (N=31)
Social media provider disclosed any right of discovery	14% (N=8)	86% (N=51)
Social media provider disclosed that user's right to appeal was narrowed by acceding to arbitration	17% (N=10)	83% (N=49)

Table Two demonstrates that a substantial majority of SNS require users to accede to predispute mandatory arbitration without the minimum information they need to weigh advantages versus disadvantages. Because only a minority of the fifty-nine social media providers choosing the AAA or JAMS provided as much as a definition of arbitration, or any explanation of the downside of acceding to arbitration, these providers failed to satisfy fundamental fairness.

Only one in three social media providers attempted to explain or define arbitration in their TOU (N=16, 33%). By agreeing—often unknowingly—to predispute mandatory arbitration and class action

waivers,⁶⁴ social media users give up their right to discovery,⁶⁵ to a jury trial, and to an appeal in a court of law;⁶⁶ yet only 49 percent (29 out of 59) of SNS made any mention of these important facts. Consumer arbitration means that the user has no right of appeal—a fact that is

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64. Absent a class action waiver, individuals with functionally equivalent complaints against a company may join in a class suit or representative action where a federal court consolidates the complaints into a single proceeding. Arbitration clauses did not typically address the distinction between class actions filed in federal and state courts and class action arbitrations. Class actions in court have radically different procedural and substantive rights than so-called class action arbitrations. For a discussion of the differences between court and arbitration class actions, see generally *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (citing empirical research that revealed that class arbitrations did not result in final award on the merits).
65. See CLAUDIA SALOMON & SAMUEL DE VILLIERS, *THE UNITED STATES FEDERAL ARBITRATION ACT: A POWERFUL TOOL FOR ENFORCING ARBITRATION AGREEMENTS AND ARBITRAL AWARDS 1* (2014), available at <http://www.lw.com/thoughtLeadership/the-us-fed-arbitration-act> (“The [Federal Arbitration Act] also empowers arbitrators to call third-party witnesses, compel them to appear (and provide any documents they have that are material to the case), and hold such witnesses in contempt if they fail to comply (9 U.S.C. § 7). However, because arbitrators do not possess the authority to enforce compliance with their orders, parties must apply to the federal court where the arbitration is seated to obtain any necessary enforcement measures.”); see also Rustad et al., *supra* note 51, at 658 n.53 (“Arbitral providers will sometimes permit general discovery but this requires an application to an arbitrator and is subject to the discretion of the arbitrator.”). *But cf.* Paul Bennett Marrow, *When Discovery Seems Unavailable, It’s Probably Available*, N.Y. ST. B. ASS’N J., Oct. 2008, at 44, available at <http://www.marrowlaw.com/articles/pdf/Journal-oct08-marrow.pdf> (arguing that “a myriad of techniques and options are available” to receive discovery even when “an arbitrator is uncooperative”). JAMS, for example, permits depositions and discovery at the arbitrator’s discretion, which is similar to the rule for the AAA. *Id.* Arbitral providers will sometimes permit general discovery, but this requires an application to an arbitrator and is subject to the discretion of the arbitrator.
66. See Rustad et al., *supra* note 51, at 644 (“Over the past few years, a quiet revolution has begun as many social networking sites (SNSs) impose predispute mandatory arbitration on consumers. Senator Patrick Leahy (D. Vt.) stated, ‘Mandatory arbitration makes a farce of the right to a jury trial and the due process guaranteed to all Americans.’ SNSs generally require users to enter into two kinds of contractual relationships, terms of service agreements and privacy policies, as a condition for accessing their websites. Hundreds of millions of consumers enter into mandatory arbitration clauses with SNSs through browsewrap, clickwrap, or registration forms. After a consumer has registered or accessed a site, SNSs reserve the right to modify substantive terms, sometimes without notifying users. An SNS, website, or . . . brick-and-mortar company can reduce transaction costs by using a predispute mandatory arbitration clause because it need not defend lawsuits in state or federal court but in a forum where it can choose the arbitral provider and rules to govern the dispute.”).

stated in only 17 percent of the sample's TOU (10 of 59). Only fifteen of the fifty-nine providers mentioned that social media users waived their legal right to seek remedies in U.S. courts. Few SNS provide basic answers to frequently asked questions, links for further information, or links to website addresses for the arbitral provider. Only eight social media providers (14%) provided consumers with any information about how arbitrators were selected. Only nine social media providers gave users information on what steps to take to initiate a claim for arbitration (15%).

SNS TOU are too brief to give their customers clear disclosures about arbitration or its implications.⁶⁷ The mean predispute mandatory arbitration clause consisted of only 404 words (median=324). Thirty-six percent of the fifty-nine arbitration clauses were 290 words or fewer. Twenty percent of the clauses were fewer than 188 words. An extreme example of a social media provider that provided no information about arbitration was FC2's cryptic and unintentionally ironic clause:

Any disputes resulting from the use of Our Service(s), will be resolved through arbitrary [sic] proceedings recognized by the state of Nevada. If a resolution cannot be made through arbitration, a Nevada State District Court receives exclusive jurisdiction rights.⁶⁸

With few exceptions, SNS do not provide consumers with a means of obtaining additional information regarding the ADR provider, fees, or the rights affected by the arbitral clause. More than two out of three SNS gave no explanation at all of arbitration or how it works. Only 24 percent (N=14) provided social media users with any place where they could gain additional information regarding arbitration. Only 19 percent of the social media providers disclosed any of the negative consequence of agreeing to arbitration (N=11). Only nine of the fifty-nine arbitration clauses provided any information on how to submit claims to arbitration.

67. In many cases, a user is bound to both the TOU and privacy policy. See *User Agreement*, LINKEDIN, <http://www.linkedin.com/legal/user-agreement> (last modified Mar. 26, 2014) ("You should carefully read our full Privacy Policy before using LinkedIn as it is hereby incorporated into this Agreement by reference, and governs our treatment of any information, including personally identifiable information you submit to us. Please note that certain information, statements, data, and content (such as photographs) which you may submit to LinkedIn, or groups you choose to join[,] might, or are likely to, reveal your gender, ethnic origin, nationality, age, and/or other personal information about you. You acknowledge that your submission of any information, statements, data, and content to us is voluntary on your part and that LinkedIn may process such information, within the terms of the Privacy Policy.").

68. *Terms of Use*, FC2, <http://help.fc2.com/common/tos/en/> (last visited Feb. 7, 2015).

Twenty-nine percent of social media providers mandating arbitration explained how arbitration works. Eighteen of the fifty-nine arbitral clauses posted a warning on the first page of their TOU, advising users that the agreement contained an arbitration clause (32%). Only two of fifty-nine TOU posted a notice box warning users of the arbitration clause. One in five social media providers incorporated an index into their TOU (N=12).

This failure to give customers the minimum disclosures they need to make a rational decision about whether to agree to arbitration violates the AAA's consumer due process principle of full and adequate disclosures. The AAA's Consumer Due Process Protocol requires social media providers to "undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs."⁶⁹ Zoosk, an online dating site, provided the most comprehensive warning of the fifty-nine arbitral clauses, in bold capital letters:

THIS AGREEMENT CONTAINS A MANDATORY ARBITRATION OF DISPUTES PROVISION IN SECTION 20 THAT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS.⁷⁰

2. Social Media TOU Are Not Reciprocal

The right to a fair and open hearing in which each party has reciprocal obligations is one of the rudiments of fair play in consumer arbitration proceedings. "The JAMS Minimum Standards (for both consumer arbitrations and employment arbitrations) contain an additional limitation on the scope of arbitration agreements, providing that arbitration agreements must be 'reciprocally binding.'"⁷¹ The fifty-nine providers choosing either the AAA or JAMS failed the "reciprocity principle" that remedies be functionally equivalent for provider and user. In our sample of AAA and JAMS clauses, the provisions were far from even handed, favoring the social media provider in nearly every respect. In general, the social media providers minimized any duties

69. *Consumer Due Process*, *supra* note 60, at 1.

70. *Terms of Use Agreement*, ZOOSK, <https://www.zoosk.com/en/tos?from=signup> (last revised Oct. 7, 2013); *see also* "Skype Offer" *Terms and Conditions*, SKYPE, http://static.acer.com/up/Resource/Acer/Images/Landing%20Page/Skype-offer/20131128/EN_Term_and_condition.pdf (last visited Feb. 7, 2015) ("('Terms and Conditions') INCLUDE A MANDATORY AND BINDING ARBITRATION PROVISION IN WHICH YOU AGREE TO RESOLVE ANY DISPUTES ARISING FROM THESE TERMS AND CONDITIONS EXCLUSIVELY THROUGH BINDING ARBITRATION.").

71. *See* Drahozal & Zyontz, *supra* note 23, at 306.

owed to their customer while asserting their own rights to the maximum.

The degree of reciprocity in warranties, remedies, and indemnification obligations is another unobtrusive measure of fundamental fairness. OnlineRussianBrides is typical in stating in its TOU that the provider “in no event [is] liable for any damages whatsoever, whether direct, indirect, general, special, compensatory, consequential and/or incidental,” arising out of the use of their social network.⁷² In addition, OnlineRussianBrides disclaims liability for punitive damages and lost profits from the consumer’s use of their website.⁷³ This asymmetric site requires its users to “indemnify and hold OnlineRussianBrides.com, its subsidiaries, affiliates, officers, agents, and other partners and employees, harmless from any loss, liability, claim, or demand, including reasonable attorney’s fee, made by any third party,” arising out of the consumer’s use of their service.⁷⁴

The indemnification clauses coupled with limitations on damages imposed by SNS illustrate the non-reciprocity of this industry’s typical TOU. Social media providers are not accountable to their users for any causes of action or any category of damages, while their paying customers are liable to the limits of the law.⁷⁵ Forty-nine percent of the

72. *Terms of Use Agreement*, ONLINE RUSSIAN BRIDES, <http://www.online-russianbrides.com/pages/terms-of-use> (last modified Dec. 29, 2012) (accessed by search for onlinerussianbrides.com in the Internet Archive Index Wayback Machine).

73. *Id.*

74. *Id.*

75. Instagram is an example of a SNS asserting its rights against users, while eliminating nearly every type of damages and capping their total liability at \$100 below the \$200 filing fee for consumer arbitration before the AAA. Instagram’s limitation of liability clause states that “IN NO EVENT WILL THE INSTAGRAM PARTIES TOTAL LIABILITY TO YOU FOR ALL DAMAGES, LOSSES OR CAUSES OR ACTION EXCEED ONE HUNDRED UNITED STATES DOLLARS (\$100.00).” *Terms of Use*, INSTAGRAM, <http://instagram.com/legal/terms/#> (last updated Jan. 19, 2013). In contrast, Instagram’s indemnification clause requires users to fully indemnify the provider:

You (and also any third party for whom you operate an account or activity on the Service) agree to defend (at Instagram’s request), indemnify and hold the Instagram Parties harmless from and against any claims, liabilities, damages, losses, and expenses, including without limitation, reasonable attorney’s fees and costs, arising out of or in any way connected with any of the following (including as a result of your direct activities on the Service or those conducted on your behalf): (i) your Content or your access to or use of the Service; (ii) your breach or alleged breach of these Terms of Use; (iii) your violation of any third-party right, including without limitation, any intellectual property right, publicity, confidentiality, property or privacy right; (iv) your violation of any

SNS arbitration clauses (29 of 59) permit injunctive relief only to protect the SNS, while only 39 percent of the clauses allow injunctive relief for the consumer as well (N=23). The right to seek injunctive relief is not addressed in 10 percent of the clauses (N=6).

The limitations of liability and indemnification clauses are emblematic of the degree of non-reciprocity found in these clauses.⁷⁶ Meetup, for example, caps total damages at the nominal amount of \$100,⁷⁷ while consumers may be required to pay the social network

laws, rules, regulations, codes, statutes, ordinances or orders of any governmental and quasi-governmental authorities, including, without limitation, all regulatory, administrative and legislative authorities; or (v) any misrepresentation made by you. You will cooperate as fully required by Instagram in the defense of any claim. Instagram reserves the right to assume the exclusive defense and control of any matter subject to indemnification by you, and you will not in any event settle any claim without the prior written consent of Instagram.

Id.

76. Snapchat's dispute clause pairs two clauses. The first clause is an indemnification clause that states the following:

By agreeing to these Terms you agree to indemnify, defend and hold harmless Snapchat, our managing members, shareholders, employees, affiliates, licensors and suppliers (the "Snapchat Parties") from and against any and all complaints, charges, claims, damages, losses, costs, liabilities, and expenses (including attorneys' fees) due to, arising out of, or relating in any way to (a) your use of the Services; (b) any User Content you post, upload, use, distribute, store or otherwise transmit through the Services; (c) your violation of these Terms; or (d) your violation of the rights of another.

SNAPCHAT, *supra* note 12. Snapchat juxtaposes this clause with a limitation of liability clause reallocating total responsibility for misuse of their service on the user and disclaiming any responsibility for its own wrongdoing. *Id.* ("Except where prohibited by law, in no event will Snapchat or the Snapchat Parties be liable for any indirect, special, punitive, incidental, exemplary or consequential damages that result from (a) the use of, or inability to use, the Services; (b) the provision of the Services or any materials available therein; or (c) the conduct of other users of the Services, even if Snapchat has been advised of the possibility of such damages. You assume total responsibility for your use of the Services.").

77. *Meetup Terms of Service Agreement*, MEETUP, <http://www.meetup.com/terms/> (last modified May 23, 2010) ("You agree that in no event shall Meetup be liable for any direct, indirect, incidental, special, consequential or exemplary damages, including but not limited to, damages for loss of profits, goodwill, use, data or other intangible losses (even if Meetup has been advised of the possibility of such damages), arising out of or in connection with our Platform or this Agreement or the inability to use our Platform (however arising, including negligence), arising out of or in connection with Third Party Transactions or arising out of or in connection with your use of our Platform or transportation

provider's attorneys' fees per Meetup's one-sided indemnification clause:

You agree to indemnify and hold us and our officers, directors, shareholders, agents, employees, consultants, affiliates, subsidiaries and third-party partners harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your breach of your representations and warranties or this Agreement or the documents it incorporates by reference, your use of our Platform,⁷⁸

Christian Mingle requires users to defend, indemnify, and hold the social networking site and its officers, employers, joint venturers, and other third parties harmless "for any losses, costs, liabilities or expenses relating to or arising out of any third party claim" arising out of the user's postings.⁷⁹ Christian Mingle makes it clear that the site is not liable to its users for damages:

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL WE BE LIABLE TO YOU OR TO ANY OTHER PERSON FOR ANY INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF DATA, LOSS OF PROGRAMS, COST OF PROCUREMENT OF SUBSTITUTE SERVICES OR SERVICE INTERRUPTIONS) ARISING OUT OF THE USE OF OR INABILITY TO USE THE SERVICE, EVEN IF WE OR OUR AGENTS OR REPRESENTATIVES KNOW OR HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.⁸⁰

Christian Mingle's cap on damages, coupled with its imbalanced indemnification clause, is emblematic of how social network providers violate the reciprocity principle that the provider and consumer have parallel rights.

to or from Meetup Gatherings, attendance at Meetup Gatherings, participation in or exclusion from Meetup Groups or Meetup Everywheres and the actions of you or others at Meetup Gatherings. Our liability to you or any third parties in any circumstance is limited to the greater of (a) the amount of fees, if any, you pay to us in the twelve (12) months prior to the action giving rise to liability, and (b) \$100.").

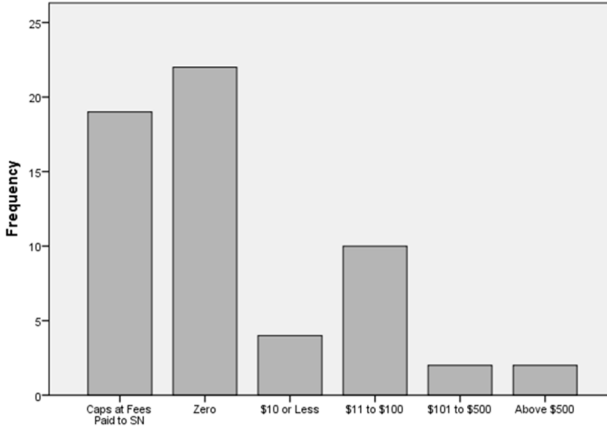
78. *Id.*

79. *Terms of Use*, CHRISTIAN MINGLE, <http://www.christianmingle.com/terms-of-use.html> (last modified Nov. 5, 2013); *see also Terms of Service*, LINDEN LAB, <http://www.lindenlab.com/tos> (last visited Feb. 7, 2015).

80. CHRISTIAN MINGLE, *supra* note 79.

a. The Dearth of Remedies: How Social Network Providers Cap Damages Below the Cost of Filing Consumer Arbitration

Figure One: Caps on Damages



As Figure One (above) reveals, 96 percent of the SNS TOU capped damages at zero dollars, fees paid, or some other nominal amount (57 of 59). The vast majority of SNS require arbitrators to cap damages at a nominal amount that is significantly lower than the consumer's cost of filing, which is \$200 under the AAA⁸¹ and \$250 for JAMS.⁸² The most commonly adopted limit on dollar damages purports to either disclaim all responsibility for paying monetary damages or to cap liability at zero dollars (37%, N=22). MOG, a music social media site, is an emblematic example of a SNS capping damages at zero.⁸³ The second most common limitation of liability is to cap monetary damages based upon subscription fees paid in the past year or another fixed

81. AM. ARB. ASS'N, CONSUMER-RELATED DISPUTES *Supplementary Procedures* 12 (2014), available at file:///C:/Users/msd81/Downloads/Consumer-Related%20Disputes%20Supplementary%20PROCEDURES.pdf (noting that the consumer filing fee is \$200 irrespective of whether it is an appearance or desk (nonappearance) arbitration).

82. JAMS, *supra* note 41, at 2.

83. MOG, *supra* note 52 ("IN NO EVENT SHALL MOG OR ITS LICENSORS OR ANY OF THEIR OFFICERS, DIRECTORS, EMPLOYEES, AGENTS OR AFFILIATES BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, DIRECT, INDIRECT, SPECIAL, PUNITIVE, OR OTHER DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS) ARISING OUT OF THIS AGREEMENT OR THE USE OF OR INABILITY TO USE ANY SERVICE, EVEN IF MOG HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.").

period (32%, N=19). Of this group, five social media providers capped damages at the amount the user paid over a designated period ranging from three months to a year. Gaia Online, for example, capped damages at the lesser of the amount the subscriber paid in the preceding twelve months or \$100.⁸⁴ When social networking sites did cap damages at an amount greater than zero dollars, the most common cap was \$11 to \$100 (17%, N=10). Two providers capped monetary damages at an amount between \$101 and \$500 (3%, N=2). Two other social media providers capped damages between \$500 and \$5,000. Every SNS incorporating either an AAA or JAMS arbitration clause disclaimed all warranties.

When the consumer arbitration filing fee exceeds the greatest possible outcome, no reasonable consumer will file a claim against a social media provider. This cap on damages effectively quashes any cause of action. To discover the rate of filings for consumer arbitrations filed against SNS, we analyzed AAA and JAMS databases, searching for any website that could disclose this information.⁸⁵ To our knowledge, no prior empirical studies have been conducted on the incidence of arbitration filings arising from social media TOU. The best circumstantial evidence of fundamental unfairness is that social media providers have devised an ADR system that effectively quashes any cause of action.

84. GAIA ONLINE, *supra* note 50 (“IN NO EVENT WILL GAIA OR ITS AFFILIATES, CONTRACTORS, EMPLOYEES, AGENTS, OR THIRD-PARTY PARTNERS, LICENSORS, OR SUPPLIERS TOTAL LIABILITY TO YOU FOR ALL DAMAGES, LOSSES, AND CAUSES OF ACTION ARISING OUT OF OR RELATING TO THESE TERMS OR YOUR USE OF GAIA ONLINE, INCLUDING WITHOUT LIMITATION YOUR INTERACTIONS WITH OTHER GAIA ONLINE MEMBERS, (WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE, WARRANTY, OR OTHERWISE) EXCEED THE AMOUNT PAID BY YOU, IF ANY, FOR ACCESSING GAIA ONLINE DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE DAY THE ACT OR OMISSION OCCURRED THAT GAVE RISE TO YOUR CLAIM OR ONE HUNDRED DOLLARS, WHICHEVER IS GREATER.”).

85. *Consumer Arbitration Statistics*, AM. ARB. ASS’N, https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat.jsessionid=WrtcTqnT7f5Lv1X2yvJhnmQVL14GVSY2Tw22CLKzSMMcCPDKzhLp!1159927633?_afLoop=24487877628203&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D24487877628203%26_afWindowMode%3D0%26_adf.ctrl-state%3D1a8vtcy6uw_4 (last visited Feb. 7, 2015).

b. Remediless Social Media Wrongs

This section does a content analysis of AAA and JAMS report data on filings, settlements, and decisions in favor of either party.⁸⁶ California⁸⁷ and Maryland⁸⁸ laws require private arbitration companies in that state to publish consumer arbitrations.⁸⁹ The AAA consumer arbitrations database, which consists of 25,139 cases, includes all real estate, employment, collection, and traditional consumer cases and systematically collects and codes these variables: the name of the non-consumer party,⁹⁰ type of disputes,⁹¹ salary range for employees in employment disputes,⁹² the prevailing party,⁹³ filing data, disposition (decided, withdrawn, settled), disposition date, claim amount by business, claim amount by consumer,⁹⁴ total arbitration fee,⁹⁵ percent

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86. The AAA database contains information for “consumer cases filed after January 1, 2003, updated on a quarterly basis, as required by law. Further inquiries regarding this notice of the information in this section can be directed to the Statistics and In-House Research Department at 877.495.4185.” *Id.* (“The AAA provides the provider organization report in spreadsheet format. Please note that each row of the spreadsheet does not equal one case; each row represents an instance of a consumer or employee bringing a claim against the identified business. Therefore, if two consumers brought claims against a single business in a single case filing (such as two homeowners filing a single case against the same builder), there would be two rows in the spreadsheet for that case. Similarly, if a consumer brought claims against two businesses (for example, when a consumer files a claim against both a car dealer and the manufacturer), that case would receive two rows in the spreadsheet. To assist in identifying rows that relate to a single case, we have included a ‘Case ID’ column. Rows with the same ‘Case ID’ are from the same case. The current data file (Q2 2014) contains 17,368 [sic] records (rows) from 16,436 cases.”).
87. CAL. CIV. PROC. CODE. § 1281.96 (West 2007).
88. MD. CODE ANN., COM. LAW §§ 14-3901–3905 (West 2013).
89. The AAA’s report of consumer arbitration statistics “is made available pursuant to state statutes such as California Code of Civil Procedure §1281.96 and Maryland Commercial Law §§ 14-3901 to 3905.” *Id.*
90. *Id.* (“This is the business or employer involved in the dispute.”).
91. *Id.* (“Type of Dispute - This is the general category of the dispute. Note that ‘Consumer Pre-Case’ indicates an incomplete request for arbitration in which the filing requirements have not been met.”).
92. *Id.* (“This is the salary range of the employee involved in the case, as provided by the filing party. This is reported only on employment cases.”).
93. *Id.* (“If the arbitrator indicates a prevailing party in the award, that information is reflected here. This is reported only on awarded cases.”).
94. *Id.* (“This is the monetary amount in dispute [as claimed by the consumer or employee (non-business party)].”).
95. *Id.* (“This is the full amount of arbitrator’s fees and expenses charged on the case.”).

of fee paid by consumer (or employee),⁹⁶ type of disposition,⁹⁷ arbitrator's name, consumer's state, whether consumer is self-represented or not, hearing date, and city and state where the hearing was held.

Table Three (below) presents the first analysis of the frequency of SNS arbitrations using this database. In more than a decade of reported cases, the AAA reported only four social media arbitrations filed. In our sample, forty arbitral providers specified the AAA as provider.⁹⁸ Only ten percent of social media providers specifying the AAA as provider had a case filed against them in a ten-year period. The data are a conservative estimate of the incidence of arbitration because our search included filings covering all consumer aspects of these websites, not just social media disputes. This finding indicates that the net impact of SNS predispute arbitration clauses is to discourage filings—therefore shielding SNS from any accountability for breach of TOU, tort claims, intellectual property rights, privacy violations, or other causes of action.⁹⁹

96. *Id.* (“This is the percentage of the Total Fee borne by the consumer and non-consumer parties.”).

97. *Id.* (“This is the manner in which the case was closed. Dispositions include:

Awarded - A case in which the arbitrator was rendered a decision.

Settled - A case that was closed after the parties reached a mutual resolution of the dispute.

Withdrawn - A case in which the moving party withdrew its claim prior to resolution.”).

98. We searched the AAA consumer arbitration database for the names of forty social media providers specifying the AAA as their arbitral provider: 43Things, 8Tracks, 99Design, Academia, AYI.com, CafeMom, Christian Mingle, CouchSurfing, eHarmony, FullCircle, Gaia Online, Geni.com, Hi5, Instagram, JDate, Koofers, Match.com, MeetMe (formerly MyYearbook), Miverse, Mubi, MyLife, OurTime, Pheed, Pinterest, PureVolume, ReverbNation, Russian Brides, Second Life, Senior People Meet, Seniors Meet, Skype, SpeedDate.com, Spotify, Squidoo, Tagged, VampireFreaks, Virb, Webshots, and WeHeartIt. Of the hundreds of millions of consumers using these sites, only three arbitral filings were uncovered during a four-year period. The AAA Consumer Arbitration database is a complete universe of all filings for the 2009–2013 period.

99. Given the high number of SNS, lawsuits are rare despite the huge potential for intentional torts, infringement, and employment-related disputes. *Cf.* E.K.D. *ex rel.* Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012) (enforcing the forum-selection clause in Facebook's Terms of Service); Claridge v. RockYou, Inc., 785 F. Supp. 2d 855 (N.D. Cal. 2011) (settling class action for failure of the site to secure user's privacy and security); Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090 (N.D. Cal. 2011) (holding that Facebook users did not consent to the SNS using their names and likenesses to promote service and ruling that the plaintiffs sufficiently stated a claim for appropriation of their names and likenesses for an advantage, but ruling that the plaintiffs were unable to prove

Table Three: AAA Consumer Arbitrations Against Social Media Sites

Social Media Site	Filing Date	Type of Disposition	Claim Amount (Consumer)	Total Fee
Skype	2/25/2013	Awarded	\$19,958	\$750
Match.com	2/20/2013	Awarded	\$74,500	\$750
MyLife.com	3/16/2012	Awarded	\$750	\$125
Pheed	11/25/09	Awarded	\$4,160	\$750

Only 10 percent of the forty SNS specifying the AAA as the provider had a single consumer claim filed against them over a decade; no provider had more than a single filing. Each of the four awards was a small fraction of what the consumer was seeking. In one case, the award was less than the AAA consumer filing fee. This suggests that a prior empirical study that concluded that consumers fare as well in arbitration as in litigation may have missed the fact that the unbalanced TOU screened out all but the most convincing consumer complaints, and, therefore, very few consumer arbitrations survived to be included in their database.¹⁰⁰ At least, this was the case for social media providers. It is also possible that the AAA refused to arbitrate disputes with these SNS because their terms clearly violated the arbiter’s due process protocols.

Next, we searched the 2,528 JAMS Consumer Arbitration cases reported in their Quarterly Report of 2014 consumer arbitration disclosures to determine the incidence of arbitral filings for the seventeen SNS¹⁰¹ that required consumers to accede to JAMS

damages); *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705 (N.D. Cal. 2011) (dismissing class action by Facebook users based upon the Electronic Communications Privacy Act as well as California state law); *Hubbard v. MySpace, Inc.*, 788 F. Supp. 2d 319 (S.D.N.Y. 2011) (filing class action against MySpace for alleged violation of the Stored Communications Act); *In re Google Buzz Privacy Litigation*, No. C10-00672JW., 2011 WL 7460099 (N.D. Cal. June 2, 2011) (approving \$8 million settlement in class action brought by Gmail users arising out of Google’s disclosure of personally identifiable information without authorization through the defunct site, Google Buzz).

100. *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 898-900 (2010) (noting that in a study of 301 AAA claims, the average consumer prevails in AAA arbitration about half the time and is awarded approximately half of what was sought).

101. AdultFriendFinder, Autospies, Flixster, FriendFinder, Gays.com (English only), Habbo, Houzz, Klout, Life360, Meetup, MySpace, PerfectMatch, Popsugar USA, QuantiMD, Raptr, Remind101, SnapChat, WordPress, and Zoosk are the nineteen social network sites that require arbitrations before JAMS.

arbitration proceedings.¹⁰² Not a single social media user filed a claim against the seventeen SNS specifying JAMS as the arbitral provider. This paucity of arbitral filings is the best evidence that arbitration clauses are stacked against the consumer. It is implausible that the hundreds of millions of users subject to mandatory arbitration never have a contractual dispute or other cause of action against SNS. LinkedIn, for example, has 255 million users.¹⁰³ Cybercriminals misappropriated six million LinkedIn passwords, posting them “on underground sites frequented by hackers,”¹⁰⁴ but not a single arbitration was filed alleging damages from negligent security.

SNS benefit greatly from shunting cases to arbitration under imbalanced rules because the TOU, for all practical purposes, cannibalize all civil remedies under the legal fiction of voluntarily negotiated contract. Consumer-forced arbitration in social media disputes is tort reform in disguise because arbitration clauses have a chilling impact on claims. The social network providers have created what is, in effect, a liability-free zone that insulates them from paying consequential damages or other significant remedies for any cause of action.¹⁰⁵

By acceding to predispute mandatory arbitration, class action preclusions,¹⁰⁶ and waivers of all meaningful remedies, social media

102. *JAMS Disclosures for Consumer Arbitrations*, JAMS, <http://www.jamsadr.com/consumer-arbitration-disclosures/> (last visited Feb. 7, 2015).

103. *Top 15 Most Popular Social Networking Sites: September 2014*, eBizMBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Feb. 7, 2015).

104. Paragon Fin. Ltd., *Social Media Industry Continue to Struggle After Facebook IPO*, MARKETWIRED (June 13, 2012, 8:20 ET), <http://www.marketwired.com/press-release/Social-Media-Industry-Continue-to-Struggle-After-Facebook-IPO-1668805.htm>.

105. See Rustad et al., *supra* note 51, at 645 (“A social media company can dodge jury verdicts, punitive damages, class actions, consequential damages, and any other meaningful remedy by requiring their users to submit to arbitration. One-sided terms of use that, in effect, divest consumers of fundamental rights raise serious concerns of procedural and substantive unfairness. ‘Users of ADR are entitled to a process that is fundamentally fair.’ Social networking sites have designed arbitration agreements that operate as poison pills that eliminate minimum adequate rights and remedies for consumers, while preserving the full array of remedies for these virtual businesses.”).

106. Absent a class action waiver, individuals with functionally equivalent complaints against a company may join in a class suit or representative action where a federal court consolidates the complaints into a single proceeding. Arbitration clauses did not typically address the distinction between class actions filed in federal and state courts and class action arbitrations. Class actions in court have radically different procedural and substantive rights than so-called class action arbitrations. For a discussion of the differences between court and arbitration class actions, see *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (citing

users forfeit the right to discovery,¹⁰⁷ a jury trial, and an appeal in a court of law.¹⁰⁸ The supporters of predispute arbitration contend that this ADR procedure is beneficial for the great majority of consumers.¹⁰⁹ Our data indicate that the reverse is true. Mandatory arbitration, under the one-sided terms specified by most social networking TOU, efficiently and effectively eliminates liability.¹¹⁰

Klout, for example, a social media site and mobile application that ranks the importance of users based on their online influence, creates a coercive contracting environment, where it can press its legal rights to the maximum, while disclaiming all warranties and limiting liability for its conduct.¹¹¹ Klout's 6,198-word TOU is composed of 120 paragraphs.

empirical research that revealed that class arbitrations did not result in final award on the merits).

107. Arbitral providers will sometimes permit general discovery, but this requires an application to an arbitrator and is subject to the discretion of the arbitrator. *See Marrow, supra* note 65, at 44–46. JAMS, for example, permits depositions and discovery at the arbitrator's discretion, which is similar to the rule for the AAA. *Id.*
108. *See Rustad et al., supra* note 51, at 644 (“Over the past few years, a quiet revolution has begun as many social networking sites (SNSs) impose predispute mandatory arbitration on consumers. Senator Patrick Leahy (D. Vt.) stated, ‘Mandatory arbitration makes a farce of the right to a jury trial and the due process guaranteed to all Americans.’ SNSs generally require users to enter into two kinds of contractual relationships, terms of service agreements and privacy policies, as a condition for accessing their websites. Hundreds of millions of consumers enter into mandatory arbitration clauses with SNSs through browwrap, clickwrap, or registration forms. After a consumer has registered or accessed a site, SNSs reserve the right to modify substantive terms, sometimes without notifying users. An SNS, website, or other brick-and-mortar company can reduce transaction costs by using a predispute mandatory arbitration clause because it need not defend lawsuits in state or federal court but in a forum where it can choose the arbitral provider and rules to govern the dispute.”).
109. *See Sternlight, supra* note 19, at 1633–34 (discussing the benefits of mandatory arbitration for both consumers and companies).
110. *See Rustad et al., supra* note 51, at 645 (“A social media company can dodge jury verdicts, punitive damages, class actions, consequential damages, and any other meaningful remedy by requiring their users to submit to arbitration. One-sided terms of use that, in effect, divest consumers of fundamental rights raise serious concerns of procedural and substantive unfairness.”).
111. Klout's indemnification clause in its terms of service states the following:

You agree to release, indemnify and hold Klout and its affiliates and their officers, employees, directors and agents harmless from any and all losses, damages, expenses, including reasonable attorneys' fees, rights, claims, actions of any kind and injury (including death) arising out of or relating to your use of the Services, any User Content, your connection to the Services, your violation of these Terms of Services or your violation of any rights of another.

A Klout registrant would have to read 110 paragraphs of text (4,966 words) before reaching Klout's arbitration clause. Klout requires its users to submit to arbitration in San Francisco, California, before a single JAMS arbitrator "in accordance with the rules and regulations promulgated by JAMS unless specifically modified in the Terms of Service."¹¹²

Klout's TOU are manifestly unbalanced because a consumer has no realistic ability to vindicate her claims.¹¹³ Its consumer arbitration clause caps monetary damages at a mere \$100,¹¹⁴ which is \$150 less than the mandatory, nonrefundable filing fee that a consumer must pay to initiate a JAMS consumer arbitration.¹¹⁵ Klout imposes a rule where "[t]he arbitrator may, in his or her discretion, assess costs and expenses (including the reasonable legal fees and expenses of the prevailing part) against any party to a proceeding."¹¹⁶ Houzz, a home design social network, asserts a "loser pays" rule that applies if the consumer challenges the enforceability of arbitration and loses.¹¹⁷

Tort reformers have long sought "loser pays" rules in consumer lawsuits, precisely to dissuade consumers from filing claims.¹¹⁸

KLOUT, *supra* note 5. In contrast, Klout's disclaimer clause eliminates all responsibility for warranties. *Id.* Similarly, Klout caps total dollar damages at \$100 eliminating every category of monetary damages. *Id.* (Limitation of Liability Clause).

112. *Id.* (Arbitration).

113. *See* JAMS, *supra* note 41, at 2.

114. KLOUT, *supra* note 5 ("The arbitrator will not have the power to award damages in excess of the limitation on actual compensatory, direct damages set forth in the Terms of Service and may not multiply actual damages or award punitive damages or any other damages that are specifically excluded under the Terms of Service, and each party hereby irrevocably waives any claim to such damages.").

115. JAMS, *supra* note 41, at 2 ("With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees.").

116. *See* KLOUT, *supra* note 5 (Arbitration).

117. *Terms of Use Agreement*, HOUZZ, <http://www.houzz.com/terms-of-use> (last updated Jan. 16, 2014) ("If any arbitration or other proceeding is brought to enforce or interpret this Agreement or matters relating to it, the substantially prevailing party, as determined by the arbitrator's award, will be entitled to recover reasonable attorneys' fees and other costs and expenses incurred in such arbitration or proceeding from the other party, in addition to any other relief to which such prevailing party is entitled; provided that in no event will the arbitrator have the authority to award punitive damages.").

118. Tami Kamin-Meyer, *Surprise! Conservative Think Tank Study Again Suggests That "Loser-Pays" Is Right for America: Even a Defense Attorney Agrees It Would Have a Chilling Effect on Filing of Many Meritorious Suits*,

Consumers are very rarely in a financial position to be able to risk paying the attorneys' fees and other costs of a social media provider, particularly when the maximum payout is capped at only \$100. Such a fee-shifting provision is unduly burdensome to the consumer—if not substantively unconscionable.¹¹⁹ Even in the unlikely event that the consumer incurs no travel, lodging, or attorneys' fees, the cost of filing alone is more than twice the maximum amount that the arbitrator can award.¹²⁰ Klout's TOU does not disclose if the website pays the cost of hiring the arbitrator, the room, and other expenses, as required by JAMS's procedural fairness statement.¹²¹

3. AAA Principle 2: Access to Information¹²²

a. Social Media's Affirmative Duty to Inform

The AAA requires providers of goods and services such as social networks to “undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs.”¹²³ To comply with the AAA's Consumer Due Process Protocol, a SNS employing consumer arbitration must give the consumer “(1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which

PLAINTIFF MAG., Mar. 2009, *available at* http://www.plaintiffmagazine.com/Mar09/Kamin-Meyer_Surprise%20-%20Conservative%20think%20tank%20study%20again%20suggests%20that%20loser-pays%20is%20right%20for%20America_Plaintiff%20magazine.pdf

119. *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 284 (3d Cir. 2004) (“[A]n arbitration provision that makes the arbitral forum prohibitively expensive for a weaker party is unconscionable.”).

120. *See, e.g., Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) (reporting that Gateway's arbitration clause required customers with claims less than \$50,000 to pay an advance fee of \$4,000, which was greater than any of the defendant's products).

121. JAMS, *supra* note 41, at 2; Klout, *supra* note 5.

122. *Consumer Due Process*, *supra* note 59, at 1 (“Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs. At the time the Consumer contracts for goods or services, such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program. After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.”).

123. *Id.*

Consumers may obtain additional information regarding the ADR Program.”¹²⁴

JAMS’s parallel due process principle states that “[t]he consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications must be clear.”¹²⁵ For 50 percent of the AAA clauses, a user would have to read at least 4,967 words just to reach the first word of the arbitration clause. Only one out of the forty social media providers specifying the AAA gave users an opportunity to opt out of mandatory arbitration. Even in this sole exception, the opt-out right is illusory because Instagram gives users only thirty days from the date the TOU was originally posted to opt out, which means that the window to exercise this option has long since passed.¹²⁶ For the nineteen JAMS social media arbitral clauses, no SNS offered an opportunity to opt out of arbitration. In contrast, a quarter of clauses in checking account and credit card contracts allowed consumers to opt out of arbitration.¹²⁷

b. AAA and JAMS Arbitral Clauses Fail to Inform Users

SNS TOU are standard form contracts marketed to consumers with identical terms for all users and no likelihood of individual negotiation.¹²⁸ Standard-form licenses are broadly enforceable so long as the license satisfies three conditions: (1) the customer has an opportunity to review the terms of the license, (2) the user manifests assent after having an opportunity to review the terms, and (3) the

124. *Id.*

125. JAMS, *supra* note 42, at 2.

126. INSTAGRAM, *supra* note 75.

127. Cordray, *supra* note 21 (“About one-quarter of the clauses contained in checking account and credit card contracts allow consumers to opt out of the arbitration requirement. For those that allow it, consumers usually have to submit a signed document by mail within a set time frame—usually thirty or sixty days from when the account was opened or the agreement was mailed.”).

128. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT § 102(a)(45) (amended 2002), 7 U.L.A. 217 (2009) (defining “Mass-market transaction” to mean: “(A) a consumer contract; or (B) any other transaction with an end-user licensee if: (i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information; (ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and (iii) the transaction is not: (I) a contract for redistribution or for public performance or public display of a copyrighted work; (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose; (III) a site license; or (IV) an access contract.”).

actions are “attributable in law” to the customer.¹²⁹ More than three out of four social media providers (76%, N=45), however, predicate contract formation on browsewrap that purports to bind the user without any affirmative act. Forty out of fifty-nine TOU with AAA or JAMS clauses assert aggressive rolling contract provisions that give the SNS the right to change the terms after contract formation at will. Houzz, for example, states that it has the right to change its service agreement and the TOU at will:

We reserve the right at any time, with or without cause, to:

- change the terms and conditions of this Agreement;
- change the Website, including eliminating or discontinuing any Information or Services or other feature of the Website; or
- deny or terminate your use of and/or access to the Website.

Any changes we make will be effective immediately upon our making such changes available on the Website or otherwise providing notice thereof. You agree that your continued use of the Website after such changes constitutes your acceptance of such changes. You hereby acknowledge that you have carefully read all of the terms and conditions of our Privacy Policy (which can be accessed at <http://houzz.com/privacypolicy>) and agree to all such terms and conditions. Be sure to return to this page periodically to ensure familiarity with the most current version of this Agreement.¹³⁰

Seventeen of the nineteen SNS choosing JAMS as the arbitral provider impose rolling contract terms that can be changed at will by the provider but not the consumer (89.5%). Sixty-six percent of the social networks choosing the AAA as the provider structure their TOU as a rolling contract (N=26).¹³¹ Users must check periodically for current

129. *Id.* § 112, cmt. 2.

130. HOZZ, *supra* note 117.

131. LINKEDIN, *supra* note 67 (“You must comply with all applicable laws and this Agreement, as may be amended from time to time with or without advance notice, and the policies and processes explained in the following sections and related webpages.”); *see also Terms of Use*, ACADEMIA.EDU, <http://www.academia.edu/terms> (last updated Mar. 13, 2013) (“Academia.edu reserves the right, at its sole discretion, to modify the Site, Services and these Terms, at any time and without prior notice. If we modify these Terms we will post the modification on the Site or provide you with notice of the modification. We will also update the “Last Updated Date” at the top of these Terms. By continuing to access or use the Site or Services after we have posted a modification on the Site or have provided

terms because their continued use constitutes acceptance of any new terms, even if the user is unaware of any changes.¹³²

Social media providers made little attempt to draw users' attention to the presence of arbitration clauses, burying them deep within the TOU or service agreement. Courts have rejected agreements where a licensor makes little effort to draw attention to pro-licensor terms. In *Bragg v. Linden Research, Inc.*,¹³³ the developer of "Second Life," an online virtual world developed by the defendant, confiscated the plaintiff's virtual property and removed him from the website.¹³⁴ The plaintiff filed suit, and Linden Research responded by filing a motion to compel arbitration based on their arbitration agreement. The court found the arbitration agreement to be procedurally and substantively unconscionable because it was obscurely situated deep in take-it-or-leave-it TOU.

The *Bragg* court found lack of mutuality and that Second Life failed to give Bragg sufficient information on the costs and rules of arbitration, as required by the rules of the International Chamber of Commerce.¹³⁵ The court reasoned that Second Life could have easily explained the arbitration procedure in either its TOU or through a hyperlink to another page. In our sample, only a handful of the providers explained the arbitration procedure or provided a hyperlink where they could learn about the arbitration rules.

The mandatory predispute binding arbitration clauses in SNS' TOU typically were written in impenetrable legalese and placed where they were almost certain to go unnoticed. The first word in the arbitration clause of the fifty-nine AAA and JAMS clauses was buried 5,662 words deep in the TOU (median 5,360 words). Because of the

you with notice of a modification, you are indicating that you agree to be bound by the modified Terms. If the modified Terms are not acceptable to you, your only recourse is to cease using the Site and Services.”).

132. *E.g.*, *Terms of Service*, TAGGED, http://www.tagged.com/terms_of_service.html (last updated Feb. 21, 2014) (“Tagged reserves the right to change or amend this Agreement at any time, for any reason, or for no reason at all, at Tagged’s sole discretion. The most recent version of this Agreement will be posted on the Tagged website. Although Tagged will provide notice of material changes to this Agreement on the Tagged website, as a Member it is your sole responsibility to keep yourself informed of any such changes or amendments. Should a Member object to any terms and conditions of the Agreement or any subsequent changes to the Agreement or become dissatisfied with Tagged in any way, Member’s only solution is to immediately: (1) discontinue use of Tagged; (2) terminate their Tagged registration; and (3) notify Tagged of termination.”).

133. 487 F. Supp. 2d 593 (E.D. Pa. 2007).

134. *Id.* at 597.

135. *Id.* at 611.

obscure location of the arbitration clause, social media users are likely to be unaware that they have waived their right to go to court.

c. Difficult-to-Read Arbitration Terms

The duty to read is a long-standing principle in Anglo-American contract law, but there is no concomitant duty of providers to make terms readable.¹³⁶ Critics argue that the opportunity to read maxim is a legal fiction because consumers almost never review the boilerplate¹³⁷ and that courts and commentators need to abandon the “opportunity to read” requirement as signifying meaningful assent.¹³⁸ To assess the readability of the fifty-nine arbitration clauses selecting the AAA or JAMS, we tested each TOU text using the Flesch Reading Ease Formula,¹³⁹ which is a standard measure for determining comprehensibility. The readability tests did not rate a single social

136. *See, e.g.,* *Hoshaw v. Cosgriff*, 247 F. 2d, 26 (8th Cir. 1917) (“[A] person, having the capacity and opportunity to read a contract, cannot avoid the contract . . . if he signs it without reading, where there are no special circumstances excusing his failure to read it. It is the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it.”); *Lenox Manor, Inc. v. Gianni*, 120 Misc. 2d 202, 204 (N.Y. Civ. Ct. 1983) (stating that “basic contract law holds that an individual has a duty to read a contract and is responsible for the provisions contained in it” and there is “no discernible legislative or common-law prohibition” to preauthorized electronic fund transfers); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 476 (2008) (“[T]raditional contract doctrine imposes on the parties a ‘duty to read.’ Accordingly, if a party objectively manifests assent to be bound to a contract (for example, by signing a written contract document), a court will almost automatically find assent to all terms contained in the writing. Courts meet parties’ excuses such as, ‘I didn’t read it’ or ‘I didn’t understand it’ with little sympathy, except in cases where more important policies are expressed in the traditional contract defenses.”). *See also* 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:19 (4th ed. 2007) (“According to the objective theory of contract formation, what is essential is not assent, but rather what the person to whom a manifestation is made is justified as regarding as assent. Thus, if an offeree, in ignorance of the terms of an offer, so acts or expresses itself as to justify the offeror in inferring assent, and this action or expression was of such a character that a reasonable person in the position of the offeree should have known it was calculated to lead the offeror to believe that the offer had been accepted, a contract will be formed in spite of the offeree’s ignorance of the terms of the offer.”).

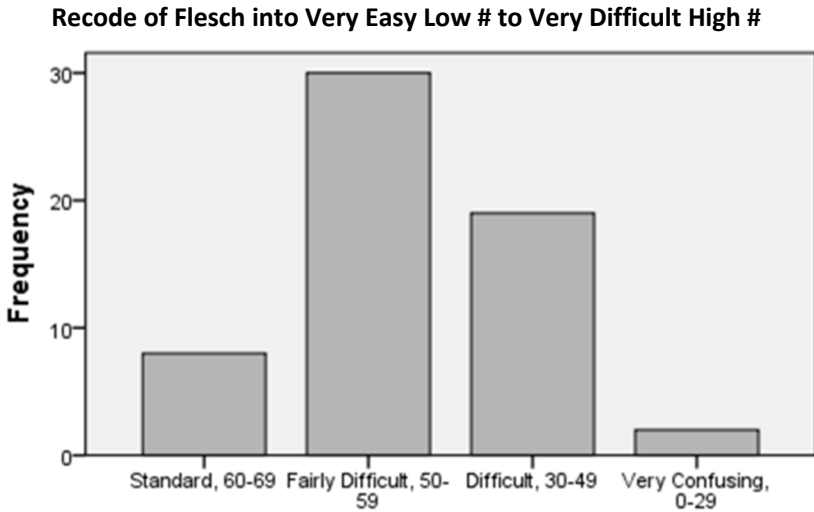
137. *See* Omri Ben-Shahar, *The Myth of the “Opportunity to Read” in Contract Law*, 5 EUR. REV. CONT. L. 1, 15 (2009).

138. *Id.* at 6.

139. The Flesch Reading Ease test was developed by Rudolf Flesch sixty-five years ago and is the most widely used test for readability. *See generally* RUDOLF FLESCH, *THE ART OF READABLE WRITING* 175–86, 247–51 (1974) (describing the Flesch Reading Ease Score methodology).

media TOU to be “easy” or “fairly easy” to comprehend. As Figure Two (below) indicates, the overwhelming conclusion was that TOU were difficult or fairly difficult to comprehend. Terms of use written at a standard level were by far the smallest category. The largest category of TOU was drafted to be fairly difficult to read, while difficult TOU were the second largest category.

Figure Two: TOU Are Difficult to Read



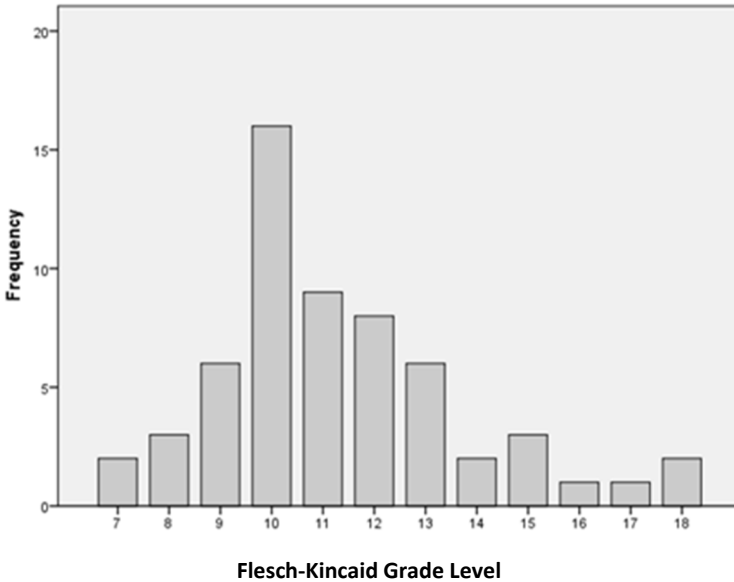
A score of sixty is considered the standard readability score under the Flesch Reading Ease Formula.¹⁴⁰ Scores higher than sixty are more readable than the standard. The mean readability of the social media TOU specifying the AAA or JAMS as providers is fifty-one (median=53), which is nine points more challenging to understand than what is considered a standard score. Under the Flesch-Kincaid Reading Ease Test, text scored as fifty-one is classified as “fairly difficult” to comprehend. Similarly, the Flesch-Kincaid grade level for the AAA and JAMS TOU was grade 11.3 (median=11), as Figure Three (below) reveals. When TOU are very hard to understand, the dominant party can impose one-sided terms that harm the unsophisticated party.¹⁴¹ Because consumer arbitration clauses impose many restrictions on

140. *Id.* at 177.

141. See Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 161 (2007) (“Little-guy consumers may therefore become subject to form arbitration provisions on a take-it-or-leave-it basis without understanding or experience with arbitration.” Furthermore, “[r]epeat-players’ form provisions may augment consumers bargaining disadvantages by impairing consumers’ legal rights and remedies.”).

consumers' legal rights, they should, at a minimum, be understandable by the average user.

Figure Three: Grade Level to Understand Terms of Use



The rights-foreclosure clauses in the social media TOU were written at a much higher-grade level than the TOU as a whole. The average readability of the fifty-nine AAA or JAMS arbitral clauses was at the grade fifteen level, the reading ability of a junior in college, which precludes the possibility that the typical user will understand them.¹⁴² The average American comprehends at between an eighth and ninth grade reading level according to the largest existing study,¹⁴³ and there is no evidence that the reading levels have improved since this two-decades-old research.¹⁴⁴ The net effect of incomprehensible provisions,

142. See *id.* at 160 (stating “consumers rarely read or understand” predispute mandatory arbitration agreements).

143. See IRWIN S. KIRSCH ET AL., NAT’L CTR. FOR EDUC. STAT., ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY (3d ed. 2002), <http://nces.ed.gov/pubs93/93275.pdf>.

144. Kimberly Hefling, *American Adults Score Poorly on Global Test*, ASSOCIATED PRESS (Oct. 8, 2013, 12:24 PM), <http://bigstory.ap.org/article/us-adults-score-below-average-worldwide-test> (using cross-national statistics from Organization of Economic Co-operation and Development to show that Americans lag between most other developed nations in reading and mathematics skills).

coupled with one-sided terms, is to produce an imbalanced agreement that lacks due process fundamental fairness.

Twitter’s TOU, for example, are drafted at a reading level between grade eighteen and nineteen.¹⁴⁵ Drafted for a person with almost twenty years of education, Twitter’s dense warranty disclaimer provision is indecipherable to anyone without advanced training.¹⁴⁶ The use of unnecessarily opaque terms like “herein” and the failure of the SNS to explain what rights are erased seem calculated to obscure the implications of the terms of the “agreement” rather than to educate the consumer.

Figure Four: Grade Level Required to Understand Social Media Arbitration Clauses

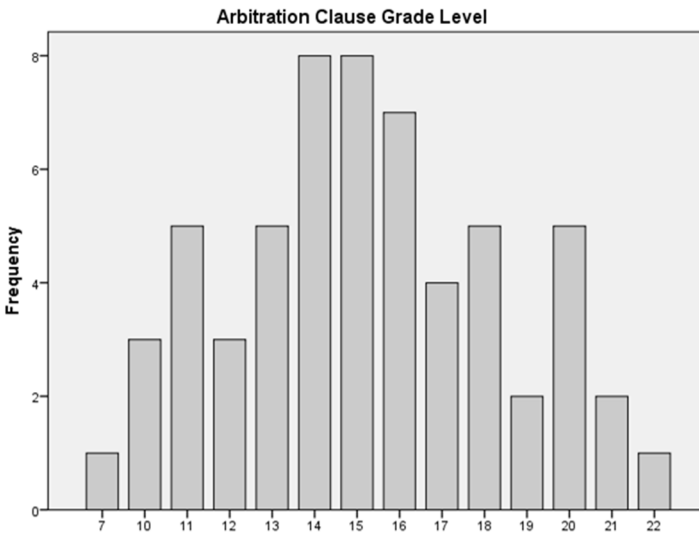


Figure Four (above) reveals that the SNS arbitration clauses were generally more complex than the TOU as a whole, being rated as “difficult” or “very confusing” and requiring an average educational level of fourteen years of schooling to understand. The Flesch Reading

145. *Free Text Readability Consensus Calculator*, READABILITY FORMULAS, <http://www.readabilityformulas.com/free-readability-formula-tests.php> (last visited Sept. 22, 2014) (“The Flesch Reading Ease formula will output a number from 0 to 100—a higher score indicates easier reading. An average document has a Flesch Reading Ease score between 6 [and] 70. As a rule of thumb, scores of 90–100 can be understood by an average 5th grader. 8th and 9th grade students can understand documents with a score of 60–70; and college graduates can understand documents with a score of 0–30.”).

146. *Id.* (“The Flesch-Kincaid Grade Level outputs a U.S. school grade level; this indicates the average student in that grade level can read the text. For example, a score of 7.4 indicates that the text is understood by an average student in 7th grade.”).

Ease Readability score was 34.5, almost twenty points more difficult than the TOU as a whole and twenty-five points below the standard score of sixty. Only one of the fifty-nine clauses was “fairly easy” to read, with a Flesch Reading Ease score between seventy and seventy-nine.

Five social media arbitration clauses were “fairly difficult.” Fifty-three out of fifty-nine consumer arbitration clauses were either “difficult” (N=30) or “very confusing” (N=23). The mean Flesch Reading Ease score for the arbitration clauses was thirty-four, which is classified as “difficult” to read (median=34). The aggregate readability score for the arbitration clause was grade fourteen as compared to grade eleven for the TOU. Our findings are consistent with a study prepared by the Consumer Financial Protection Bureau, which found that arbitration clauses in consumer credit agreements were almost always more unreadable than the other parts of the contract.¹⁴⁷

d. Neither AAA nor JAMS Clauses Specify the Disadvantages of Arbitration

Predispute consumer arbitration does not provide for judicially monitored discovery, apply rules of evidence, allow a jury to decide the case, or recognize a right of appeal. Only 28 percent of the SNS specifying the AAA attempted to explain what arbitration involves (11 of 40). Fifty percent of the forty AAA arbitral clauses give the SNS user notice that they are foreclosing their Seventh Amendment right to jury (N=20). Only three out of the forty AAA clauses mentioned that social media users have no judicially monitored right of discovery.

Similarly, only five out of nineteen JAMS clauses mentioned whether the user retained their right to discovery. No social media provider’s clause mentioned that discovery is not judicially supervised in arbitration proceedings. Only two of the nineteen SNS that chose JAMS as the provider warned users that they lose the right to an appeal. Yet with mandatory arbitration, there is no right to appeal even if the arbitrator erroneously applies the law or misstates the facts.¹⁴⁸

4. AAA Principle 5: Retaining Access to Small Claims Courts

The AAA’s Principle 5 states that “[c]onsumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its

147. Cordray, *supra* note 21.

148. A content analysis of the arbitration clauses cannot reveal whether Principles 3 and 4 are satisfied. AAA Principle 3 is whether arbitration is independent, impartial and decided by a neutral with independent administration. Principle 4 requires the quality and competence of neutral arbitrations. *Consumer Due Process*, *supra* note 59, at 2.

jurisdiction.”¹⁴⁹ JAMS Principle 1 parallels this provision: “no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction.”¹⁵⁰ Contrary to AAA Consumer Due Process Principle 5 and JAMS Principle 1, three out of four SNS (N=43), with the AAA or JAMS as the arbitral provider, preclude the possibility that consumers can seek relief in small claims courts (73%). Twenty-seven of the forty social media specifying the AAA as the arbitral provider did not allow users to pursue small claims as opposed to arbitration. A slightly higher percentage of JAMS clauses precluded the possibility of small claims. (79% or 15 of 19).

Some courts are skeptical of providers that do not permit consumers to opt out of arbitration in order to pursue small claims. In *Scarcella v. America Online*,¹⁵¹ a New York trial court refused to enforce a forum selection clause in a clickwrap license because it violated a state policy favoring the simplified proceedings of small claims court for low-value disputes. These cases are the exception, as most U.S. courts will enforce choice of forum clauses that divest consumers of their right to litigate in their home court.¹⁵²

Gays.com, the leading social networking site for LGBTs, requires its users to appear before three arbitrators in Shanghai, China, under its arbitral clause that specifies JAMS as the provider, applying the

149. *Id.*

150. JAMS, *supra* note 41, at 2.

151. No. 1168/04, 2004 WL 2093429, at *3 (N.Y. Civ. Ct. Sept. 8, 2004).

152. *See, e.g., Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last updated Nov. 15, 2013) (imposing a choice of forum clause that requires consumers to litigate in their home forum in California: “You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.”); 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, 722 (1992) (“For many consumers, however, the additional costs of litigation—including their own and their witnesses’ airfares to attend a distant trial and the increased attorney fees mandated by the need for local counsel—will impose serious burdens. These costs often will constitute a significant share of the consumer’s disposable income. For some, the hardships of suit in a foreign forum will be prohibitive. The consequences likely will be several hidden, but significant, costs. Consumers may view enforcement of forum clauses as depriving them of their day in court, not to mention compensation for, perhaps, grievous injury.”); *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758, 1783 (2010) (“Arbitration provisions, this Court has noted, are a species of forum-selection clauses.”).

laws of Hong Kong.¹⁵³ One Travel offers a one-way \$1,018 ticket on American Airlines from Boston's Logan Airport to Shanghai's Hongqiao Airport. Cheap Tickets' least expensive ticket from Boston to Hong Kong was \$1,253 on August 11, 2014. The cheapest return option was also \$1,253. The cost of air travel to Hong Kong or Shanghai would be 100 times or greater than the typical recovery.¹⁵⁴ A consumer seeking to challenge Gays.com's arbitral clause will realize after consultation with their attorney, "I've been shanghaiied."¹⁵⁵ Gays.com does not give consumers the option of filing in small claims court; they must appear in Shanghai or Hong Kong, which is, in effect, an anti-remedy. Figure Five (below) confirms that relatively few SNS allow consumers to file actions in local small claims courts, which is less expensive than consumer arbitration, even if the provider pays for the arbitrator and all other expenses.¹⁵⁶

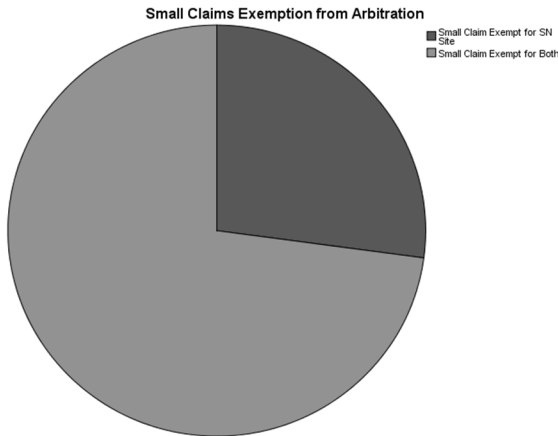
153. *Terms of Service*, GAYS.COM, <http://www.gays.com/conditions> (last updated Apr. 30, 2008) ("Except to the extent applicable law, if any, provides otherwise, this Agreement, any access to or use of the Website will be governed by the laws of Hong Kong, S.A.R., China, excluding its conflict of law provisions, and the proper venue for any disputes arising out of or relating to any of the same will be the state and federal courts located in Shanghai, China. Except for claims for injunctive or equitable relief or claims regarding intellectual property rights (which may be brought in any competent court without the posting of a bond), any dispute arising under this Agreement shall be finally settled in accordance with the Comprehensive Arbitration Rules of the Judicial Arbitration and Mediation Service, Inc. ("JAMS") by three arbitrators appointed in accordance with such Rules. The arbitration shall take place in Hong Kong, in the English language and the arbitral decision may be enforced in any court. The prevailing party in any action or proceeding to enforce this Agreement shall be entitled to costs and attorneys' fees.").

154. While the basic service of Gays.com is free, "[c]ertain other services are provided for free only to beta users." *Id.* What's probable is that dollar recovery for a user's contractual dispute is likely to be far less than \$250, which is the JAMS filing fee for consumer arbitration. However, Gays.com does not refer to consumer arbitration and requires all disputes to be heard by three arbitrators in Hong Kong. The Gays.com arbitration clause states that "[a]greement shall be finally settled in accordance with the Comprehensive Arbitration Rules of the Judicial Arbitration and Mediation Service, Inc. ("JAMS") by three arbitrators appointed in accordance with such Rules." *Id.* Neither the TOU nor the arbitration clause makes reference to the provider subsidizing the cost of hiring the three arbitrators, renting the room for the hearing, or other expenses. *Id.*

155. Shanghaiing means "the practice of drugging, tricking, intoxicating, or otherwise illegally inducing a person to work aboard a vessel" BLACK'S LAW DICTIONARY 1500 (9th ed. 2009). Social media users accessing to arbitration have clicked agreement to Gays.com TOU and must either appear in Shanghai or Hong Kong or forego any remedy.

156. Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act, It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, n.55 (2009) ("Although most small claims courts provide a judge and

*Figure Five: Incidence of SNS Permitting
Small Claims Court as an Option*



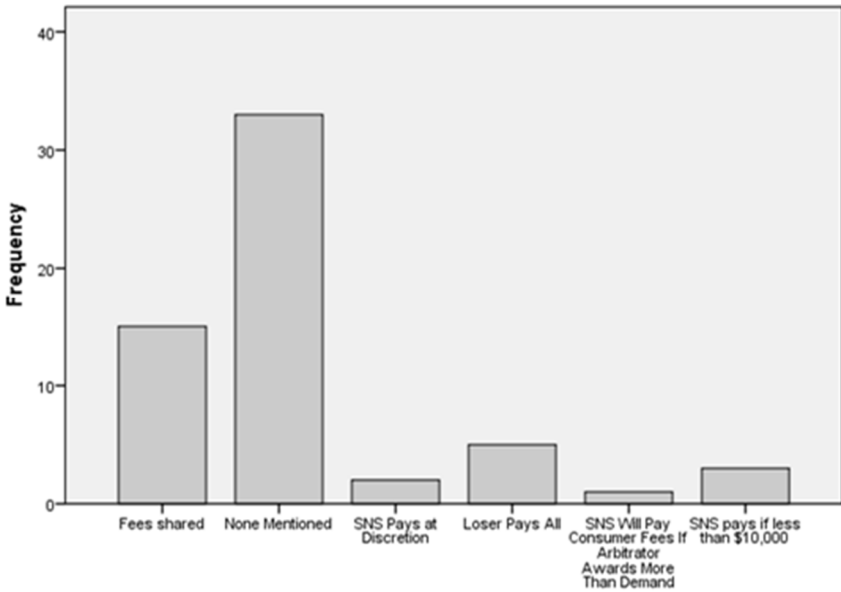
For the SNS choosing either AAA or JAMS arbitration, only sixteen out of fifty-nine providers allowed claimants to pursue a remedy in small claims court (27%). Seventy-three percent of the providers made no mention of an option to pursue small claims, which violates the protocol principle that consumers be allowed to pursue small claims as an inexpensive alternative to forced arbitration. The small claims preclusion effectively slams the door shut on small dollar claims in arbitration proceedings. Skype’s consumer TOU agreement is an exception in permitting users to file small claims in their county of residence.¹⁵⁷ The banning of small claims is just one example of the systematic violation of the more general fundamental fairness principle of “reasonable cost.”

jury for less than \$100, the costs of arbitration far exceed this amount. A recent study by Public Citizen concludes that the costs of arbitration almost always exceed the costs of litigation.”).

157. *Skype’s USA Consumer Terms of Use*, SKYPE, <http://www.skype.com/en/legal/tou-usa/> (last updated June 2014) (“You may also litigate any dispute in a small claims court in your county of residence, King County, Washington, or Santa Clara County, California, if the dispute meets all requirements to be heard in the small claims court. You may litigate in a small claims court whether or not you negotiated informally first.”).

5. AAA Principle 6: Reasonable Cost

Figure Six: Social Media Providers Paying Costs of Arbitration



a. SNS Are Unclear About the Allocation of Arbitration Costs

AAA Principle 6 requires providers to develop arbitration and other ADR programs where the cost is calibrated to the nature of goods or services “and the ability of the Consumer to pay.”¹⁵⁸ Under the AAA’s Consumer Due Process Protocol, the business must pay the cost of arbitration, the room, and other expenses other than the \$200 filing fee.¹⁵⁹ JAMS Principle 7 also makes it clear that consumers are not responsible for paying the cost of the arbitrator or room:

With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company including any remaining JAMS Case Management Fee and all professional fees for the arbitrator’s services. When the company is the claiming party initiating

158. *Consumer Due Process*, *supra* note 59, at 19.

159. *Id.* (“Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.”).

arbitration against the consumer, the company will be required to pay all costs associated with the arbitration.¹⁶⁰

Figure Six (above) reveals that social media providers are systematically violating this AAA Consumer Due Process Principle.

The majority of SNS fail to inform consumers that the provider will subsidize the cost of arbitration; eleven providers misleadingly state the cost of consumer arbitration is split or make ambiguous statements about the allocation of expenses. Meetup, a social media provider choosing JAMS, for example, requires consumers to pay half of the cost of hiring an arbitrator, renting a hearing room, and other expenses, which is inconsistent with JAMS consumer arbitration rules.¹⁶¹ Pinterest¹⁶² agrees to subsidize consumers, but only for “non-frivolous filings.”¹⁶³ It is unclear who decides if a filing is frivolous.

Fifty-six percent of the providers (N=33) note that they subsidize arbitration costs, while 24 percent suggest that the costs may be shared. Sixteen social media providers impose limited “loser pays” rules in some circumstances. One provider asserts that it has the discretion to pay arbitration fees if it loses. Another provider’s clause states that it will pay the consumer fees if the arbitrator awards more than the consumer’s demand in its complaint. Three providers assert that they will pay the arbitrator’s fees so long as the award is less than \$10,000. Two other providers say they will pay the arbitrator’s fees only under some conditions. All of these reservations on payment violate the AAA Principle that costs be reasonable for the consumer.

b. Ban on Class Actions Violates the Reasonable Cost Principle

Class actions are often the running partner of consumer arbitration clauses as Figure 7 (below) illustrates.¹⁶⁴ Seventy-six percent of the

160. JAMS, *supra* note 41, at 2.

161. MEETUP, *supra* note 77.

162. Pinterest, an entity founded in early 2010, provides online services through its website, www.pinterest.com. Pinterest’s web-based platform allows users to accumulate images and other content, which the user organizes into themed “boards.”

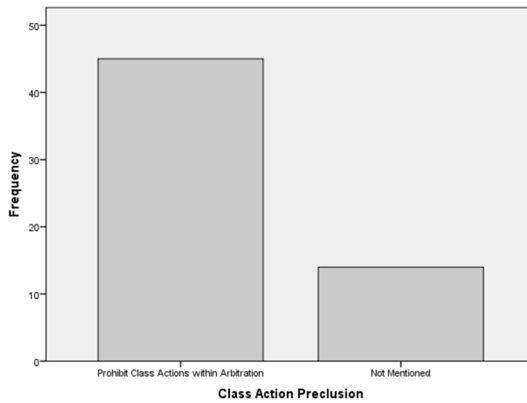
163. *Terms of Service*, PINTEREST, <https://about.pinterest.com/en/terms-service> (last visited Sept. 22, 2014) (“Pinterest will pay for your reasonable filing, administrative, and arbitrator fees if your claim for damages does not exceed \$75,000 and is non-frivolous (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)). The award rendered by the arbitrator shall include costs of arbitration, reasonable attorneys’ fees and reasonable costs for expert and other witnesses, and any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.”).

164. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75 (2004).

fifty-nine social media providers mandating arbitration also prohibit consumers from initiating or joining class actions (N=38). Flixster's class action waiver clause is typical:

The parties agree that they will resolve their disputes on an individual basis. Any claims brought under this agreement must be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class, collective, or representative proceeding. This agreement also prevents any party from participating in a class action (existing or future) that was brought by any other party. Instead, the parties agree to resolve their disputes under this agreement on an individual basis.¹⁶⁵

Figure Seven: Most Social Media Sites with Arbitration Clauses Also Prohibit Class Actions



For small dollar claims, consumer class actions are the only practical means of recourse. If a social media user is prohibited from initiating or joining a class action, it is likely that no arbitrations will be filed because individual claims will seldom be greater than the expenses in pursuing arbitration, which may include filing fees, airfares, a hotel stay, and legal representation. Caps on damages, coupled with anti-class action waivers render legal rights moot because there is no meaningful remedy.¹⁶⁶ Tagged.com forbids users from employing class

165. *Flixster Terms of Service*, FLIXSTER, <https://www.flixster.com/docs/terms/us/> (last updated Apr. 25, 2013).

166. Our research on social media sites concludes that when capped damages, anti-class action waivers, and other limitations on the ability of damages are considered total consumer fees almost always exceed the total possible recovery. *Cf. The Costs of Arbitration*, PUBLIC CITIZEN, <http://www.citizen.org/publications/publicationredirect.cfm?ID=7173> (last visited Sept. 24, 2014) (“The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary

actions but reserves its right to consolidate claims if the website judges it beneficial:

At any time and in its sole discretion Tagged may direct the AAA to consolidate any and all pending individual arbitration claims that (i) arise in substantial part from the same and/or related transactions, events and/or occurrences, and (ii) involve a common question of law and/or fact which, if resolved in multiple individual and non-consolidated arbitration proceedings, may result in conflicting and/or inconsistent results. In said event, you hereby consent to consolidated arbitration, in lieu of individual arbitration, of any and all claims you may have against tagged and the AAA rules set forth herein shall govern all parties.¹⁶⁷

Class actions against SNS are a real danger when these clauses are not included. Online injuries, such as privacy violations, often cause only small amounts of damage to each user but impact tens of millions of customers.¹⁶⁸ In March 2013, the mobile social network provider Path, whose TOU did not contain a class action preclusion, was targeted by an Illinois class action, contending that Path violated the Telephone

arbitration provider organizations demonstrates that *forum costs*—the costs charged by the tribunal that will decide the dispute—can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case.”). *But cf.* Drahozal & Zyontz, *supra* note 100, at 891 (“Total arbitration fees (i.e., both administrative and arbitrator’s fees) ranged from 0.0% of the amount claimed to 65.1% of the amount claimed. The outlier was a case in which the amount sought was less than \$200. In no other case did the total arbitration costs exceed 25.0% of the amount claimed.”).

167. TAGGED, *supra* note 132.

168. Social media providers face the greatest potential liability for the invasion of privacy and most actions are filed as class actions. *See, e.g.*, Claridge v. RockYou, Inc., 785 F. Supp. 2d 855 (N.D. Cal. 2011) (settling class action for failure of the site to secure user’s privacy and security); Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090 (N.D. Cal. 2011) (holding that Facebook users did not consent to the SNS using their names and likenesses to promote service and ruling that the plaintiffs sufficiently stated a claim for appropriation of their names and likenesses for an advantage, but ruling that plaintiffs were unable to prove damages); *In re* Facebook Privacy Litigation, 791 F. Supp. 2d 705 (N.D. Cal. 2011) (dismissing class action by Facebook users based upon the Electronic Communications Privacy Act as well as California state law); Hubbard v. MySpace, Inc., 788 F. Supp. 2d 319 (S.D.N.Y. 2011) (filing class action against MySpace for alleged violation of the Stored Communications Act); *In re* Google Buzz Privacy Litigation, No. C 10–00672 JW., 2011 WL 7460099 (N.D. Cal. June 2, 2011) (approving \$8 million dollar settlement in class action brought by Gmail users arising out of Google’s disclosure of personally identifiable information without authorization through the defunct site, Google Buzz).

Consumer Protection Act¹⁶⁹ by using automated services to transmit SMS messages without the recipient's consent.¹⁷⁰ The widespread use of mandatory arbitration clauses coupled with anti-class action waivers is a distinctively American market-based solution to reallocate the cost of wrongdoing.¹⁷¹ Only nine of the eighteen foreign SNS specifying class actions ban class actions.

c. Loser Pays Provisions

Ten of the fifty-nine SNS specifying either the AAA or JAMS as the arbitral provider require the consumer to either pay for motions to compel arbitration or SNS' attorneys' fee and costs if they do not prevail. JAMS Principle 8 provides that (under California law) "the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail."¹⁷² This is a significant failure because twenty-seven of the forty-nine clauses specified California as the exclusive arbitral forum (54%).¹⁷³ Christian Mingle, which is located in Los Angeles, agrees to pay arbitration costs, exclusive of attorney's fees, for non-frivolous cases,¹⁷⁴ but imposes a "loser pays" rule where it can seek attorneys' fees from consumer.¹⁷⁵

169. 47 U.S.C. § 227 (2012).

170. *Sterk v. Path, Inc.*, No. 13 C 2330, 2013 WL 5460813 (N.D. Ill. Sept. 26, 2013); Sarah Pierce, *Path Mobile App Privacy Class Action Lawsuit*, TOP CLASS ACTIONS (Mar. 29, 2012), <http://topclassactions.com/lawsuit-settlements/lawsuit-news/1728-path-mobile-app-privacy-class-action-lawsuit/>.

171. Anti-class action waivers are routinely included into consumer arbitration agreements. *See, e.g.*, Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 300 (2012) ("A study by the Searle Civil Justice Institute of AAA consumer arbitrations found that every arbitration agreement involving cell phone services and credit cards prohibited class actions.").

172. JAMS, *supra* note 41, at 3.

173. California state law prohibits agreements that require a nonprevailing consumer party to pay fees and costs incurred by the opposing party. CAL. CIV. PROC. CODE § 1284.3 (West 2007).

174. CHRISTIAN MINGLE, *supra* note 79 ("We will pay the amount of any arbitration costs and fees charged by the AAA for claims totaling less than \$10,000 unless the arbitrator determines the claims are frivolous. In no event will We pay for Your attorneys' fees unless required by law.").

175. *Id.* ("The prevailing party in any of the following matters (without regard to the Limitation of Liability provisions) shall be entitled to recover its reasonable attorneys' fees and costs incurred in any of the following circumstances: (i) a motion which any party is required to make in any court to compel arbitration of a Dispute; (ii) any appeal of an arbitration award, whether to the arbitrator or the courts, for the purpose of vacating

None of the SNS arbitral clauses gave consumers even a ballpark estimate of the cost of filing an arbitration request or information stating whether the deposits were refundable. No SNS gave consumers an estimate of the hourly rate of arbitrators. The reasonable cost principle also was not met because of the providers' caps and limitations on warranties and damages.¹⁷⁶

6. AAA Principle 7: Reasonably Convenient Location

The AAA requires that providers conduct in-person arbitration in a location reasonably convenient to the consumer, not just beneficial to the provider. AAA Principle 7 states the following:

In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the Independent ADR Institution or by the Neutral.¹⁷⁷

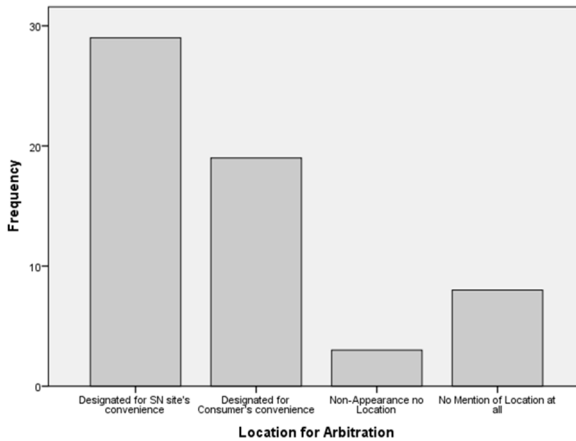
Figure Eight (below) reveals that 48 percent of the arbitration clauses (N=28) specified that the arbitration be held in the social media's home jurisdiction as opposed to the consumer's home jurisdiction, which would make proceedings more affordable for the user.

or modifying the award; or (iii) any action to enforce the confidentiality provisions stated herein.”).

176. See, e.g., *Terms of Use*, 99DESIGNS, <http://99designs.com/legal/terms-of-use> (last updated Oct. 2013) (“Notwithstanding anything to the contrary contained herein, our (and our suppliers’) liability to you for any damages arising from or related to this Agreement (for any cause whatsoever and regardless of the form of the action), will at all times be limited to the greater of fifty us dollars (\$50) or (b) amounts you have paid 99designs in the prior 12 months (if any). The existence of more than one claim will not enlarge this limit.”).

177. *Consumer Due Process*, *supra* note 59.

Figure Eight: Where Mandatory Arbitration Is Held



Only nineteen out of the fifty-nine TOU specified the consumer's home jurisdiction as the location where the arbitration is conducted (32%). Nine providers do not specify the location of the hearing (15%). In three clauses, nonappearance arbitration was specified, defined as a telephone hearing or decision purely on the documents that are submitted by the parties. Academic.edu contemplates arbitration hearings in the consumer's home country, but for small dollar amounts, arbitration is based on the documents alone: "Unless you and Academia.edu otherwise agree, the arbitration will be conducted in the county where you reside. If your claim does not exceed \$10,000, then the arbitration will be conducted solely on the basis of the documents that you and Academia.edu submit . . ." ¹⁷⁸ Several arbitration clauses in the larger sample specified distant, inconvenient forums. Mouthshut, a site located in India, has a TOU that states as follows:

This Agreement is governed in all respects by the laws of Republic of India as such laws are applied to agreements entered into and to be performed entirely within India between Indian residents. Any controversy or claim arising out of or relating to this Agreement or the MouthShut.com site shall be settled by binding arbitration in accordance with the Indian Arbitration Act 1996. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of any other party. The arbitration shall be conducted in Mumbai, India and judgment on the arbitration award may be entered into any court having jurisdiction thereof.¹⁷⁹

178. ACADEMIA.EDU, *supra* note 131.

179. *Terms of Services*, MOUTHSHUT.COM, <http://www.mouthshut.com/help/tos.php> (last visited Sept. 26, 2014).

Of course, a user in India would consider the requirement that they litigate half a world away in California to be equally onerous.

7. AAA Principle 9: Right to Representation

The AAA requires the provider to specify that “[a]ll parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing.”¹⁸⁰ In fifty-eight out of fifty-nine AAA and JAMS arbitral clauses drafted by SNS, there was no mention of the role of lawyers in arbitration, even though this violates a basic AAA principle. Only one provider discloses this fundamental right of being represented by an attorney at arbitration proceedings. This right of representation, however, is largely moot. No reasonable attorney will represent a social media user where the cost of filing and traveling to a distant forum far outweighs the possible recovery.

8. AAA Principle 10: Mediation

AAA Principle 10 states that “[t]he use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes.”¹⁸¹ Yet amongst the arbitration clauses surveyed, one out of the fifty-nine provided for a mediation option prior to arbitration. Many of the providers specified informal dispute resolution with the provider, but mediation by neutral or independent mediators was not offered.

9. AAA Principle 11: Agreements to Arbitrate

By incorporating predispute mandatory arbitration clauses into their TOU, a large and growing number of Internet websites are divesting users of their rights to civil recourse against providers who violate their privacy, commit torts, or infringe their intellectual property rights.¹⁸² SNS users around the world are required to agree to

180. *Consumer Due Process*, *supra* note 59.

181. *Id.*

182. Civil wrongs committed on social media sites are difficult to litigate because of endemic problems such as the anonymous poster, the distant forum, the problem of finding representation, and arbitral clauses. Given that there are billions of social media sites, lawsuits are rare despite the huge potential for intentional torts, infringement, and employment-related disputes. *E.g.*, *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012) (enforcing the forum selection clause in Facebook’s Terms of Service); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855 (N.D. Cal. 2011) (settling class action for failure of the site to secure user’s privacy and security); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090 (N.D. Cal. 2011) (holding that Facebook users did not consent to the SNS using their names and likenesses to promote service and ruling that the plaintiffs sufficiently stated a claim for appropriation of their names and likenesses for an advantage but ruling that plaintiffs were unable to prove damages); *In re Facebook*

predispute mandatory arbitration as a condition of visiting SNS.¹⁸³ Seventy-one percent of SNS did not explain arbitration, thus violating both AAA and JAMS principles. Seven of the fifty-nine (12%) arbitral clauses provided the user with any information about how to submit their claim to arbitration. Eighty-six percent (51 of 59) of the arbitration clauses provided no information on how to initiate arbitration. Only ten (17%) providers mentioned that consumers agreeing to arbitration have restricted rights to an appeal in the event of an adverse decision by the arbitrator. Only 14 percent of social media TOU disclosed that consumers agreeing to arbitration also were waiving their right to court-supervised discovery. No SNS disclosed that private arbitrators have no subpoena power (8 of 59). Only 31 percent (18 of 59) mentioned that the user was waiving access to courts.

10. AAA Principle 12: Arbitration Hearings

None of the SNS arbitration clauses attempted to explain how ADR hearings worked despite AAA Principle 12, which holds that parties “are entitled to a fundamentally-fair arbitration hearing.”¹⁸⁴ “This requires adequate notice of hearings and an opportunity to be heard and to present relevant evidence to impartial decision-makers.”¹⁸⁵ The requirements of a fair arbitration hearing, according to the AAA’s rules, “may be met by hearings conducted by electronic or telephonic means or by a submission of documents.”¹⁸⁶ Only six out of fifty-nine

Privacy Litigation, 791 F. Supp. 2d 705 (N.D. Cal. 2011) (dismissing class action by Facebook users based upon the Electronic Communications Privacy Act as well as California state law); *Hubbard v. MySpace, Inc.*, 788 F. Supp. 2d 319 (S.D.N.Y. 2011) (filing class action against MySpace for alleged violation of the Stored Communications Act); *In re Google Buzz Privacy Litigation*, No. C 10-00672 JW., 2011 WL 7460099 (N.D. Cal. June 2, 2011) (approving \$8 million settlement in class action brought by Gmail users arising out of Google’s disclosure of personally identifiable information without authorization through the defunct site, Google Buzz).

183. The first research study of pre-dispute mandatory arbitration clauses in SNS studied a sample broadly representative of the universe of social media in 2012. Rustad et al., *supra* note 51, at 649 (“Generalist sites, such as Facebook and MyLife, target connections between friends, family, and acquaintances. In contrast, niche sites include those designed for educational, career, or professional development such as LinkedIn. Sites that enable meetings in major cities for shared interest groups are included in the sample. Social media websites targeting specific age, racial, cultural, or status-oriented groups are also part of the SNS sample. Sites appealing to rating, dating, mating, and sexual fetishism are included in the sample, as are sites dedicated to entertainment (anime, video sharing, book reviews, and movies) and highlighting talent.”).

184. *Consumer Due Process*, *supra* note 59.

185. *Id.*

186. *Id.*

arbitration clauses (10%) offered nonappearance arbitration. Even in these cases, the ADR provider did not offer a face-to-face hearing, which is inconsistent with the principle that this option be made available.¹⁸⁷ In two other cases (3%), nonappearance arbitration options were available, but the plaintiff had the option to pursue an in-person hearing. Requiring a consumer to travel to a distant forum for a small dollar claim is unreasonable.

11. AAA Principle 13: Access to Information

AAA Principle 13 provides that parties have a right to discovery.¹⁸⁸ It states that “[n]o party should ever be denied the right to a fundamentally-fair process due to an inability to obtain information material to a dispute.”¹⁸⁹ The AAA provides that “[c]onsumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration.”¹⁹⁰ Only eight of the fifty-nine (14%) arbitral clauses mentioned the word “discovery.” Overwhelmingly, arbitration clauses do not address this important due process right. Only three of the fifty-nine AAA and JAMS clauses described a procedure for exchanging information. SNS made no effort to disclose to their customers that by agreeing to arbitration that they were foreclosing rights fundamental to court proceedings.

12. AAA Principle 14: Full Remedies in Arbitration

AAA Principle 14 requires that providers give arbitrators the power “to grant whatever relief would be available in court under law or in equity.”¹⁹¹ Fifty-eight of the fifty-nine SNS violate AAA Consumer Due Process Protocol in not allowing arbitrators to award the full range of remedies available in U.S. courts. Fifty-eight out of fifty-nine providers disclaimed all UCC performance warranties in their TOU. All of the providers precluded the arbitrator from awarding damages for express warranties, the implied warranty of merchantability, and any other U.C.C. Article 2 warranty. The consistent pattern in our sample is that

187. *Id.* (“[T]he Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party.”).

188. Arbitral providers will sometimes permit general discovery, but this requires an application to an arbitrator and is subject to the discretion of the arbitrator. *See Marrow, supra* note 65, at 44–46. JAMS, for example, permits depositions and discovery at the arbitrator’s discretion, which is similar to the rule for the AAA. *Id.*

189. *Consumer Due Process, supra* note 59.

190. *Id.*

191. *Id.*

social media providers are engaged in a systematic rights and remedies foreclosure scheme.

The social media providers generally included clauses that eliminated consequential damages, special damages, punitive damages, and many other categories of damages. The remedy of punitive damages incentivizes private attorneys general¹⁹² to uncover fraudulent or deceptive practices, thus supplementing public enforcement.¹⁹³ “Private tort litigants serve the public interest by uncovering dangerous products and practices.”¹⁹⁴ Empowering private citizens and their attorneys as private attorneys general reflects a legislative intent to augment or enlarge consumer protection.¹⁹⁵ Punitive damages often have a greater deterrent effect than the relatively slight civil penalties imposed by

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192. The legal realist Jerome Frank, a Second Circuit U.S. Court of Appeals jurist, coined the term “private attorneys general.” He used the term “private attorney general” to refer to “any person, official or not,” who brought a proceeding, “even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.” *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). The private attorney general is a “powerful engine of public policy.” Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 179 (1998). Examples of the private attorney general role include the Sherman Act, 15 U.S.C. §§ 1–2 (2012), the Clayton Act, 15 U.S.C. § 18 (2012), and the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §§ 13–13b (2012). See Thomas Koenig & Michael Rustad, “*Crimtorts*” as *Corporate Just Deserts*, 31 U. MICH. J. L. REFORM 289, 306 n.75 (1998) (noting that “[d]ual governmental and private enforcement” is provided for in the statute provisions stated herein when explaining role of punitive damages and statutory damages in evidencing the role of private enforcement for a public purpose).
193. See *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) (“Flexibility is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability.”); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984) (“If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect.”).
194. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 2 (2001).
195. See *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) (“[P]unitive damages reward individuals who serve as ‘private attorneys general’ in bringing wrongdoers to account.”). See also *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 696 A.2d 546, 553–54 (N.J. 1997) (explaining the private attorney general role in consumer cases). Cf. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987) (“Both statutes bring to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective . . . is the carrot of treble damages.”).

federal regulators.¹⁹⁶ The valuable institution of the private attorney general is undermined by TOU that eliminate the possibility of punitive damages.

Social media providers violate the consumer due process protocols for both arbitral providers when they place extreme limitations on what remedies the arbitrator may award.¹⁹⁷ One hundred percent of the nineteen arbitration clauses choosing JAMS as the provider capped damages at a nominal amount. Three out of four JAMS arbitration clauses limited damages to ten dollars or less.¹⁹⁸ The JAMS clauses overreach in making the total dollar recovery 1/25 of the initial arbitration fee. Second Life's exclusion of direct, indirect, economic, exemplary, incidental, consequential, reliance, special, or punitive losses or damages as well as all equitable remedies, for example, is not in accord with AAA principles.¹⁹⁹ Second Life also violates the due process principle in restricting the dollar amount of damages that an arbitrator may award.²⁰⁰ Many of the SNS eliminate remedies, such as Spotify's clause that precludes awarding "declaratory or injunctive relief."²⁰¹

Statutes of limitations curtail the period in which claims can be asserted against providers. The Uniform Computer Information Transactions Act (UCITA), for example, adopts a complicated statute of limitations that combines a discovery rule with a rule of repose. Section 805 imposes the later of a four-year statute of limitations from the time the cause of action accrues or "one year after the breach was

196. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1325 n.282 (1993) ("The total of all CPSC fines in its history is the functional equivalent of a parking ticket for a Fortune 500 firm. Statutory penalties are too insignificant to be noticed.").

197. *See Consumer Due Process*, *supra* note 59 ("The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."); JAMS, *supra* note 41, at 2 ("Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause.").

198. Every social media choosing JAMS as a provider (19 of 19) disclaimed all warranties in their TOU. All nineteen clauses require the consumer to indemnify the social media should third parties file suit against them for their postings, comments, or pictures.

199. LINDEN LAB, *supra* note 79.

200. *Id.* ("EXCEPT AS MAY BE PROVIDED IN ANY ADDITIONAL TERMS, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL LINDEN LAB'S CUMULATIVE LIABILITY TO YOU EXCEED THE GREATER OF (i) ONE HUNDRED DOLLARS (U.S. \$100.00); OR (ii) THE FEES, IF ANY, PAID BY YOU FOR USE OF THE SERVICE . . .").

201. *Spotify Terms and Conditions of Use*, SPOTIFY, <https://www.spotify.com/us/legal/end-user-agreement/#s19> (last updated Mar. 5, 2014).

or should have been discovered, but not later than five years after the right of action accrues.”²⁰²

The absolute limit to file an action is “five years after the right of action accrues.”²⁰³ Third-party warranty claims are subject to different statutes of limitation and statutes of repose.²⁰⁴ The parties may agree to reduce the period of limitation but not for less than a year after the cause of action accrues, except in consumer contracts where this limitation may not be reduced.²⁰⁵ The social media providers in our sample reduced the statute of limitations to the outer limits of what is permitted under UCITA, and a few providers went even further. Twenty-two of the fifty-nine social media providers (37%) reduced the statute of limitations, with fourteen specifying a period of one year or less.²⁰⁶ Two social media providers trimmed down the statute of limitations to a diminished period ranging from only thirty days to a year, thus reducing the period in which plaintiffs may assert claims. Only four providers that slashed the statute of limitations allowed claims to be filed for a period greater than a year. Meetup’s terms and conditions states that “[y]ou and Meetup each agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to the use of our Platform or this Agreement must be filed within one (1) year after the claim or cause of action arose or be forever barred.”²⁰⁷

In the U.S. legal system, tort statutes of limitations are set by state statute at periods of two to four years.²⁰⁸ In the absence of this reduced statute of limitations provision, courts would have the power to award damages or enter equitable remedies for cases filed during a longer period in accord with the state’s statute of limitations. These measures demonstrate unequivocally that social media providers are not giving

202. Unif. Computer Info. Transactions Act § 805(a) (2002).

203. *Id.*

204. *Id.* § 805(d).

205. *Id.* § 805(b).

206. *See, e.g.,* PHEED, *supra* note 58 note 58 (“YOU AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO THESE TERMS OR THE SERVICE MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY BARRED.”).

207. MEETUP, *supra* note 77..

208. *See, e.g.,* Ala. Code § 6-2-38 (West 2005) (setting statute of limitations for injury claims at two years); CAL. CIV. PROC. CODE § 335.1, 338 (West 2006) (noting that tort personal injury claims are set at two years and property damage claims at three years); D.C. CODE § 12-301 (2001) (setting statute of limitations for property damages claims at three years); FLA. STAT. ANN. § 95.11 (West 2002) (setting property and personal injury statute of limitations at four years); MASS. GEN. LAWS ANN. ch. 260, § 2A (West 2004) (establishing statute of limitations for personal injury and property damages at three years).

consumers the same remedies available in court. Consumers are clearly locked into a rigged system, where their rights are systematically foreclosed and their remedies cannibalized by TOU, which are contracts of adhesion.

13. What We Still Don't Know About Fundamental Fairness

Our findings support the proposition that SNS are drafting clauses that violate many consumer due process principles promulgated by the AAA and JAMS. Our study, however, cannot examine whether JAMS or the AAA effectively reviews arbitration clauses for protocol compliance, because there are only four arbitral filings against the social media providers in our sample. Data are unknown and likely unknowable regarding whether arbitration was independent, impartial, and independently administered, which is Principle 3 of AAA Consumer Due Process Protocol. Losers in both arbitration and the courts, of course, frequently perceive the process as unfair. Nor do we have data on whether arbitrators are competent (Principle 4). Neither the AAA nor JAMS publishes systematic data on the record of accomplishment of arbitrators conducting consumer arbitrations, although the catalog of qualifications necessary to become an AAA arbiter appears imposing.²⁰⁹

Our content analysis demonstrates that social media providers are systematically ignoring AAA and JAMS consumer due process protocols in drafting top-heavy arbitration clauses favoring the dominant party.²¹⁰ This one-sided boilerplate, like mandatory arbitration clauses in credit card loans should not be enforceable.²¹¹ A number of decisions by the U.S. Supreme Court over the past decade, however, have emboldened companies to draft extremely imbalanced TOU.

209. *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS'N 1, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878 (last visited Sept. 27, 2014).

210. *See generally* Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 50–51 (2007) (“Furthermore, companies have ignored the Protocol’s ‘shoulds,’ and arbitral institutions have little power or incentive to impose consumer-friendly procedures or otherwise regulate companies’ arbitral programs. Administering institutions have been under fire for favoring repeat-player companies and promulgating permissive rules that generally allow for companies’ manipulation to their disproportionate advantage.”).

211. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS SECTION 1028(A) STUDY RESULTS TO DATE 19–20 (2013) (“CFPB Study”) (noting that the *Ross v. Bank of America*, No. 05 Civ. 7116 settlement removed mandatory arbitration for 43 percent of credit card loans outstanding as of 2012).

G. Explaining Why U.S. Social Media Draft Such Aggressive Clauses

The only prior empirical research on arbitration clauses, a 2007 study, found that greater than three out of four consumer arbitration clauses fully complied with the AAA's Consumer Due Process Protocol.²¹² In contrast, our research on consumer arbitration clauses conducted in 2014 found the opposite. Social media providers violated consumer due process protocols in nearly every respect.²¹³

One possible explanation for the differences is that the Court has sent a series of strong signals over the past decade that there are no legal limits to pursuing self-advantage through one-sided clauses. Neither courts nor consumer regulators appear to be protecting consumers from draconian TOU, such as MouthShut's clause requiring consumers to appear before arbitrators in Mumbai. "Instead, the Supreme Court itself is leading the revolutionary transition from litigation to mandatory binding private arbitration, proclaiming 'federal policy favors arbitration, over litigation.'"²¹⁴ Secure in the knowledge that one-sided provisions will be enforced in America, U.S. websites appear to be responding to the Supreme Court's jurisprudence by drafting imbalanced arbitration clauses.

*H. The U.S. Supreme Court's Preoccupation
with Predispute Arbitration*

Congress enacted the Federal Arbitration Act in 1925 in large part to overcome judicial hostility to arbitration in the early twentieth century by "plac[ing] arbitration agreements upon the same footing as other contracts."²¹⁵ Since the late 1990s, the Supreme Court has decided three times more arbitration cases than punitive damages due process cases, repeatedly validating mandatory arbitration in consumer, employment, and business transactions.²¹⁶ An incredible twenty-four

212. See Drahozal & Zyontz, *supra* note 23, at 341 ("In the case file sample of AAA consumer arbitrations, the majority of consumer arbitration clauses (229 of 299, or 76.6%) fully complied with the Consumer Due Process Protocol as applied by the AAA.").

213. *Id.* at 341–42 (noting in the only prior empirical study, "the AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (or 9.4% of its total consumer caseload), because the business failed to comply with the Consumer Due Process Protocol. The most common reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.").

214. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996).

215. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

216. See, e.g., *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (holding per curiam that "West Virginia's prohibition against

Court rulings have radically expanded the reach of arbitration clauses since 1998.²¹⁷ Two of these twenty-four “Supreme Court opinions, *Allied-Bruce Terminix Cos. v. Dobson* and *Doctor’s Associates, Inc. v. Casarotto*, ‘creat[ed] a sea change in the way that consumer arbitration would be viewed.’”²¹⁸ Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas rule consistently “in favor of rigorously enforcing arbitration agreements and tend to construe arbitration provisions in such a way as to render them enforceable.”²¹⁹ The Supreme Court’s consumer arbitration jurisprudence implicitly accepts the corporate wrongdoers’ mantra that redistributionist juries are out of control. Bypassing the court system by employing private proceedings conducted by arbitrators is championed in the name of efficiency and freedom of contract.²²⁰

I. Role of U.S. Supreme Court in Abridging Class Action

In a class action, one or more people, called class representatives, sue on behalf of people who have similar claims. All these people are members of the class, except for those who exclude themselves from the class. The class action provides the keys to the courthouse when individual damages are capped because the aggregation of small dollar claims makes it cost-effective to seek a collective remedy for substantially similar claims.²²¹

predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672–73 (2012) (holding in part that consumer claims arising under the Credit Repair Organizations Act (CROA) are subject to mandatory arbitration because Congress was silent on whether these claims were arbitratable).

217. Rustad et al., *supra* note 51, at 679–80, 684–88 (depicting cases and holdings for twenty-four U.S. Supreme Court cases decided between 1998 and 2012).
218. Yvette Ostolaza, *Overview of Arbitration Clauses in Consumer Financial Services Contracts*, 40 TEX. TECH L. REV. 37, 38 (2007) (footnote omitted).
219. Adam Borstein, *Arbitrary Enforcement: When Arbitration Agreements Contain Unlawful Provisions*, 39 LOY. L.A. L. REV. 1259, 1294 (2006).
220. Kiera S. Gans and Davide Rossetti, *US Supreme Court Upholds Freedom-of-Contract Principle in Antitrust Class Arbitration*, LAWYER (Sept. 30, 2013), <http://www.thelawyer.com/briefings/us-supreme-court-upholds-freedom-of-contract-principle-in-antitrust-class-arbitration/3010172.article> (“In the recent case of *American Express co et al v Italian Colors Restaurant et al*, the US Supreme Court addressed the validity of a contractual waiver to class arbitration where the cost of individually arbitrating a federal statutory antitrust claim made it cost-prohibitive to raise those claims independently rather than as part of a collective class. The court’s conclusion in favour of upholding the agreement can be seen as a further re-affirmation of the principles of freedom of contract.”).
221. See generally Bryon Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial*

The class action, when not prohibited by the TOU, enables social media users to seek remedies for widespread damages such as breaches of their privacy. *Fraley v. Facebook, Inc.*²²² was a class action settlement resulting from users' claims that the social media giant misappropriated their users' names and likenesses in advertisements called "Sponsored Stories."²²³ The plaintiffs alleged that their names and profile pictures were presented as promoting products and services because they clicked on Facebook's "like" button. The court approved a twenty million dollar settlement fund, and Facebook also agreed "to make changes to the Statement of Rights and Responsibilities" and "to implement additional mechanisms giving users greater information about, and control over, how their names and likenesses are employed in connection with Sponsored Stories."²²⁴ "The settlement fund is to be distributed in cash payments of \$15 each to Facebook members who submitted valid claims."²²⁵

*Lane v. Facebook, Inc.*²²⁶ was a class action lawsuit filed by users against Facebook's 2007 program entitled Beacon that resulted in private information being posted on Facebook without users' consent.²²⁷ Facebook ended up terminating the Beacon program and created a \$9.5 million fund for privacy and security. The settlement did not result in any monetary award to Facebook users who had been allegedly harmed by Beacon.²²⁸ These cases are prototypical examples of litigation that would not be cost-justified without the ability to join into a class of victims. Table Four (below) documents that the typical social media class action involves small dollar amounts by numerous users.

Standard, 45 HOUS. L. REV. 215, 223 (2008) (discussing arguments for and against upholding class action waivers in mandatory arbitration clauses).

222. No. C 11-1726 RS, 2013 WL 4516806 (N.D. Cal. Aug. 26, 2013).

223. *Id.* at *1.

224. *Id.*

225. *Id.*

226. 696 F.3d 811 (9th Cir. 2012).

227. *Id.* at 816.

228. *Id.* at 816–17.

Table Four: Class Actions Filed by Social Media Users (2011–2014)

Name of Case and Citation	Basis for Claim
<i>In re</i> Zynga Privacy Litig., 750 F.3d 1098 (9th Cir. 2014).	Plaintiffs contended that Zynga’s header information, which included a social network user’s unique ID and the address of the webpage from which the user’s request to view another webpage violated the Electronic Communications Privacy Act’s (ECPA) and the Stored Communications Act. The appeals court affirmed dismissal of case.
C.M.D. v. Facebook, Inc., No. C 12–1216 RS, 2014 WL 1266291 (N.D. Cal. Mar. 26, 2014).	Practices by which Facebook utilizes the names and profile pictures of its users in ways that arguably constitute advertising for various third parties. The putative plaintiff class in this action is composed solely of minors.
Fraley v. Facebook, Inc., 966 F. Supp. 2d 939 (N.D. Cal. 2013).	Class action against Facebook alleging misappropriation of names and/or likenesses to promote products and services. Final settlement class approved; Facebook agreed to make certain changes to the Statement of Rights and Responsibilities (“SRRs”). The agreement also contemplates Facebook making a <i>cy pres</i> payment of several million dollars to certain organizations involved in Internet privacy issues, and provides that plaintiffs may apply for attorneys’ fees.
Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012).	Settlement agreement in class action brought by members against Facebook and participants in network program that had updated members’ network personal profiles to reflect actions taken by members on participants’ websites. Approved settlement’s <i>cy pres</i> funds to fund and sponsor programs to educate users and others regarding online privacy issues.
Leong v. MySpace, Inc., No. CV 10–8366 AHM (Ex.), 2011 WL 7808208 (C.D. Cal. Mar. 11, 2011).	Plaintiffs alleged intentional and knowing transmission of data about MySpace users to outside advertising companies. Court ordered transfer enforcing MySpace’s choice of forum clause.
<i>In re</i> LinkedIn User Privacy Litig., 932 F. Supp. 2d 1089 (N.D. Cal. 2013).	Plaintiffs contended “that networking website failed to adequately protect user information”; defendant’s motion to dismiss granted.

Rodriguez v. Instagram, L.L.C., No. C 12-06482 WHA, 2013 WL 3732883 (N.D. Cal. July 15, 2013).	Courts dismissed putative class action based upon breach of contract arising from Instagram's unilateral modification of its TOU that included a predispute mandatory arbitration clause.
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Neither the AAA nor JAMS address the issue of whether providers can include an anti-class action waiver in their arbitration clauses. The U.S. Supreme Court has held that the Federal Arbitration Act (FAA) does not permit a court to invalidate a contractual waiver of class arbitration, even if the possible recovery has been capped below the minimum costs of pursuing the dispute.²²⁹ Anti-class action waivers, in effect, shield the SNS from any liability for torts such as inadequate security or the invasion of privacy or for breach of the service agreement.²³⁰ These aggressive TOU have been encouraged by the Supreme Court's series of anti-consumer decisions that uphold one-sided, coercive predispute "agreements." With these rulings, the Court is validating a coercive contracting environment where plaintiffs are shunted off to a private, secret arbitration proceeding, where they are forbidden to join similarly aggrieved consumers in an effort to hold SNS accountable.

In *Discover Bank v. Superior Court*,²³¹ a California state court held that class action waivers in a limited class of consumer contracts of adhesion were per se unconscionable in settings involving a scheme to defraud large numbers of consumers out of individually small sums of money.²³² The U.S. Supreme Court overruled *Discover Bank* in *AT&T Mobility L.L.C. v. Concepcion*.²³³ The Court's conclusion was that class arbitration is inconsistent with the Federal Arbitration Association and "lacks its benefits."²³⁴ The Court observed that imposing class actions on arbitration proceedings clashed with the FAA's policy of enforcing

229. See, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

230. F. Paul Bland Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 380 (2009) ("In cases involving fraud, misleading statements, or complex corporate practices, absent class members are unlikely to discover the factual basis for their claims without the assistance of a class action. This contributes to the exculpatory nature of many corporate class action bans.").

231. 113 P.3d 1100 (Cal. 2005).

232. *Id.* at 1110.

233. 131 S. Ct. 1740 (2011).

234. *Id.* at 1753.

arbitration agreements according to their terms.²³⁵ This is a federal takeover of California's efforts to allow class actions in arbitration so that small claims may be pursued.²³⁶ After *Concepcion*, state courts are not free to refuse to enforce arbitration agreements with anti-class action waivers.²³⁷ The U.S. Supreme Court's validation of forced arbitration, even when combined with anti-class action waivers, accounts for why social media providers are so confident that their one-sided TOU will be enforced by courts. The Court's arbitration jurisprudence has created, in effect, a federal immunity against lawsuits filed against social media providers.²³⁸

In the 2013 case of *American Express Co. v. Italian Colors Restaurant*,²³⁹ the U.S. Supreme Court went even further, holding that the FAA preempts state law even where there is no other effective way to vindicate federal rights.²⁴⁰ The plaintiff in that case was a small business, which proved that the cost of pursuing their antitrust claims would far exceed the maximum possible recovery in the absence of a way to aggregate claims with other affected businesses.²⁴¹ Nevertheless, the Court ruled that the restaurant was bound by its predispute agreement that mandated individual arbitration, because the policies underlying the federal antitrust laws and class action rules did not override the FAA's requirement that arbitration agreements be enforced.²⁴²

The *American Express* Court noted that *Concepcion* "specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"²⁴³ The Court reasoned that the "FAA does . . . favor the absence of litigation

235. *Id.* at 1750–53.

236. See Edward P. Boyle & David N. Cinotti, Beyond Nondiscrimination: AT&T Mobility LLC v. Concepcion and the Further Federalization of U.S. Arbitration Law, 12 PEPP. DISP. RESOL. L.J. 373 (2012).

237. 131 S. Ct. 1740, 1747–48 (2011).

238. Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. (forthcoming 2015) (demonstrating that it was rare for the hundreds of millions of users of publicly traded social networks to file consumer arbitrations arising out of TOU).

239. 133 S. Ct. 2304, 2306 (2013) (holding that the Federal Arbitration Act "does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.").

240. *Id.* at 2309–12.

241. *Id.* at 2308.

242. *Id.* at 2309–10.

243. *Id.* at 2312 (citation omitted).

when that is the consequence of a class-action waiver”²⁴⁴ Under *American Express Co. v. Italian Colors Restaurant*, if the arbitration agreement provides the right to pursue the claim, then the arbitration agreement should be enforced even if the cost of consumer arbitration exceeds what is at stake.²⁴⁵ The Court concluded that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”²⁴⁶ In her dissenting opinion, Justice Kagan argued that the class action waiver “prevent[ed] the effective vindication of federal statutory rights.”²⁴⁷ In reality, the Court precludes access to the arbitration forum altogether when the costs of pursuing the remedy exceed the largest possible award.

Class action waivers preclude Internet users from filing a class action or even joining an existing one.²⁴⁸ This de facto immunity shields SNS from class actions for violations of privacy, contract, tort, or intellectual property rights that would otherwise be recognized in federal and state courts. In these opinions, the Court is going far beyond placing “arbitration agreements on an equal footing with other contracts.”²⁴⁹

The Supreme Court’s legitimation of hard-line arbitral clauses that contain anti-class action waivers, coupled with predispute mandatory arbitration, largely precludes the possibility of redress for small dollar claims such as violations of the Stored Communications Act, Electronic

244. *Id.* at 2312 n.5; *Id.* at 2309 (The Supreme Court ruled that “arbitration is a matter of contract” and consistent with the text of the FAA, “courts must ‘rigorously enforce’ arbitration agreements according to their terms” (citation omitted)).

245. *Id.* at 2309–12.

246. *Id.* at 2311; *cf.* *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (stating that where “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs”).

247. 133 S. Ct. at 2313 (Kagan, J., dissenting).

248. The U.S. Supreme Court upheld anti-class action waivers in *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

249. *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. at 1745. *See generally* Schmitz, *supra* note 210, at 40 (“Most consumer arbitration agreements are ‘boilerplate,’ pre-printed form contract clauses. Furthermore, ‘repeat player’ retailers and manufacturers routinely include these arbitration clauses in their non-negotiable form contracts, allowing these players to dictate the rules individuals must follow in asserting their claims. This may be problematic when repeat players use arbitration as means for curbing consumer remedies and preventing class actions. In addition, it allows them to shield the public from information regarding their wrongs and essentially to privatize justice.”).

Communications Privacy Act, promissory fraud, breach of contract, or the invasion of privacy because the cost of arbitration exceeds the potential recovery. SNS that combine mandatory arbitration with anti-class action waivers ensure that these powerful entities will not be accountable for failing to secure and safeguard their users' sensitive personally identifiable information. SNS can use the names, likenesses, and personal information of their users with impunity.²⁵⁰

User privacy, right of publicity, or other torts have largely become rights without any realistic remedy because of the Court's vindication of these bold TOU. Following the Court's lead, lower courts are predisposed to enforce mandatory arbitration provisions even in the consumer software context.²⁵¹ In *In re Online Travel Co.*, for example, a Texas federal court upheld a predispute mandatory arbitration TOU clause, finding that the website users manifested their assent to the arbitration provisions and class arbitration waiver by accessing the website, thereby creating enforceable contracts.²⁵²

J. Are There Any Limits to Unbalanced TOU?

The Court's methodical legitimization of consumer arbitration has emboldened websites to incorporate other unfair clauses into their TOU. KlearGear.com, a computer products cataloger and e-commerce retailer, like many Internet companies, disclaims all warranties in its TOU boilerplate.²⁵³ What sets KlearGear.com apart in being a poster child for aggressive terms is its previously included "Non-Disparagement Clause," which stated the following:

In an effort to ensure fair and honest public feedback, and to prevent the publishing of libelous content in any form, your acceptance of this sales contract prohibits you from taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.

250. See, e.g., Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999) (describing unfair consumer arbitration).

251. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (App. Div. 1998) (ruling that buyer assented to arbitration clause shipped inside box with computer and software by retaining items beyond date specified by license terms). See also *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532–33 (N.J. Super. Ct. App. Div. 1999) (upholding forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click "I Agree" or "I Don't Agree"); *Lieschke v. RealNetworks, Inc.*, No. 99 C 7274, 99 C 7380, 2000 WL 198424 (N.D. Ill. Feb. 11, 2000) (upholding end-user license agreement).

252. 953 F. Supp. 2d 713 (N.D. Tex. 2013).

253. *Terms of Sale and Use, and Policies*, KLEARGEAR.COM, <http://www.kleargear.com/help.html> (last visited Sept. 18, 2014).

Should you violate this clause, as determined by KlearGear.com in its sole discretion, you will be provided a seventy-two (72) hour opportunity to retract the content in question. If the content remains, in whole or in part, you will immediately be billed \$3,500.00 USD for legal fees and court costs until such complete costs are determined in litigation. Should these charges remain unpaid for 30 calendar days from the billing date, your unpaid invoice will be forwarded to our third party collection firm and will be reported to consumer credit reporting agencies until paid.²⁵⁴

KlearGear's non-disparagement clause is not conspicuous, not even "on the page that comes up when you click 'Terms of Use,' nor is it on the page that is directly linked from the checkout page. Instead, those links take you to a 'help' page that looks a lot like a Terms of Use page."²⁵⁵ Further "[w]ithin that page, there is buried a link to an actual Terms of Sale page that contains the clause in question."²⁵⁶ When a dissatisfied consumer complained in an online posting that Kleargear had not sent the items she had ordered, the company charged a \$3,500 penalty and ruined the consumer's credit score by reporting this amount to credit rating agencies as an unpaid debt.²⁵⁷ A New York guesthouse's TOU threatens to impose a \$500 fine if guests post disparaging comments on social networking websites such as Yelp.²⁵⁸ The enforceability of such aggressive clauses is not yet clear.

At present, U.S. consumers have little or no meaningful protection against one-sided boilerplate because of the Supreme Court's jurisprudence. In effect, American consumers wave good-bye to any meaningful right or remedy when they click "yes" to manifest assent to a terms of use or even enter a website whose TOU contains a browsewrap

254. Ken White, *New from KlearGear: Free Speech, Only \$3,500 Plus Shipping and Handling*, POPEHAT (Nov. 15, 2013), <http://www.popehat.com/2013/11/15/new-from-kleargear-free-speech-only-3500-plus-shipping-and-handling/> (noting that the current TOU do not include the non-disparagement clause).

255. Chris Morran, *KlearGear Defends \$3,500 Non-Disparagement Fee, Says Court Ruling Doesn't Count*, CONSUMERIST (May 20, 2014), <http://consumerist.com/2014/05/20/kleargear-defends-3500-non-disparagement-fee-says-court-order-doesnt-count/>.

256. *Id.*

257. Chris Morran, *Court Rules Company Can't Collect \$3,500 "Non-Disparagement" Fee for Negative Online Review*, CONSUMERIST (May 15, 2014), <http://consumerist.com/2014/05/15/court-rules-company-cant-collect-3500-non-disparagement-fee-for-negative-online-review/>.

258. Caroline Moss, *Hotel Fines Brides \$500 for Every Negative Yelp Review Their Wedding Guests Leave*, BUSINESS INSIDER (Aug. 4, 2014, 8:43 AM), <http://www.businessinsider.com/hotel-fines-brides-for-negative-yelp-reviews-2014-8#ixzz3A6mOodVK>.

provision. Consumer rights and remedies are subject only to “the grab law,” where providers protect their rights to the maximum while grabbing all rights and remedies from consumers.

The U.S. Supreme Court has given U.S. companies the green light that they may continue to expand “form contracts, envelope stuffers, and Web sites to require their consumers, patients, students, and employees to resolve future disputes through binding arbitration, rather than in court.”²⁵⁹ In the United States, predispute mandatory arbitration has become the most accepted and favored method of resolving disputes.²⁶⁰ Cases like Kleargear will define how far the courts are willing to go in enforcing one-sided arbitration clauses.

CONCLUSION

Our empirical research on SNS arbitral clauses demonstrates that providers systematically foreclose consumer rights, violating the majority of the AAA’s and JAMS’s minimum consumer due process standards. SNS fail nearly every test of consumer due process fundamental fairness by creating a one-sided legal universe where users have no meaningful rights because they lack any practical way of obtaining a remedy. Arbitration clauses are the classic illustration of a private justice system where SNS can sidestep the possibility of punitive damages, jury verdicts, class actions, and consequential damages. Tort law is being subsumed by this radical extension of contract law.

SNS have created an ADR procedure that is fundamentally unfair, secure in the knowledge that the U.S. Supreme Court is willing to enforce consumer arbitration even when the imbalanced terms do not enable plaintiffs to vindicate small-dollar claims. Nearly all SNS mandating consumer arbitration draft their rights-foreclosure clauses to systematically divest their users of any practical remedy for all possible

259. Sternlight, *supra* note 19, at 1631.

260. The Supreme Court’s arbitration jurisprudence freely enforces arbitration agreements in consumer transactions. The Court has continued to hand down decisions enforcing FAA preemption against various forms of challenges. In addition to the *Marmet* case, these decisions include *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (reversing denial of motion to compel arbitration of claims for violation of a federal credit repair statute, because the law does require claims to proceed in court, and reaffirming that the FAA “requires courts to enforce agreements to arbitrate according to their terms”); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (reversing lower court’s refusal to compel arbitration of arbitral claims on grounds that non-arbitrable claims also existed, and holding that the FAA “requires courts to enforce the bargain of the parties to arbitrate” (citation omitted)); *Huff v. Liberty League Int’l, L.L.C.*, No. EDCV 08–1010–VAP (SSx), 2009 WL 1033788, at *8 (C.D. Cal. Apr. 14, 2009) (granting motion to compel arbitration; “courts across the country have enforced so-called ‘clicking agreements’ that contain arbitration clauses”).

causes of action.²⁶¹ Compulsory arbitration channels consumers into nonpublic proceedings decided by private judges who operate outside the state or federal court systems. Arbitrators are the ultimate umpires in a system of secret proceedings where there is no right of replay or appeal. Without standardized rules of evidence or court-supervised discovery, the consumer is at a huge disadvantage against repeat players.

The corporate defendant chooses the arbitral provider, appoints and pays for the arbitrator, and establishes the rules of the game.²⁶² The arbitrator has a perverse incentive to rule in favor of the SNS because the SNS pays his salary. Arbitrators who rule against repeat players are unlikely to be selected by the provider in the future. The constricted right of appeal gives the consumer no recourse even if the arbitrator misapplies the law or refuses to admit key evidence of wrongdoing.²⁶³ Congress should prohibit mandatory consumer arbitration for social networks, particularly when conducted under such fundamentally unfair rules.

261. We are not the first to castigate consumer arbitration as fundamentally unfair to consumers. Indeed, these user agreement arbitration clauses have been routinely decried as unfair to consumers. *See, e.g.*, Van Wezel Stone, *supra* note 250.

262. Rustad et al., *supra* note 51, at 664 (“[C]onsumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen.”) (quoting from the American Arbitration Association’s Statement of Principles of the National Consumer Disputes Advisory Committee).

263. AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (noting under Section 2 of the Federal Arbitration Act, a party may seek revocation of an arbitration agreement “upon such grounds as exist at law or in equity for the revocation of any contract,” including “generally applicable contract defenses, such as fraud, duress, or unconscionability” (quoting 9 U.S.C. § 2 (2012))) (citations omitted).